Court of Appeal for Saskatchewan
Docket: CACV3893

Citation: *Piett v Canada Revenue Agency*, 2022 SKCA 141
Date: 2022-12-08

Between:

Lorne Piett

Appellant
(Plaintiff)

And

Canada Revenue Agency

Respondent
(Defendant)

Before:	Barrington-Foote J.A. (in Chambers)
Disposition:	Application for leave denied
Written reasons by:	The Honourable Mr. Justice Barrington-Foote
On application from: Application heard:	2021 SKQB 232, Regina November 24, 2021
Counsel:	E.F. Anthony Merchant K.C., and Anthony Tibbs for the Appellant Anne Jinnouchi for the Respondent Tina Yang for the plaintiff in Wintercorn v Global Learning Group Inc.

Barrington-Foote J.A.

I. INTRODUCTION

[1] Lorne Piett has applied for leave to appeal an August 27, 2021 decision (*Piett v Global Learning Group Inc.,* 2021 SKQB 232 [certification decision]) of a judge of the Court of Queen's Bench [designated judge] denying the following applications by Mr. Piett in the proposed multi-jurisdictional class action underpinning this appeal [*Piett* action]:

(a) To certify the *Piett* action as a class action; and

(b) To substitute Randy Shoeman for Mr. Piett as the representative plaintiff.

[2] For the reasons that follow, I would deny leave to appeal.

II. BACKGROUND

[3] The *Piett* action relates to a tax shelter scheme operated by Global Learning Group Inc. [GLG]. Taxpayers who sought the benefits of the scheme donated to a charitable donation program, and in turn, were issued charitable tax receipts. GLG marketed and operated this scheme through a network of sales agents, who were paid commissions. Mr. Piett and Mr. Shoeman, both of whom made donations, also participated in the marketing effort and received very substantial commissions for doing so.

[4] The tax shelter ultimately failed, as the respondent Canada Revenue Agency [CRA] reassessed taxpayers that had made donations, disallowing their claimed donation tax credits. As a result, Mr. Piett commenced the *Piett* action, naming a variety of defendants that were alleged to have played some role in relation to the GLG scheme, along with the CRA. The defendants included persons that were alleged to have promoted the scheme, and lawyers and accountants that were alleged to have advised GLG. The statement of claim asserted, among other things, that these actors had played these roles despite knowing it was a sham. It also alleged that the CRA knew the GLG scheme was a sham and a fraud and that it would eventually disallow taxpayers' claim, but nonetheless failed to warn affected taxpayers in accordance with a CRA policy titled the Taxpayer Bill of Rights. Indeed, Mr. Piett claimed that CRA intentionally delayed audits and

delayed processing returns for tactical reasons, resulting in the accumulation by taxpayers of penalties, fines, interest and other charges.

[5] The designated judge refused to grant the certification order on three grounds. She first held that the *Piett* action was an abuse of process, and for that reason, could not be certified and in addition, should be "struck in its entirety". Although that conclusion effectively disposed of both applications before her, she proceeded, in the alternative, to consider certain other factors that might preclude certification. She found that neither Mr. Piett, whom she denied leave to withdraw as representative plaintiff, nor Mr. Shoeman, who was proposed as a substitute, were suitable representative plaintiffs within the meaning of s. 6(1)(e) of *The Class Actions Act*, SS 2001, c C-12.01 [*CAA*]. Further, she held pursuant to s. 6(2) of the *CAA* that a class action commenced in the Ontario Superior Court of Justice, *Wintercorn v Global Learning Group Inc*., was a preferable proceeding to the *Piett* action in which to resolve the claims of the proposed class members.

