

COURT OF APPEAL FOR ONTARIO

CITATION: Elliot v. Aviva Insurance Company of Canada, 2020 ONCA 36

DATE: 20200121

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Pardu, Brown and Huscroft JJ.A.

BETWEEN

William Elliot

Plaintiff/Responding Party (Respondent)

and

Aviva Insurance Company of Canada, Her Majesty the Queen in Right of Ontario, Philip Howell and Brian Mills

Defendants/Moving Party (Appellant)

And in the following 13 actions:

Shelli-Lynn Black v. Belair Insurance Company Inc. c.o.b. Belair Direct, et al.
CV-18-00607931-00CP

Catherine Brooks v. Intact Financial Corporation c.o.b. Intact Insurance, et al.
CV-18-00607933-00CP

Jill Nicholson v. Unifund Assurance Company, et al.
CV-18-00607937-00CP

Fernanda Sampaio v. Certas Home and Automobile Insurance Company, et al.
CV-18-00607939-00CP

David Macleod v. The Commonwealth Mutual Insurance Group, et al.
CV-18-00608382-00CP

Madeleine Bonhomme v. Co-Operators General Insurance Company, et al.
CV-18-00608386-00CP

John Ross Robertson v. Echelon General Insurance Company, et al.
CV-18-00608390-00CP

Bradley Dorman v. Economical Mutual Insurance Company, et al.
CV-18-00608396-00CP

Mark Cicciarelli v. Wawanesa Mutual Insurance Company, et al.

CV-18-00608399-00CP
Kristopher Baron v. St. Paul Fire and Marine Insurance Company, Travelers
Insurance Company of Canada, et al.
CV-19-00611894-00CP
Garry Gibbons v. TD Insurance, et al.
CV-19-00611895-00CP
Brian Nagle v. Gore Mutual Insurance Company, et al.
CV-19-00611899-00CP
David Sura v. Cumis General Insurance Company, et al.
CV-19-00611901-00CP

L. Glenn Frelick and Dona Salmon, for the appellant

Ron Bohm and David Lee, for the respondents

Heard: January 7, 2020

On appeal from the order of Justice Edward Belobaba of the Superior Court of Justice, dated May 9, 2019, with reasons reported at 2019 ONSC 2827.

BROWN J.A.:

OVERVIEW

[1] At issue on this appeal is the motions judge's decision that a letter dated July 13, 2018 ("Notice Letter") satisfied the notice requirement contained in s. 7(1) of the *Proceedings Against the Crown Act*, R.S.O. 1990, c. P.27 ("PACA"), for 15 class actions commenced in late 2018 and early 2019 against the appellant, Her Majesty the Queen in right of Ontario, Philip Howell, Brian Mills, and 15 Ontario automobile insurers. Howell acted as Superintendent of the Financial Services Commission of Ontario ("FSCO") from 2009 until 2014; Mills is his successor.

[2] PACA s. 7(1) states, in part, that "no action for a claim shall be commenced against the Crown unless the claimant has, at least sixty days before the

commencement of the action, served on the Crown a notice of the claim containing sufficient particulars to identify the occasion out of which the claim arose”.¹

[3] The 15 actions assert a common allegation against the Crown defendants: FSCO failed to enforce its guidelines concerning the Harmonized Sales Tax (“HST”) against all automobile insurers in Ontario in respect of the payment of benefits set out in the Statutory Accident Benefits Schedule (“SABS”) made under the *Insurance Act*, R.S.O. 1990, c. I.8. The actions allege that the FSCO guidelines directed Ontario automobile insurers to pay applicable HST in addition to the cost of the goods and/or services provided under the SABS and not to include HST within the calculation of any cap on benefits under the SABS. The actions contend that insurers consistently breached those guidelines and FSCO was aware of that wrongful conduct but took no steps to stop it.

[4] The commencement of the 15 actions was proceeded by the delivery of the July 13, 2018 Notice Letter, which was styled as “NOTICE PURSUANT TO PROCEEDINGS AGAINST THE CROWN ACT”. The Notice Letter stated that pursuant to *PACA* s. 7(1), Jeannette Milette intended to commence an action

¹ *PACA* was repealed on July 1, 2019 and replaced by the *Crown Liability and Proceedings Act, 2019*, S.O. 2019, c. 7, Sched. 17, s. 18(1) of which states: “No proceeding that includes a claim for damages may be brought against the Crown unless, at least 60 days before the commencement of the proceeding, the claimant serves on the Crown, in accordance with section 15, notice of the claim containing sufficient particulars to identify the occasion out of which the claim arose.”

against the appellant and the other defendants in respect of class members, whom the letter described as:

all persons who suffered loss or damage arising from the use or operation of an automobile who were entitled to receive [benefits under the SABS], who submitted an application or applications for Statutory Accident Benefits that were approved pursuant to an automobile policy of insurance issued in Ontario, and whose entitlement to benefits was reduced by the amount of [HST]. [Emphasis added.]

