



**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION**

Citation: *Way v. Intact Insurance Company*, 2024 NLSC 46

Date: March 21, 2024

Docket: 202201G1350 CP

2024 NLSC 46 (CanLII)

BETWEEN:

NORMA DARLENE WAY

PLAINTIFF

AND:

INTACT INSURANCE COMPANY

FIRST DEFENDANT

AND:

**~~THE WAWANESA MUTUAL
INSURANCE COMPANY~~**

**~~SECOND DEFENDANT
(Discontinued)~~**

AND:

**AVIVA INSURANCE COMPANY OF
CANADA**

THIRD DEFENDANT

AND:

**~~ATLANTIC INSURANCE COMPANY
LTD.~~**

**~~FOURTH DEFENDANT
(Discontinued)~~**

AND:

JOHNSON INC.

**~~FIFTH DEFENDANT
(Discontinued)~~**

AND:

SUNCO INSURANCE LIMITED

SIXTH DEFENDANT

(Discontinued)

AND:

**CO-OPERATORS GENERAL
INSURANCE COMPANY**

SEVENTH DEFENDANT

Before: Justice Valerie L. Marshall

Place of Hearing:

St. John's, Newfoundland and Labrador

Date of Hearing:

March 11, 2024

Date of Oral Judgment:

March 11, 2024

Summary:

The Plaintiff applied to discontinue the action pursuant to section 35(1) of the *Class Actions Act*, without providing notice to the proposed class members.

HELD: The application was granted.

Appearances:

Mike Dull

Appearing on behalf of the Plaintiff

Rodney J. Zdebiak

Appearing on behalf of the First
Defendant

Denis J. Fleming and
Paul J. Martin

Appearing on behalf of the Third
Defendant

Robert Bradley

Appearing on behalf of the Seventh
Defendant

Authorities Cited:

CASES CONSIDERED: *Chen v. Memorial University of Newfoundland and Labrador*, 2019 NLSC 193

STATUTES CONSIDERED: *Class Actions Act*, S.N.L. 2001, c. C-18.1

EDITED REASONS FOR JUDGMENT GIVEN ORALLY

MARSHALL, J.:

INTRODUCTION

[1] The Plaintiff seeks an order to discontinue this action pursuant to section 35(1) of the *Class Actions Act*, S.N.L. 2001, c. C-18.1. The application for certification had been filed, but not yet heard. The Plaintiff seeks to discontinue the action without giving notice to members of the proposed class.

FACTS

[2] On May 3, 2022 the Plaintiff filed a statement of claim pursuant to the *Class Actions Act*. The Defendants are automobile insurers throughout Newfoundland and Labrador.

[3] The Plaintiff's action was based on allegations of breach of contract with respect to entitlement to weekly payments for loss of income under the section B

accident benefits, as provided in the province's standard automobile policy (S.P.F. No. 1). The Plaintiff claimed that the Defendants wrongfully reduced the section B weekly payments for loss of income.

[4] Statements of defence have not been filed. Lists of documents have not been filed. There have been no discoveries.

[5] The Plaintiff's action was discontinued against Sunco Insurance Limited on June 7, 2022; and against Wawanese Mutual Insurance Company, Atlantic Insurance Company Ltd. and Johnson Inc. on December 5, 2022. The Plaintiff filed an application to add Royal and Sun Alliance Insurance Company of Canada, Unifund Assurance Company and Travelers Insurance Company of Canada as parties. That application has not been heard.

[6] The Plaintiff also filed a certification application. In that application, the Plaintiff sought an order defining the "Class" and "Class Members" as persons who: "a. Are a natural person or the estate of a deceased natural person; b. Have received Weekly Payments under their Section B Contract with one of the Defendants commencing during or after May 3, 2012; and c. Have had the Weekly Payments reduced due to the receipt of disability benefits received from an insurance company, trust fund, employer, union or other entity, including Canada Pension Plan Disability ("Collateral Disability Benefits"), commencing during or after May 3, 2012." The application for certification has not been heard.

[7] Notice of the class action has never been given to potential class members. At paragraph 13 of the application for discontinuance, Counsel for the Plaintiff stated that this "proceeding has not been publicized and there has been no notice program to date".

[8] At the hearing of this application for discontinuance, the Plaintiff's Counsel confirmed that he could not find any evidence that the action had been publicized either through the media or on the website of the Plaintiff's Counsel (current and previous counsel). The Defendants' Counsel did not contest this application, and

also confirmed that they had no knowledge of any reliance on this action by proposed class members.

[9] Further, the Plaintiff's Counsel filed an affidavit indicating that he was not aware of any putative class member who had knowledge of and reliance on this proceeding for the resolution of a claim against the Defendants; and that the discontinuance is not a condition for the settlement of one or any individual claim within the proposed class.

