IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Rorison v. Insurance Corporation of British Columbia,* 2024 BCSC 834

Date: 20240515
Docket: S202406
Registry: Vancouver

Between:

Robert Rorison and Brayden Methot

Plaintiffs

And

Insurance Corporation of British Columbia and His Majesty the King in Right of the Province of British Columbia

Defendants

Before: The Honourable Mr. Justice N. Smith

Reasons for Judgment

Counsel for the Plaintiffs:	J.S. Stanley G. van Ert M.J. Sobkin
Counsel for the Defendant, Insurance Corporation of British Columbia:	J.A. Morris
Counsel for the Defendant, His Majesty the King in Right of the Province of British Columbia:	L.V. Mauro C. Rajotte E.C. Lapper S. Ortega
Written Submissions of the Plaintiffs:	April 3, 2024
Written Submissions of the Defendant, His Majesty the King in Right of the Province of British Columbia:	April 24, 2024

Written Reply Submissions of the Plaintiffs:	April 26, 2024
Place and Date of Judgment:	Vancouver, B.C. May 15, 2024

[1] The plaintiff, Robert Rorison, seeks certification of a class action on behalf of all persons who have purchased compulsory vehicle insurance from the defendant, Insurance Corporation of British Columbia ("ICBC"), since the Crown corporation was founded in 1973 (the "Ratepayer Class"). The plaintiff challenges the legality of a long-standing arrangement under which ICBC pays the provincial government for basic medical care provided to individuals injured in motor vehicle accidents, although those expenses are already covered by the province's publicly funded Medical Services Plan ("MSP").

[2] The plaintiff argues that this reimbursement to the province (the "MSP Payments") wrongfully increased insurance costs for all buyers of compulsory vehicle insurance from the provincial Crown corporation and is, in fact, an unconstitutional tax.

[3] In reasons for judgment indexed at 2022 BCSC 624, I found that the pleadings did not disclose a cause action as required by s. 4(1)(a) of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 and dismissed the certification application. The Court of Appeal, in a judgment indexed at 2023 BCCA 474, held that the unconstitutional tax claim raises an arguable cause of action that is not bound to fail. The Court of Appeal set aside the dismissal of the certification application and remitted the matter for consideration of the remaining requirements for certification in s. 4(1). The section reads:

> **4** (1) Subject to subsections (3) and (4), the court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:
>
> (a) the pleadings disclose a cause of action;
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> (b) there is an identifiable class of 2 or more persons;
>
> (c) the claims of the class members raise common issues, whether or not those common issues predominate 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;
>
> (e) there is a representative plaintiff who
>
> (i) would fairly and adequately represent the interests of the class,

> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
>
> (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

[4] In a six-day certification hearing before me, the plaintiff argued a number of common law causes of action in addition to the claim of unconstitutional taxation. After that hearing but before judgment could be given, the legislature amended the governing legislation to retroactively require ICBC to "reimburse the government for costs of health-related services." This legislation was clearly intended to block the claim of the Ratepayer Class, and only the constitutional issue of illegal taxation is able to proceed in the face of it.

[5] (The certification application was also brought on behalf of a second, much smaller class, consisting of people who have suffered catastrophic injuries in motor vehicle accidents (the "Accident Victim Class"). That claim alleges that the MSP Payments wrongfully reduced the amount of other medical and rehabilitation benefits available from ICBC. I certified the action for the Accident Victim Class, and the Court of Appeal did not interfere with that result. The claim of the Accident Victim Class is not relevant to these reasons.)

[6] Because I found the pleadings for the Ratepayer Class had not met the requirement in s. 4(1)(a), I did not consider it necessary to rule on the other requirements in s. 4(1) in respect of the Ratepayer Class. However, those issues had been argued in the certification application. Following the Court of Appeal judgment, the plaintiff and the province provided further written submissions.

[7] The province now takes no position on whether the plaintiff has met the certification requirements in ss. 4(1)(c) to (e). Nor does the province dispute the existence of an identifiable class under s. 4(1)(b). The province does, however, argue that the plaintiff's proposed class definition is overbroad.

[8] The province says that defining the class to include anyone who ever purchased compulsory auto insurance from ICBC since its creation in 1973 would

include claims that were already barred by the 30-year limitation period in s. 8(1)(c) of the former *Limitation Act*, R.S.B.C. 1996, c. 266 before the coming into force of the current *Limitation Act*, S.B.C. 2012, c. 13 on June 1, 2013. This position is set out in the province's recent written submission but was not argued at the full certification hearing.

[9] Section 30(2) of the current *Limitation Act* states:

> (2) A court proceeding must not be commenced with respect to a pre-existing claim if
>
> (a) a former limitation period applied to that claim before the effective date, and
>
> (b) that former limitation period expired before the effective date.

[10] A "pre-existing claim" is defined in s. 30(1) as a claim based on an act or omission that took place before the current *Limitation Act* came into force, but for which a proceeding had not been commenced before that date. The "effective date" is the date that the current *Limitation Act* came into force.

[11] The former *Limitation Act* set out limitation periods for various causes of action, specified some matters for which no limitation period applied and stated in s. 3(5) that:

> Any other action not specifically provided for in this Act or any other Act may not be brought after the expiration of 6 years after the date on which the right to do so arose.