The Notice Letter concluded with the sentence: “This shall be your good and sufficient notice of the intention to commence proceedings as against Her Majesty the Queen in Right of Ontario” (emphasis added).²

[5] Jeannette Mierette is named as the representative plaintiff in the first of the 15 actions (the “Mierette Action”). The remaining 14 actions name other individuals as the representative plaintiffs (the “Other Actions”). Each action names a different Ontario automobile insurer as the defendant. All 15 actions name the appellant as a defendant and were commenced more than 60 days after service of the Notice Letter.

[6] Before the motions judge, the appellant accepted that the Notice Letter satisfied *PACA* s. 7(1) for the Mierette Action but moved to strike out the statements of claim in the Other Actions because they named different

² Other references to “proceeding” in the Notice Letter used the singular form of the word.

representative plaintiffs. The appellant was prepared to treat the statements of claim in the Other Actions as notices under *PACA* s. 7(1) but argued that the representative plaintiffs in the Other Actions would have to issue new statements of claim.

[7] The motions judge dismissed the appellant's motions, holding that the Notice Letter satisfied *PACA* s. 7(1), as interpreted by this court in *Mattick Estate v. Ontario (Minister of Health)* (2001), 52 O.R. (3d) 221 (C.A.), for the Other Actions.

[8] The appellant appeals. It argues that the word "claimant" in *PACA* s. 7(1) can refer only to the plaintiff in one action, with the result that the motions judge erred in interpreting and applying s. 7(1) to permit the Notice Letter to satisfy the statutory notice requirement for the Other Actions.

[9] For the reasons set out below, I would dismiss the appeal.

ANALYSIS

[10] The decision of this court in *Mattick Estate* remains the leading authority on the interpretation of *PACA* s. 7(1).

[11] *Mattick Estate* involved a lawsuit commenced by the widow and children of James Mattick, who had suffered a heart attack at his home and was transported to hospital by emergency medical attendants employed by the Province. Prior to commencing the lawsuit, Mr. Mattick's widow, Laureen Mattick, sent a letter to the

Ministry of Health expressing concerns about the care her husband had received on the day he was transported by the emergency medical attendants and about the lack of communication from the Ministry of Health following her earlier telephone complaint about the matter. The Crown moved to dismiss the action on the basis that the letter did not satisfy the requirements of *PACA* s. 7(1).

[12] The decision in *Mattick Estate* set down several principles concerning the interpretation of *PACA* s. 7(1). At paras. 15-18, this court stated:

- (i) The legislative purpose of the *PACA* s. 7(1) notice provision is to allow the Crown to gather sufficient information to permit it to resolve a complaint to the mutual satisfaction of itself and the complainant in advance of any litigation, and failing that, to allow the Crown to properly prepare a defence to the litigation which may result;
- (ii) The section requires a claimant to serve a notice that communicates a complaint which, if not satisfied, could reasonably be anticipated to result in litigation against the Crown. When such a notice is coupled with particulars that sufficiently identify the occasion in question to permit the Crown to investigate, resolve the complaint in advance of legal action or prepare to defend the litigation, the notice fulfils the legislative purpose;
- (iii) However, a claimant is not required to state expressly in her notice that she intends to take legal action against the Crown as such a requirement would be inconsistent with the legislative purpose of permitting the Crown to investigate in order to resolve the complaint at an early point in time without the commencement of legal proceedings. Nevertheless, not every complaint to the Province must be treated as a *PACA* s. 7(1) notice; and
- (iv) No particular formula or words must be used to give notice.

See also: *Beardsley v. Ontario* (2001), 57 O.R. (3d) 1 (C.A.), at paras. 8-17; *Latta v. Ontario* (2002), 62 O.R. (3d) 7 (C.A.), at paras. 26-27, 29.

[13] Applying those principles to the letter written by Laureen Mattick, this court concluded that the letter met the requirements of *PACA* s. 7(1), stating at para. 19:

[The letter] precisely identifies the events of April 24, 1994, which is the occasion concerned. Particularly in the context of her telephone discussion with the Province, her letter clearly constitutes a complaint that her husband had received unacceptable patient care from provincial employees that day. Given the nature of Mrs. Mattick's concerns and given that her husband died shortly after receiving the care complained of, it would be reasonable for the Province to anticipate that if Mrs. Mattick's complaint could not be satisfactorily resolved there would be litigation asserting that the unacceptable care caused his death.

[14] Although in *Mattick Estate* this court did not expressly consider the meaning of the word "claimant" in *PACA* s. 7(1), in the result it found that Ms. Mattick's letter complied with the section notwithstanding that it did not threaten litigation or refer to a potential claim that included her co-plaintiffs, the children of James and Laureen Mattick.

