

Federal Court



Cour fédérale

Date: 20231107

Docket: T-469-22

Citation: 2023 FC 1483

Ottawa, Ontario, November 7, 2023

PRESENT: The Honourable Mr. Justice Pamel

SIMPLIFIED ACTION

BETWEEN:

992275 ONTARIO INC.

Plaintiff

and

**HIS MAJESTY THE KING IN THE RIGHT
OF CANADA
REPRESENTED BY ATTORNEY
GENERAL FOR CANADA
ON BEHALF OF MINISTER FOR EXPORT
DEVELOPMENT CANADA**

Defendant

ORDER AND REASONS

[1] The motion before me is for leave under Rule 120 of the *Federal Courts Rules*, SOR/98-106, permitting Mr. Axel Winkelmann, the Plaintiff's sole shareholder and operating

officer, to represent the Plaintiff, 992275 Ontario Inc. [the Plaintiff or the company], in these proceedings.

[2] The Canada Emergency Business Account [CEBA] program was established as part of the Government of Canada's response to the COVID-19 pandemic; the program offered interest-free payroll or non-deferrable expense loans of up to \$60,000 to eligible small businesses and not-for-profits through participating financial institutions. In April 2020, the company applied for assistance in the form of a payroll loan under the first phase of the CEBA program, and received an advance loan of \$40,000 through the Royal Bank of Canada, subject to an audit review of the company's application. In December 2020, the CEBA program was expanded, and the company applied for a further \$20,000 [the expansion loan]; that application was denied because, upon verification, the company was determined to be ineligible under the expanded CEBA program.

[3] Over one year later, in March 2022, the company instituted the underlying action seeking various forms of relief: (1) declaratory relief in the form of an Order that the company is entitled to receive full benefits under the initial and expanded CEBA program; (2) in the alternative, an Order for specific performance as regards the approval and funding of the expansion loan of \$20,000 to the company; in the further alternative, \$30,000 in specific and general damages; (3) costs; and, in particular, (4) leave to allow Mr. Winkelmann to represent the company in these proceedings. Mr. Winkelmann signed the statement of claim as the representative of the company, contrary to Rule 120, which states:

**Corporations or
unincorporated associations**

**Personne morale, société de
personnes ou association**

120 A corporation, partnership or unincorporated association shall be represented by a solicitor in all proceedings, unless the Court in special circumstances grants leave to it to be represented by an officer, partner or member, as the case may be.

[Emphasis added.]

120 Une personne morale, une société de personnes ou une association sans personnalité morale se fait représenter par un avocat dans toute instance, à moins que la Cour, à cause de circonstances particulières, ne l'autorise à se faire représenter par un de ses dirigeants, associés ou membres, selon le cas.

[Je souligne.]

[4] The Defendant, the Minister for Export Development Canada [EDC], filed her statement of defence in April 2022 and served it upon Mr. Winkelmann. However, with no requisition for a pre-trial conference being filed within 360 days from the issuance of the statement of claim, on August 17, 2023, the underlying action was ordered to continue as a specially managed proceeding, and the Plaintiff was ordered to serve and file within 20 days a proposed timetable for the completion of the steps necessary to advance the proceeding in an expeditious manner; I was appointed case management judge. In early September 2023, counsel for EDC wrote to the Court and advised that the parties had agreed that the action proceed as a Simplified Action under Rule 292 and that they had exchanged documents and written discovery questions pursuant to Rules 295 and 296 – I will therefore order the amendment of the style of cause in conformity with Rule 294. The letter confirmed the Plaintiff's intention to bring a motion to compel EDC to answer questions previously refused. However, pursuant to Rule 298, any preliminary motion in a Simplified Action is to be returnable only at a pre-trial conference which, pursuant to Rule 258, can only be requisitioned upon certification that all examinations have been concluded; the parties therefore requested that a case management conference be held to determine the proper sequencing of the proposed motion and the pre-trial conference.

[5] During the pre-trial conference, I advised the parties that before the proceeding could move forward, the matter of the representation of the Plaintiff would have to be addressed, and that Mr. Winkelmann would have to bring a motion seeking leave of this Court under Rule 120 to do so. The company now brings the present motion under Rule 120 to be represented by Mr. Winkelmann; the EDC consents to the motion.

[6] In short, and regardless of EDC's consent, I must dismiss the motion; the paucity of evidence regarding the company's ability to pay for legal representation is insufficient to meet the test set out by the case law. Moreover, the legal issues raised by the statement of claim are not simple and straightforward; they involve complex issues going to the legitimacy and efficient running of government programs, issues which may well be beyond Mr. Winkelmann's capabilities to navigate.

