

Court of King's Bench of Alberta

Citation: Romero v The Meat Shop at Pine Haven, 2022 ABKB 621

Date: 20220915
Docket: 1803 08418
Registry: Edmonton

Between:

Nora Romero, as Representative Plaintiff

Plaintiff

- and -

**The Meat Shop at Pine Haven and Pine Haven Hutterite Colony and Hutterian Brethren
Church of Pine Haven**

Defendants

- and -

**1890063 Alberta Ltd., Carrying on Business Under the Style of Mama Nita's Binalot,
1950331 Alberta Ltd., Carrying on Business Under the Style of Mama Nita's Binaolt, Abc
Company and John Doe/Jane Doe**

Third Party

**Reasons for Decision, Application for Certification of Class Action
of the
Honourable Justice James T. Neilson**

[1] This action has been brought by the proposed Representative Plaintiff, Nora Romero pursuant to the *Class Proceedings Act*, R.S.A. 2003, c.C-16.5, on behalf of a class of persons who are alleged to have suffered injury and loss as the result of the purchase and consumption of pork products produced by the Defendants during the period February 19, 2018 and April 24, 2018 (“the Recalled Pork”). It is alleged that pork products were contaminated by a toxin known as E. coli 0157. It is alleged that contaminated pork resulted in at least forty-three illnesses, fourteen hospitalizations, five cases of a serious syndrome known as Hemolytic Uremic Syndrome (“HUS”) and one death.

[2] The Defendants deny all liability and in turn have issued third party proceedings against the third parties known collectively as “Mama Nita’s”, that had purchased pork products from the Defendants and sold them to consumers. Specifically, the Defendants allege that they were not negligent and met the standard of care required of a pork product producer. They deny that any of its pork products were contaminated with E. coli bacteria, but if there was any such contamination, then it denies causation of any resultant illness. Rather, any injury and loss were caused by the negligence or contributory negligence of intermediaries and ultimate consumers in failing to properly cook pork products to a point where any E. coli present was eliminated, making the pork safe to consume. Mama Nita’s denies the allegations against it.

[3] Submissions were made on behalf of “the Meat Shop at Pine Haven” to the effect that it is not a legal entity and ought not to be the subject of this class action if certified. However, it was confirmed that this trade name was used by the Defendants Pine Haven Hutterite Colony and Hutterian Brethren Church of Pine Haven. Rules 2.2 and 2.5 provide that a partnership or sole proprietorship party may sue or be sued in the name of a tradename. Rule 11.13 provides for service upon a corporation carrying on a business or operating in a name other than its own. Once the name of the business is determined that is operating under the tradename, then the proper recourse is to continue the action against the Corporation, not the tradename. Therefore, in order to clarify the pleadings, the Plaintiff proposes, and I now order that the style of cause in this action shall be amended so that the Defendants will be identified as follows:

Pine Haven Hutterite Colony and Hutterian Brethren Church of Pine Haven
operating under the name and style of the Meat Shop at Pine Haven

The Proposed Class

[4] The Proposed Class is all natural persons in Canada who:

1. Consumed Recalled Pork and suffered an illness or injury;
2. Purchased Recalled Pork and suffered an economic loss;
3. Purchased Recalled Pork, which was not of merchantable quality or reasonably fit for the purchase or sale to consumers; or
4. Purchased Recalled Pork and suffered emotional distress

[5] The Plaintiff also proposes a “Family Class” being all individuals who by reason of their relationship to a member of the Class are entitled to make claims under the *Fatal Accidents Act*, R.S.A. 2000, c.F-8, or similar statutes in Canada or the common law as a result of the death or other injury to such member of the Class.

Application for Certification of the Class Action

[6] Section 5(1) of the *Class Proceedings Act* sets out the five preconditions to certification of a class action:

In order for a proceeding to be certified as a class proceeding on an application made under section 2 or 3, the Court must be satisfied as to each of the following:

- (a) the pleadings disclose a cause of action;
- (b) there is an identifiable class of 2 or more persons;
- (c) the claims of the prospective class members raise a common issue, whether or not the common issue predominates over issues affecting only individual prospective class members;
- (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
- (e) there is a person eligible to be appointed as a representative plaintiff who, in the opinion of the Court,
 - (i) will 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, in respect of the common issues, an interest that is in conflict with the interests of other prospective class members.