[10] The Plaintiff's submission was that it was not necessary to provide notice of discontinuance to the potential class members. The Plaintiff submitted that the substantive rights of putative class members were not affected by the discontinuance.

[11] The Defendants do not contest the discontinuance of this action without notice, and without an order for costs.

ISSUE

[12] The issue to be determined is whether the Court ought to exercise its discretion pursuant to section 35(1) of the *Class Actions Act* to order the proceeding be discontinued without notice to the proposed class members.

ANALYSIS

[13] Section 35(1) of the *Class Actions Act* requires Court approval for a class action to be discontinued. Section 35(1) states, as follows:

35. (1) A class action may be settled, discontinued or abandoned only with the approval of the court on terms the court considers appropriate.

[14] Section 35(5) of the *Class Actions Act* requires the Court to consider whether notice should be given as follows:

35(5) In dismissing a class action or in approving a settlement, discontinuance or abandonment, the court may consider whether notice should be given under section 20 and whether the notice should include

- (a) an account of the conduct of the action;
- (b) a statement of the result of the action; and
- (c) a description of a plan for distributing settlement funds.

[15] Even though the application for certification never proceeded in this matter, the Court is still required to consider whether notice of discontinuance should be given to the proposed class members. Notice may be required if there has been reliance on the proceeding by the potential class members; and if the Plaintiff fails to establish that discontinuance of the action will not prejudice or will not be unfair to the members of the proposed class. In *Chen v. Memorial University of Newfoundland and Labrador*, 2019 NLSC 193, at paragraphs 8 to 9, Justice Thompson stated, as follows:

- 8 Notice to the putative class members of a discontinuance of a proposed class action may be significant if prospective class members have been relying on the class proceeding rather than commencing actions of their own. To the extent that discontinuance of a class proceeding may recommence the running of any limitation period, these potential class members may be prejudiced from pursuing their rights and ought to be given reasonable notice.
- 9 The Honourable Warren K. Winkler *et al*, in *Law of Class Actions in Canada* (Thomson Reuters, 2014) at 224 note that the Plaintiff must demonstrate that the discontinuance will not give rise to prejudice or unfairness to members of the class (*Smith v. Crown Life Insurance Company* (2002), 40 C.P.C. (6th) 371, 43 C.C.L.I. (4th) 123 (Ont. Sup. Ct. J.)).

[16] In *Chen*, the class proceeding had also not been certified. Justice Thompson determined that there was potential prejudice to putative class members by the application for abandonment of the class action. The prejudice was the “potential for putative class members to have their action prescribed” (at paragraph 11). Justice

Thompson ordered that notice to the proposed class members be provided; he ordered that the plaintiff obtain the names and addresses of all members who could fall within the defined class and provide them with notice (see paragraph 14 of *Chen*).

[17] *Chen* is distinguishable from the case before me. In *Chen*, the defendant brought to Justice Thompson's attention that there had been publicity through "a news report in 2013 of approximately 50 other graduate students expressing issues similar to those disclosed in these proceedings", (at paragraph 12 of *Chen*). This suggests there was possibly reliance on the proposed proceeding in *Chen* arising from the publicity. Unlike *Chen*, according to the Plaintiff's Counsel, the Plaintiff's action has never been publicized and there has been no notice program of this action to date.

[18] There may indeed be a potential for prejudice to some of the proposed class members, in the event of discontinuance and the possible ensuing expiration of limitation periods. However, based on the representations of Counsel that this uncertified proceeding has not been publicized, and that there has been no notice program to date, I am satisfied that there has been no reliance by potential class members on this action. Consequently, in the circumstance of this case, notice of discontinuance to the proposed class members appears to be unnecessary. Due to the lack of reliance, I am satisfied that it would not be unfair to the members of the proposed class to permit discontinuance without notice.

[19] Further on this, I again refer to the Plaintiff's Counsel's affidavit in which he indicated that he was not aware of any putative class member who had knowledge of and reliance on this proceeding; and that the discontinuance sought was not a condition for settlement. Finally, I accept the Plaintiff's submission that the costs of notice would be disproportionate to the benefit of such in the circumstances of this case.

[20] Based on the foregoing, I find it appropriate to permit discontinuance of this action without requiring any notice to potential class members.

CONCLUSION

[21] After considering the submissions of Counsel, and pursuant to section 35(1) of the *Class Actions Act*, I order that the discontinuance of this proceeding as against the Defendants is approved, without the requirement of notice to the proposed class members, and on a without costs basis.

[22] Order accordingly.

VALERIE L. MARSHALL
Justice