[6] In his draft amended notice of appeal, Mr. Piett has listed many proposed grounds of appeal, as follows:

> (a) The Chambers Judge erred in law by finding that the claim against the Attorney General of Canada (Canada Revenue Agency) disclosed no reasonable cause of action, when in fact:
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> > (i) it was not *plain and obvious* that no such claim could be made out against CRA, as it has been in other cases (e.g. *Leroux v Canada Revenue Agency*, 2014 BCSC 720);
> >
> > (ii) on the facts of this case, CRA's wrongdoing included tortuous (sic) operational decisions made in a specific tax office which deviated from the norm (and not merely institutional policy decisions), which in and of itself gives rise to a private law duty of no application in most earlier authorities;
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> (b) The Chambers Judge erred in law as a matter of statutory interpretation in finding that s. 22(2) of *The Class Actions Act* requires that a prospective representative plaintiff apply *prior* to certification of a class action for approval to receive payment for legal fees and disbursements from class members or other parties;
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> (c) The Chambers Judge erred in law by finding that a prior or future solicitor/client relationship between counsel and the (proposed) representative plaintiff in a class action is a disqualifying conflict;
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> (d) The Chambers Judge erred in refusing to permit the substitution of the proposed representative plaintiff;
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> (e) The Chambers Judge erred in law by dismissing the proposed class action for reasons peculiar to the proposed representative plaintiff, without affording an opportunity for

> another member of the class to come forward and assume the role, as is more conventionally done;
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> (f) The Chambers Judge erred in finding that the Ontario Wintercorn proceeding is the preferable procedure for resolving the claims of the class members, in circumstances where the Canada Revenue Agency is not a defendant in Wintercorn and the claims advanced against the Canada Revenue Agency will never be adjudicated in Wintercorn;
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> (g) The Learned Chambers Judge erred in fact and in law by concluding, without evidence and without any real argument on the issue, that the fact that the Wintercorn proceeding is underwritten by Ontario's Class Proceedings Fund "consequently [means] they have less risk and more resources than either Mr. Piett or Mr. Shoeman" and by inference, Ontario actions are always preferable over all other Canadian jurisdictions where the *in fact* reality is that the Wintercorn class compared to the Saskatchewan Class suffers at least a 10% penalty, a priori Ontario is 10% worse; and
>
> (h) The Learned Chambers Judge erred in fact and in law by concluding, without evidence and without any real argument on the issue, that the Wintercorn action in Ontario is preferable where they have third party funding, essentially overruling the Saskatchewan Legislature which has determined that Saskatchewan does not require a class proceedings fund, and finding that Ontario proceedings will always be preferable by her reasoning, which overrules The CAA.
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> (emphasis in original)

III. THE TEST FOR LEAVE TO APPEAL

[7] The test applied by this Court on an application for leave to appeal is that specified by Cameron J.A. in *Rothmans, Benson & Hedges Inc. v Saskatchewan*, 2002 SKCA 119, 227 Sask R 121 [*Rothmans*]:

> [6] ... Generally, leave is granted or withheld on considerations of merit and importance, as follows:
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> > First: Is the proposed appeal of sufficient merit to warrant the attention of the Court of Appeal?
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> > > • Is it prima facie frivolous or vexatious?
> > >
> > > • Is it prima facie destined to fail in any event, having regard to the nature of the issue and the scope of the right of appeal, for instance, or the nature of the adjudicative framework, such as that pertaining to the exercise of discretionary power?
> > >
> > > • Is it apt to unduly delay the proceedings or be overcome by them and rendered moot?
> > >
> > > • Is it apt to add unduly or disproportionately to the cost of the proceedings?
> >
> > Second: Is the proposed appeal of sufficient importance to the proceedings before the court, or to the field of practice or the state of the law, or to the administration of justice generally, to warrant determination by the Court of Appeal?

> • does the decision bear heavily and potentially prejudicially upon the course or outcome of the particular proceedings?
>
> • does it raise a new or controversial or unusual issue of practice?
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> • does it raise a new or uncertain or unsettled point of law?
>
> • does it transcend the particular in its implications?
>
> (emphasis in original)

[8] Further, as the Court confirmed in *Hoedel v WestJet Airline Ltd.*, 2022 SKCA 27, the *Rothmans* criteria are not a straitjacket:

> [12] These questions are not exhaustive. They are "conventional considerations" rather than "fixed rules" (Rothmans at para 6) or a checklist. The authority to grant leave is discretionary and calls for the Chambers judge to decide whether they are sufficiently concerned about the correctness of a decision to warrant its exercise: see also *Lepage Contracting Ltd. v Saskatchewan (Employment Standards)*, 2020 SKCA 29 at paras 23-24; and *Saskatoon (City) v North Ridge Development Corporation*, 2015 SKCA 13 at para 50, 451 Sask R 265; and *Consumers Co-operative Refineries Limited c/o Federated Co-operatives Limited (SK) v Regina (City)*, 2021 SKCA 166 at paras 8-9.