[7] The Alberta Court of Appeal has recently affirmed the test for certification in *Spring v Goodyear Canada Inc.*, 2021 ABCA 182 at paragraphs 17 and 18 as follows:

[17] The representative plaintiff must establish all five of the preconditions to certification found in s. 5 of the Class Proceedings Act. If those five preconditions are met, the action must be certified; if they are not met, the application for certification must be dismissed.

[18] The certification process plays a screening role, but it is limited in scope. At the certification stage, the judge is ruling on a purely procedural question. The

judge must not deal with the merits of the case, as they are to be considered only after the application for certification has been granted: *L'Oratoire Saint-Joseph du Mont-Royal v J.J.*, 2019 SCC 35 at para. 7...

[8] The Alberta Court of Appeal has given further guidance as to sufficient facts to support the application for certification as a class proceeding in *Fisher v Richardson GMP Limited*, 2022 ABCA 123 at paras 34-36:

The court must certify the action as a class proceeding where all the requirements of subsections 5(1)(a) to (e) are satisfied. If the requirements are not met, the certification application must be dismissed: CPA, ss. 5(3) and 5(4); *Spring* at para 17.

The applicant must show there is some “basis in fact” for each of the statutory requirements, except for the requirement that the pleadings disclose a cause of action. This criterion is governed by the rule that a pleading should not be struck for failure to disclose a cause of action unless it is plain and obvious that no claim exists: *Pro-Sys Consultants Ltd v Microsoft Corporation*, 2013 SCC 57 at paras 63 and 99, citing *Hollick v Toronto (City)*, 2001 SCC 68 at para 25; *Warner* at paras 12-14.

The “basis in fact” standard has been described as “sufficient facts to satisfy the applications judge that the conditions for certification have been met to a degree that should allow the matter to proceed on a class basis without foundering at the merits stage by reason of the requirements of...the CPA not having been met”: *Pro-Sys* at para 104. The evidentiary burden is not onerous and requires only a minimum evidentiary basis: *Warner* at para 13, citing *Hollick* at paras 24-25 and *Stewart v General Motors of Canada Ltd*, [2007] OJ No 2319 (SCJ). This is consistent with the principle that the certification hearing is not a determination of the merits of the claim: CPA, s. 6(2). It is, instead, a procedural application concerned with the form of the action: *Warner* at para 10, citing *Pardy v Bayer Inc*, 2004 NLSCTD 72 at para 91. The question is not whether the claim is likely to succeed, but whether it is appropriately prosecuted as a class action: *Hollick* at para 16.

(a) Causes of Action

[9] The Plaintiff advances this claim alleging negligence and breach of warranties under the *Sale of Goods Act*, R.S.A. 2000, c.S-2. The Statement of Claim sets out particulars of the claim in negligence as well as allegations of producing and selling product that was not fit for consumption and was not of merchantable quality.

[10] At the certification application stage, the Court does not embark on a consideration of the merits as to whether the elements, in this case, of the tort of negligence or breach of warranties under the *Sale of Goods Act* are to be made out in the evidence. Should the action be certified, then this would be one of the common issues to be considered at the subsequent trial.

[11] As the Statement of Claim discloses causes of action, the requirement under section 5(1)(a) of the *Class Proceedings Act* is met.

(b) An Identifiable Class of Two or more Persons

[12] The Proposed Class is adequately described. It comprises of people who have suffered injury or loss as a result of the purchase and consumption of Recalled Pork. There is also proposed a “Family Class”, being individuals who by reason of their relationship to a Class member are entitled to make claims under Fatal Accident legislation. Although all members of the Proposed Class and the Family Class have not yet been individually identified, the class is well defined and not overly broad. The exact size of the class is unknown at present but would be founded and objectively determinable based on the proposed class definition.

[13] Accordingly, the requirement in section 5(1)(b) of the *Class Proceedings Act* is satisfied.