[7] The test to meet under Rule 120 was recently summarized by Justice McHaffie in *UBS Group AG v Yones*, 2022 FC 487 at para 7:

[7] A party seeking to show there are “special circumstances” for the purposes of Rule 120 must generally demonstrate that (i) it cannot afford a lawyer; (ii) the proposed representative will not be required to be both advocate and witness; (iii) the issues are not so complex as to be beyond the proposed representative's capabilities; and (iv) the action can proceed in an expeditious manner: *El Mocambo Rocks Inc v Society of Composers, Authors and Music Publishers of Canada (SOCAN)*, 2012 FCA 98 at paras 3–5; *Alpha Marathon Technologies Inc v Dual Spiral Systems Inc*, 2005 FC 1582 at para 3; *Kobetek Systems Ltd v Canada*, 1998 CanLII 7265 (FC). Demonstrating that the company cannot afford a lawyer should usually be done “by submitting complete and clear financial information concerning the corporation, preferably by means of financial statements”: *El Mocambo* at para 4. While the foregoing factors are not determinative or exhaustive, they must generally be

met to establish special circumstances to justify an order permitting representation of a company by an officer.

[8] The only evidence of the company's inability to afford a lawyer is the following statement by Mr. Winkelmann at paragraph 5 of his affidavit: "As President of the Company, I can attest to the fact that the Company's finances were such that it was seeking remedial funds from the CEBA program, that the Company commenced this litigation to secure funds that it still requires, and that the Company is without sufficient financial resources to engage proper legal representation." No financial records were submitted, and no mention is made by Mr. Winkelmann of what the revenues or profits of the company presently are, whether the company is presently operating, or what its revenue prospects are for the future.

[9] It would also seem that Mr. Winkelmann would be required to be both advocate and witness for the company. There is no evidence that there is anyone else who could speak for the company as witness. That said, I accept that owner-operators of small businesses are often the only individuals who know enough to be able to effectively give evidence regarding their companies, and that a strict application of this second factor would be disproportionately onerous on them. However, here, there is simply no evidence on this issue, and thus I am left to speculate as to the circumstances to which this factor must be applied.

[10] Third, in its statement of claim, the company alleges that the Government of Canada failed to administer the CEBA program in a fair, honest and equitable way; that there is a lack of transparency and communication within the program directorate and that the CEBA program failed to meet any standard of fundamental fairness under the circumstances; and that EDC acted

with gross negligence and total disregard for the company's interests and rights within the context of the CEBA program. Had the statement of claim kept the issues to simply whether or not the company met the eligibility requirements of the CEBA program, I may have viewed the matter differently. However, with its allegations of gross negligence and dishonest administration of the CEBA program by EDC, the company is raising the level of complexity of the issues to the point where, on the basis of the record before me, I am not satisfied that Mr. Winkelmann, acting alone and without even the minimal legal assistance, would be able to handle representing the Plaintiff in this matter.

[11] Finally, as to whether the action is able to proceed in an expeditious manner with Mr. Winkelmann as representative of the company, the fact that the Order of August 17, 2023 had to be issued weighs against such a prospect.

[12] All in all, the company has simply not succeeded in satisfactorily addressing the factors which would tend to establish "special circumstances" for the purposes of Rule 120, and for this reason, I must dismiss the present motion. The company will have 30 days to appoint counsel, and until then, the present proceeding will remain in abeyance. As for costs, given EDC's position on the motion, no costs shall be ordered to be paid.

ORDER in T-469-22

THIS COURT ORDERS that:

1. The style of cause is to be amended to be prefaced by the heading “Simplified Action”.
2. Otherwise, the present motion by the Plaintiff for leave under Rule 120 is dismissed.
3. The Plaintiff shall instruct counsel who are to confirm with the Court their appointment as solicitors of record for the Plaintiff within 30 days from the date of this Order.
4. The whole without costs.

"Peter G. Pamel"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-469-22

STYLE OF CAUSE: 992275 ONTARIO INC v HIS MAJESTY THE KING
IN RIGHT OF CANADA et al

MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO

ORDER AND REASONS: PAMEL J.

DATED: NOVEMBER 7, 2023

APPEARANCES:

Axel Winkelmann

FOR THE APPLICANT
(ON HIS OWN BEHALF REPRESENTING
992275 ONTARIO INC)

Graham Splawski
Laura Thistle

FOR THE RESPONDENT
(MINISTER FOR EXPORT DEVELOPMENT
CANADA)

SOLICITORS OF RECORD:

Borden Ladner Gervais LLP
Toronto

FOR THE RESPONDENT
(MINISTER FOR EXPORT DEVELOPMENT
CANADA)