IV. ANALYSIS

[9] As noted above, there were two applications before the designated judge; that is, an application for certification and an application to permit Mr. Piett to withdraw, and to substitute Mr. Shoeman as the representative plaintiff. There was no application to strike the fifth amended statement of claim pursuant to Rule 7-9 of *The Queen's Bench Rules* or otherwise. The designated judge nonetheless dealt first with the question of whether the *Piett* action was an abuse of process. Counsel advised at the hearing of this application that this issue had been raised in the court below in briefs filed by the defendants against which Mr. Piett has now discontinued, but not by the CRA. It was also addressed in oral argument before the designated judge.

[10] In her reasons relating to abuse of process, the designated judge made the following key findings:

> [50] In my view, the evidence adduced in this case demonstrates that the background conduct of the litigation giving rise to the *Piett Action* constitutes an abuse of process. Mr. Piett, Mr. Shoeman, and others have undermined the integrity of the class actions adjudicative process by advancing this litigation to the certification stage for an improper purpose: to profit from the class members that they purport to represent.
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> [51] The class actions process is intended to provide access to justice. However, Mr. Piett, Mr. Shoeman and a third party, Mr. Mitchell, have subverted that process to enrich themselves, without disclosing their enrichment to class members and without seeking

approval from the court for their Fee Arrangement. They have also created a two-tiered structure for class members — where those who pay to participate may get more information than those who do not. All of this is improper.

…

[55] The following evidence demonstrates that the conduct of the *Piett Action* was focussed on creating profit for the Piett Action's promoters at the expense of class members, resulting in an abuse of process:

> a) Mr. Mitchell, a former senior executive of GLGI, Mr. Piett and plaintiffs' counsel established a steering committee to drive the Piett Action. Through the steering committee it was decided that Mr. Piett would be the representative plaintiff and Mr. Piett agreed to be the representative plaintiff on the condition that he be financially compensated for doing so;
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> b) Mr. Mitchell created the websites, *Merchant Law Helps* and *Donors4Donors*, in order to solicit class members to pay a retainer to plaintiffs' counsel to participate in the class action, without court approval;
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> c) The content of the *Merchant Law Helps* website was created or approved by plaintiffs' counsel;
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> d) Mr. Mitchell used a list of donors from his work for the defendant, GLGI, to contact potential class members;
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> e) If putative class members did not pay $500, they were advised that they would be "technically" part of the class action, but would receive less notice and information about the proceeding. This created a two-tiered structure for class members, where those who paid to participate had greater access to information than those who did not pay, violating the purpose and intent of the *CAA* and specifically s. 6(1)(ii);
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> f) Mr. Shoeman and Mr. Piett "sold" participation in the class action to class members for a finder's fee and these recruited putative class members were the same donors to whom they had sold the Gift Program;
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> g) The $500 fee solicited from putative class members (which total approximately $1.7 million) was largely used to pay finder's fees and/or consulting fees to Mr. Piett, Mr. Shoeman, and Mr. Mitchell. The money was not used primarily for legal fees as it was stated it would be on the *Merchant Law Helps* website;
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> h) Plaintiffs' counsel did not seek the court's approval of the Fee Agreement, but did pay itself for legal fees and disbursements;
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> i) No statements of account were sent to class members showing the payments from plaintiffs' counsel's trust account; and,
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> j) Plaintiffs' counsel would not have commenced the *Piett Action* but for the Fee Arrangement: Piett Undertakings at para. 153.

[11] The reference in (h) in this list was to s. 22(2) of the *CAA*, which the designated judge found to apply to the fee arrangements that had been made between Mr. Piett's counsel and Messrs. Piett, Shoeman and Mitchell. For that reason, she found that those arrangements "violat[ed] the requirement for court approval" (at para 63). Further, it was her view that this "funding scheme"

was “contrary to the purpose and objectives of the CAA”, brought the administration into disrepute (at para 63), and was “akin to maintenance”. In the result, she concluded as follows:

> [66] Superior Courts have an inherent jurisdiction to control their proceedings to prevent interference with the proper administration of justice and to dismiss an action if the circumstances warrant and the claim is otherwise an abuse of process: *The Queen's Bench Rules*, Rule 7-9. As an abuse of process, the *Piett Action* has no reasonable possibility of success. As a result, the application for certification is dismissed and the Piett Action is struck in its entirety.