(c) Common Issues

[14] The Representative Plaintiff proposes the following common issues:

- a) Was the Recalled Pork contaminated with e.coli?
- b) What are the health risks associated with consumption of e.coli contaminated Recalled Pork?
- c) If the Recalled Pork was contaminated with e.coli was the contamination caused or contributed to by the acts or omissions of the Defendants?

Negligence

- d) Did the Defendants owe a duty of care to the Class to:
 - i. Take such care as was reasonable in all the circumstances and follow best practices such that the Recalled Pork was safe or reasonably safe for consumption and that the ingestion of such products would not cause illness or injury;
 - ii. Establish and follow proper procedures with respect to the testing of the Recalled Pork to reasonably ensure that such products were safe for consumption and that consumption of such products would not cause illness or injury;
 - iii. Distribute Recalled Pork that was safe for consumption and that consumption for such products would not cause illness or injury;
 - iv. Develop and implement adequate control methods for dealing with situations of e.coli contamination;
 - v. Upon discovering possible e.coli contamination;
 - (a) Take immediate and comprehensive steps to inform the public of the contamination;
 - (b) Immediately remove any and all Recalled Pork from the marketplace;
 - (c) Ensure that the retail channels in which the Recalled Pork were sold were adequately informed of the recall;
 - vi. Develop and implement what was the applicable standard of care and did the Defendants fail to meet the applicable standard of care and so breach and of the duties of care owed to the Class?

Sale of Goods Legislation Claims

- e) Are Class members who bought the Recalled Pork “buyers” within the meaning of the *Sale of Goods Act*, R.S.A. 2000, c. S-2, s. 16?

- f) Were the Defendants, having agreed to sell the Recalled Pork, “sellers” within the meaning of the *Sale of Goods Act*?
- g) Is the Recalled Pork “goods” within the meaning of the *Sale of Goods Act*?
- h) Was Recalled Pork supplied by the Defendants to the Class, under contracts of sale such that sufficient privity of contract existed?
- i) Was there an implied condition that the Recalled Pork was of merchantable quality?
- j) Was there an implied warranty or condition as to the quality and fitness of the Recalled Pork for its ordinary purpose?
- k) Did the Defendants breach any such warranties and conditions?

[15] As discussed below, issues relating to damages being claimed by individual Class Members are not amenable to classification as Common Issues.

[16] The Plaintiff submits that she has established “some basis in fact” to support the common issues proposed: *Fisher v Richardson GMP Limited, supra*. In order to establish commonality, evidence that the acts alleged actually occurred is not required. Rather, the factual evidence required at this stage goes only to establishing whether these questions are common to all the class members. When examining the existence of common issues, it is important to understand that the common issues do not have to be issues which are determinate of liability; they need only be issues of fact or law that move the litigation forward.

[17] The Plaintiff submits that evidence establishing “some basis in fact” for the common issues is provided in the Affidavit of the proposed Plaintiff Nora Romero, the expert report of Mr. Ron Vail (food safety), the expert report of Dr. Rebekah DeVinney (microbiology), the Affidavit of Mr. Hofer on behalf of the Defendants, the cross-examination on Mr. Hofer’s Affidavit and the expert report of the Defence expert Dr. Romney.

The Alberta Health Services Report

[18] The Romero Affidavit appended records received from Alberta Health Services pursuant to a FOIP Request. The “executive summary” of the AHS report detailed that, during March to May 2018, an outbreak of 43 *Escherichia coli* 0157 infections in Alberta, Canada was identified through notifiable disease surveillance and investigated by member agencies of the Canada-Alberta Partners in Food Safety Alberta Foodborne Illness and Investigation Protocol. Fourteen patients were hospitalized, five of whom developed HUS; one death was reported.

[19] The epidemiological laboratory and food safety/food trace back evidence collected during the investigation supported pork from Pine Haven Colony, Wetaskiwin, Alberta as the primary source of this outbreak.

[20] Pine Haven Colony on April 24, 2018 voluntarily recalled all pork products produced at the facility on or between February 19 and April 24, 2019. This resulted in over 100 Recalled Pork products produced or sold by eight facilities.

[21] A root cause analysis was conducted by Alberta Agriculture and Forestry. The final results of the investigation were not available at the time that report was prepared.

[22] Twenty-two outbreak cases were epidemiologically linked to one food facility, Mama Nita's Binalot Restaurant, Edmonton.