[15] The motions judge correctly stated the principles set out in *Mattick Estate*: at paras. 10 and 15-18. He concluded that the Notice Letter satisfied those principles as (i) it communicated a complaint which, if not satisfied, could reasonably be anticipated to result in litigation against the Crown and (ii) "set out a precise description of the Crown defendants that would be sued, the conduct complained about, and the class members impacted by the impugned conduct": at

paras. 11 and 18. Those conclusions are fully supported by the language of the Notice Letter.

[16] The motions judge held that the Notice Letter satisfied the requirements of *PACA* s. 7(1) for all 15 actions stating, at paras. 6, 14 and 20:

I pause here to note that it was not completely clear from the [Notice Letter] whether at the time of this notice just one proposed class action would proceed (naming the FSCO defendants and the 15 insurers) or, as it turned out, 15 separate proposed class actions would proceed with the same claim being made against the FSCO defendants in each of the 15 separate actions. Both possibilities, given Mr. Ralston's use of "proceeding" and "proceedings" were covered in the [Notice Letter].

...

The fact that the [Notice Letter] did not make clear if the proposed class action would be a single proceeding or 15 separate proceedings and did not explicitly name the "other 14" proposed representative plaintiffs was really of no concern to the Crown. Whether the proposed class action continued as one proceeding or fifteen is something that class counsel would have to decide in the months ahead. The important point is that the FSCO defendants were being sued regardless; the claims against the FSCO defendants would remain the same, unaltered and identical; and the Crown was sufficiently notified of these claims in the [Notice Letter].

...

The identification and suitability of the representative plaintiff is a procedural issue that is best dealt with as part of the certification process. The identification of every proposed representative plaintiff months before certification is impracticable and would serve no useful purpose when considering the "legislative purpose" of s. 7(1) of *PACA*.

[17] I see no error in that analysis. First, the motions judge applied the interpretative approach to *PACA* s. 7(1) adopted by this court in *Mattick Estate* and subsequent decisions.

[18] Second, the issue before the motions judge was not whether the representative plaintiffs named in each of the 15 actions met the certification criteria of s. 5(1)(e) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, or whether Ms. Mieyette would have qualified to act as the representative plaintiff in the Other Actions. The issue was whether the Notice Letter, having identified Ms. Mieyette as the intended representative plaintiff, satisfied *PACA* s. 7(1), as interpreted by this court, in respect of all 15 class actions that ensued.

[19] In determining that issue, the assessment of the adequacy of the Notice Letter's language was required to take into account the nature of the complaint it alleged. The Notice Letter made a complaint against FSCO on behalf of a broad class of persons: "all persons who suffered loss or damage arising from the use or operation of an automobile who were entitled to receive [benefits under the SABS], who submitted an application or applications for [benefits], and whose entitlement to benefits was reduced by the amount of [HST]" (emphasis added). The Notice Letter alleged that FSCO failed to enforce its HST guidelines against all automobile insurers in Ontario, not just some, and that class action litigation was intended in respect of those failures. The Notice Letter did not name a particular insurer nor did the letter limit its complaint to only one insurer.

[20] The language of complaint in the Notice Letter was broad enough to bring each of the 15 actions within its scope. The fact that 15 class actions ensued does not detract from the breadth of the complaint asserted in the Notice Letter, including its description of the broad class of persons impacted by the alleged wrongful conduct. It appears that multiple actions were started to ensure that each named representative plaintiff was an insured of the named automobile insurer. As well, each of the class actions commenced against the different insurers joined the same Crown defendants and asserted the same claims against the Crown, as were described in the Notice Letter.

[21] Finally, I do not accept the appellant's submission that the form of notice accepted by the motions judge resulted in significant prejudice to the appellant. The affidavit of Ms. Zuyin Wang filed by the appellant in support of its motion did not identify any prejudice resulting from the form of the notice. Nor did the November 7, 2018 letter from Crown counsel that responded to service of the first statements of claim. Indeed, it is difficult to conceive how the Crown's ability to gather sufficient information to permit it to resolve a complaint could be prejudiced when the complaint against the Crown asserted in the Notice Letter was the same as those pleaded in the 15 actions.

[22] Accordingly, given the breadth of the complaint described in the Notice Letter and its clear signal that class action litigation would follow in respect of that broad complaint, I see no reason to interfere with the motions judge's dismissal of

the Crown's motion on the basis that the Notice Letter (i) satisfied the legislative purpose of *PACA* s. 7(1), (ii) set out a specific grievance, (iii) identified the class members impacted by the impugned conduct, (iv) threatened litigation, and (v) was not an impediment to the resolution of the claim against FSCO, thereby complying with *PACA* s. 7(1): at paras. 13 and 17-19.

DISPOSITION

[23] For the reasons set out above, I would dismiss the appeal.

[24] The parties agreed that the successful party is entitled to its costs of the appeal in the amount of \$7,500, inclusive of disbursements and applicable taxes.

Consequently, the appellant shall pay such costs to the respondents.

Released:



JAN 21 2020