[12] The CRA submits that this application for leave should be denied because Mr. Piett’s notice of appeal does not address the finding that the *Piett* action is an abuse of process, and for that reason should not only be denied certification, but struck pursuant to her inherent jurisdiction. It relies on *Ammazzini v Anglo American PLC*, 2019 SKCA 142, 48 CPC (8th) 1 [*Ammazzini*] in this context, where a judge of this Court refused leave to appeal a decision permanently staying a prospective class action. A judge of the Court of Queen’s Bench had stayed that action, finding, among other things, that it was duplicative and unnecessary in light of the settlement achieved in parallel Quebec, Ontario and British Columbia class actions, and as such, amounted to an abuse of process. In denying leave to appeal, Caldwell J.A. dealt with the abuse of process issue as follows:

> [72] Moreover, in my assessment, the proposed appeal does not adequately address the second reason given by the Chambers judge for permanently staying the Saskatchewan Action, namely, that "as it now stands and as the Saskatchewan plaintiffs would amend it, [it] falls into the category of being vexatious and oppressive - of being an abuse of process" (at para 70). Nothing in the draft notice of appeal comes to direct grips with this ruling in *Ammazzini QB 2019*. Since that ruling could stand regardless of the Applicants' success in their proposed appeal, I am unable to conclude that the proposed appeal is of sufficient merit for a panel of this Court to consider.

[13] As in *Ammazzini*, Mr. Piett’s proposed appeal did not deal adequately with abuse of process. Mr. Piett did not seek leave to appeal on the basis that there was no application to strike before the designated judge, and that she had accordingly erred by ordering that it be struck for that reason alone. Indeed, he did not allege that she had erred by concluding that the action was an abuse of process.

[14] The most that can be said is that Mr. Piett sought leave to appeal in relation to two of the many factors the designated judge took into account when deciding there had been an abuse of process. He sought leave to appeal her conclusion that he was required to obtain court approval pursuant to s. 22 of the *CAA*, on the basis that s. 22 does not apply before certification. He also

claimed that she had committed a reversible error of fact by finding that fees collected from putative class members were used largely for finder's fees and/or consulting fees to Messrs. Piett, Shoeman and Mitchell.

[15] Neither of these arguments would be destined to fail. To that extent, an appeal based on these grounds raise issues which relate to the foundation for the finding by the designated judge that the *Piett* action was an abuse of process. That, in turn, raises the question identified in *Ammazzini*: could the conclusion that this action should be struck as an abuse of process stand regardless of Mr. Piett's success in relation to these or any other issues?

[16] In my opinion, it would stand. The designated judge found the fee arrangements and funding structure to be objectionable for many reasons other than a lack of court approval pursuant to s. 22(2). Her conclusion on that point did not depend on her view of s. 22. Similarly, even if, as Mr. Piett contends, the designated judge committed a palpable and overriding error of fact in relation to the proportion of fees collected from putative class members that were used to pay finders and consulting fees, the *substance* of the concerns identified by the designated judge as to the fee solicitation and expenditure of funds would remain. Further, the other factors she took into account in when finding there had been abuse would remain. In the result, the decision that the *Piett* action has been struck would stand regardless of the outcome in relation to these and any of the other issues identified as proposed grounds of appeal.

[17] The appeal is accordingly moot, and leave should be denied for that reason. Further, this is not an appropriate case to grant leave in relation to any of the other proposed grounds of appeal regardless, despite the fact that several of those grounds of appeal would not have been destined to fail. Those issues are best left for another day.

V. CONCLUSION

[18] For these reasons, leave to appeal is denied.

[19] Finally, although s. 40 of the *CAA* does not provide that costs reflexively follow the cause, (*Ammazzini v Anglo American PLC,* 2016 SKCA 164, at para 84, 405 DLR (4th) 119), I find it is appropriate to order that the Respondents shall have one set of costs in this application.

"Barrington-Foote J.A."

Barrington-Foote J.A.