The Canadian Food Inspection Report

[23] The Romero Affidavit also appended an exhibit, a record from the Canadian Food Inspection Agency. The CFIA record cites the root cause analysis conducted by AAF that revealed three general areas for improvement at the Pine Haven Facility: a lack of record keeping verifying process controls; inadequate handling of RTE product; and inadequate slaughter procedures. The Meat Shop at Pine Haven has taken actions to address the identified concerns, and AF continues to follow up with them to ensure that the operator continues to make the necessary improvements.

The Recall Notice

[24] Mr. Hofer in cross-examination confirmed that The Meat Shop at Pine Haven had issued a Recall Notice, that provided as follows:

The Meat Shop at Pine Haven is a full service provincially inspected abattoir and artisan sausage making facility located at the Pine Haven Hutterite community west of Wetaskiwin, AB.

On April 18, 2018, The Meat Shop was notified that the Canadian Food Inspection Agency (CFIA), Alberta Agriculture & Forestry (AAF), and Alberta Health Services (AHS) have been investigating a food borne illness outbreak in the Edmonton area due to E. coli O157:H7. As a supplier of raw pork products, The Meat Shop has been included in this investigation and is fully cooperating in this thorough process.

On April 24, 2018, the Meat Shop at Pine Haven was notified of a positive testing results for E. coli O157:H7 in some raw pork samples. The Meat Shop at Pine Haven immediately initiated a voluntary recall with CFIA recalling raw pork products from the marketplace due to possible E. coli O157:H7 contamination. Late afternoon on April 25, 2018 AHS notified The Meat Shop at Pine Haven that the investigation into the outbreak of E. coli O157:H7 in the Edmonton region has been linked to the facility.

The Meat Shop is currently notifying its customers of this recall and continues to work with the CFIA, AAF, and AHS to diligently address the issue.

Consumers should not consume the raw pork products and distributors, retailers and food services establishments, such as hotels, restaurants and cafeterias, should not sell or use the voluntarily recalled products described at:

<http://www.inspection.gc.ca/about-th-cfia/newsroom/food-recall-warnings/complete-listing/2018-04-24/eng/1524625349384/1524625353588>

Expert Reports

[25] The Plaintiff filed an Affidavit by Ron Vail, a food safety expert. The Vail Report is preliminary as the parties have not yet had any exchange of records or any witness questioning.

Vail reviewed the records produced by Alberta Health and the Canadian Food Inspection Agency and cited, in his opinion, that certain programs and standards were likely not being implemented or followed as required and contributed to the E. coli incident.

[26] Dr. Rebekah DeVinney provided expert opinion on the health hazards that can result by the consumption of food contaminated with E. coli. An analysis called “STEC Finger Printing” can be followed by investigators to determine if clusters of illness are related and allow for tracing back to the source.

[27] The Defence expert, Dr. Romney, and Dr. DeVinney confirmed that the illnesses resulting from a low infectious dose of E. coli can involve a broad spectrum of gastrointestinal illness including mild diarrhea, stomach cramps, fever, bloody stools and can include life threatening complications such as HUS.

Objections to Hearsay Evidence

[28] The Defendants objected to the evidence led relating to the common issues identified by the Plaintiff on the basis that the evidence was hearsay, obtained from the records of AHS and CFIA.

[29] However, the Rule 13.18 of the *Rules of Court* provides that an affidavit may be sworn on the basis of personal knowledge or on the basis of information known to the person swearing the affidavit and that person’s belief. Where the affidavit is sworn on the basis of information and belief, the source of the information must be disclosed in the affidavit.

[30] In the Affidavits of Nora Romero, Dr. DeVinney and Ron Vail, each deponent averred that they had personal knowledge of the matters deposed to, “except where stated to be based on information and belief, and where so stated I do verify believe the same to be true.”

[31] This is a procedural interlocutory application and not an application to dispose of all or part of a claim. Therefore, affidavit evidence based on information and belief is admissible in this application pursuant to Rule 13.18.