[12] The legislation also set out circumstances which postponed the running of time for limitation periods. Those included claims that were not discoverable until a later date and claims by persons who were minors or under a disability when the right to bring action arose. However, that was subject to s. 8(1)(c), which stated that notwithstanding such postponement, no action "to which this act applies may be brought":

> (c) …after the expiration of 30 years from the date the right to bring action arose.

[13] The only extension to the ultimate limitation period was that the time didn't begin to run until a plaintiff reached the age of majority.

[14] The province argues that the class must therefore be narrowed to include only persons who purchased compulsory auto insurance from ICBC after May 31, 1983, or who were born on or after May 31, 1964, and purchased compulsory auto insurance from ICBC after May 31, 1980, while under the age of 19. It says any claims related to purchases before those dates would have been barred by the 30-year ultimate limitation period by the time the current *Limitation Act* came into force in 2013.

[15] In *Godfrey v. Sony Corporation*, 2017 BCCA 302, aff'd *Pioneer Corp. v. Godfrey*, 2019 SCC 42, the Court of Appeal stated at para. 67 that limitation issues can be considered at the certification stage, in exceptional circumstances, but generally should not be. The Court found that the limitation issue in that case was "bound up in the facts": para. 68. Relying on *Godfrey*, I declined to rule on limitation issues raised against the Accident Victim Class and the Court of Appeal agreed.

[16] The province argues that the exceptional circumstances contemplated in *Godfrey* apply to the 30-year ultimate limitation period, because it was not subject to postponement on the basis of discoverability or disability and is, therefore, not bound up with any factual issues.

[17] The province also relies on *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, 2007 SCC 1 [*Kingstreet*]. In *Kingstreet*, the Court considered the issue of whether restitution is available for the recovery of monies collected under legislation that is subsequently declared to be *ultra vires*. The Court found that the remedy was available but that such claims "may" be subject to an applicable limitation period: para. 59. The Court agreed with the New Brunswick Court of Appeal that a six-year limitation in that province's limitation statute applied.

[18] The language of the New Brunswick statute at issue in *Kingstreet* was similar, but not identical, to the language in the former *Limitation Act*. The applicability of the

30-year ultimate limitation to constitutional claims does not appear to have been considered by the courts of this province in any cases that arose under the former *Limitation Act*.

[19] Whether or not the 30-year limitation period is connected to any factual issues, it may not be the only limitation period that is argued at the trial of common issues. I find that it would be more appropriately argued and decided in the context of all legal issues and evidence and I decline to narrow the class definition at this early stage.

[20] I am also not persuaded that giving effect to the province's argument at this stage would have a significant effect on the class size. It is likely that many, if not most, BC motorists who purchased vehicle insurance annually between 1973 and 1983, and who are still alive, continued to do so after 1983 and would therefore remain members of the class in any event.

[21] The province also argues that the class should be limited to persons resident in British Columbia who purchased compulsory insurance from ICBC. I agree with the plaintiff that the province has suggested no compelling reason why former residents of British Columbia who paid the disputed amounts, perhaps for many years before moving out of the province, should be excluded from the class.

[22] I therefore find that class proposed by the plaintiff is the appropriate one to be certified. Any narrowing or alteration of the class should be left to the judge deciding common issues.

[23] As said above, the province now takes no position on the remaining certification requirements in s. 4(1), but it remains necessary for the Court to rule on them.

[24] The common issues proposed by the plaintiff under s. 4(1)(c) are:

> What are the terms of all agreements between ICBC and the Province whereby ICBC agreed to reimburse the Province (including MSP) for healthcare expenses arising out of motor vehicle accidents (the "Payments Agreement")?

> What amounts were paid by ICBC to the Province (including MSP) under the Payments Agreement (the "Payments")?
>
> Does the Payments Agreement, or the Payments made under it, constitute an unconstitutional tax on the Ratepayer Class?

[25] The commonality threshold is a low one, requiring only a triable factual or legal issue that advances the litigation. The critical factors in determining whether an issue is common are that: (i) its resolution will avoid duplicative fact-finding or legal analysis; (ii) it is a substantial ingredient of each class member's claim and must be resolved to resolve the claim; and (iii) success for one class member on the issue will mean success for all: *Finkel v. Coast Capital Savings Credit Union,* 2017 BCCA 361 at para. 22, citing *Thorburn v. British Columbia (Public Safety and Solicitor General),* 2013 BCCA 480 at paras. 35–38. I find that all of those factors apply to the plaintiff's claim, easily meeting the requirement of s. 4(1)(c).

[26] In relation to s. 4(1)(d), I find that a class proceeding is clearly the preferable procedure. Indeed, I cannot conceive of any other procedure that would be possible in light of the size of the class and the presence of a constitutional issue. At the certification hearing, the province argued that the matter fell within the jurisdiction of the British Columbia Utilities Commission, which regulates ICBC premiums. However, that commission can have no jurisdiction over a constitutional issue.

[27] I find that Mr. Rorison meets the requirements for a representative plaintiff set out in s. 4(1)(e). In my previous decision, I found the plaintiff, Brayden Methot, to be an appropriate representative plaintiff for the Accident Victim Class, stating that there was no evidence to the contrary. The same comment applies to Mr. Rorison. I also find that litigation plan submitted meets the requirements of s. 4(1)(e)(ii), although modifications and refinements may be required as the matter proceeds.

[28] In summary, the action for the Ratepayer Class is certified for the class and common issues proposed by the plaintiff.

"N. Smith J."