[32] Furthermore, the records produced by AHS and CFIA can be accepted under the business records exception to the rule against hearsay evidence, pursuant to the decision of the Supreme Court of Canada in *Ares v Venner* [1970] SCR 608. Also, at this procedural stage for certification, the Plaintiff need only establish “some basis of fact” to support the proposed common issues. The class claimants could not be expected at this stage of the proceedings to have any personal knowledge of the operations that are within the knowledge of the Defendants, before the discovery phase of the litigation. On this basis, the Court can take into account the necessity and reliability of records that have been produced from AHS and CFIA in considering the establishment of “some basis in fact”: *R v Khan*, [1990] 2 SCR 531.

Damages

[33] If at the Common Issues Trial some basis for liability on the part of the Defendants is established, then it would remain that damages being claimed by individual class members would have to be assessed. These assessments would have to be done even if claims against the Defendants had been filed independently and not within the proposed class action. However, the proposed common issues, if established at the Common Issues Trial, would move the litigation

forward. The individual claimants would not have to repeatedly establish liability with respect to the proposed Common Issues if found in their favour.

[34] Resolution of the Common Issues would also move the litigation forward, in the third party proceedings filed by the Defendants against Mama Nita's. If the Defendants succeed in dismissing the Common Issues claims, then no claim for contribution or indemnity would remain against Mama Nita's.

[35] At the damages phase, the Defendants would raise issues of causation and contributory negligence, relating to alleged inadequate preparation of the pork products before consumption, or within facilities which had been supplied pork products by the Defendants and in turn sold to consumers. With respect to warranties under the *Sale of Goods Act*, these apply only where there is privity of contract between the seller and the buyer: *Engen v Hyuadai Auto Canada Corp.*, 2021 ABQB 740 at para. 27. The Defendants did sell pork products from its own facility to the public. However, where pork products had been purchased and consumed through intermediaries then the *Sale of Goods Act* warranties would not apply as against the Defendants.

[36] Counsel for the Plaintiff stated during the course of oral submissions that the Plaintiff is not pursuing a claim for punitive damages against the Defendant, as the Defendant moved promptly to issue its voluntary recall notice immediately after the issue re E. coli contaminating was brought to their attention by AHS investigators.

Conclusion re: Common Issues

[37] I find that the Plaintiff has established a basis in fact for the Common Issues as identified in paragraph 14 of these Reasons. Those common issues are to proceed to a Common Issues trial.

(d) Preferable Procedure

[38] I find that the class proceeding is a preferable procedure for the fair and efficient resolution of the Common Issues as described. The assessment of the claims for damages by individual class members would have to follow any finding in favour of the Plaintiffs on the Common Issues but, as stated, these assessments would have to be done in any event had individual claimants sued the Defendants in separate actions.

(e) The appointed Representative Plaintiff

[39] I find that the proposed Representative Plaintiff, Nora Romero will fairly and adequately represent the interests of the Class. The Plaintiff 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 does not have, in respect of the common issues, an interest that is in conflict with the interests of the other prospective class members.

[40] Accordingly, for the foregoing reasons, I certify this action pursuant to the *Class Proceedings Act*.

[41] The Plaintiff has proposed an agenda for the steps to be take for the production of records and Questioning. Such steps will also be required in the third party proceedings by the Defendants against Mama Nita's. If the parties require direction as to the litigation plan to be followed, they may request that a case management conference be scheduled.

[42] As the Plaintiff has been successful in this Certification Application, costs will be payable by the Defendants to the Plaintiff. If agreement cannot be reached with respect to costs, written submissions may be made by the parties within 60 days of the date of these reasons for decision.

Heard on the 15th and 16th days of December, 2021.

Dated at the City of Edmonton, Alberta this 15th day of September, 2022.

James T. Neilson
J.C.K.B.A.

Appearances:

Richard J. Mallet
James H. Brown & Associates
and Clint G. Docken, KC
Guardian Law Group LLP
for the Plaintiff

Jonathan Hillson
Dentons Canada LLP
for the Defendants Pine Haven Hutterite Colony and Hutterian Brethren Church of Pine Haven

Christopher Rhone and Ruby Egit
Branch McMaster LLP
for the Defendant The Meat Shop at Pine Haven

Angela P. Kos
Brownlee LLP
For the Third Party Mama Nita's