

COURT FILE NO.: 99-CV-10694**DATE: 2007-11-30****SUPERIOR COURT OF JUSTICE - ONTARIO**

RE: Nicole Lacroix and Rosie Ladouceur vs. Canada Mortgage and Housing Corporation and Marc Rochon, Claude Poirier-Defoy, Jim Millar, Karen Kinsley, Gerald Norbraten, Jean-Guy Tanguay, David Metzack and Brian Knight being the Trustees of the Canada Mortgage and Housing Corporation Pension Fund

BEFORE: The Honourable Justice Michel Z. Charbonneau

COUNSEL: William Sammon et James Barnes, for the plaintiffs Lacroix et al
Brett Ledger and Denise Sayer, for the defendants
Paul N. Leaman, for the plaintiffs in the companion action No.07-CV-37862

ENDORSEMENT

[1] The defendants bring a motion to strike paragraphs 14 and 15 of the affidavit of Kellie Stewart sworn on September 18, 2007. Those paragraphs identify and annex, as exhibit D to the affidavit, a series of written questions put by the plaintiffs to an O.F.S.I. representative and the answers of that representative, Ms. Dais-Visca. Those written questions and answers were the result of a negotiated settlement of a motion brought by the plaintiffs to compel O.F.S.I. to answer questions at an out-of-court examination, which motion was being defended by O.F.S.I.

[2] The defendants also ask the court to strike three (3) exhibits annexed to the affidavit of Nicole Lacroix sworn March 22nd, 2007. These exhibits are excerpts of documents taken from the O.F.S.I.'s C.M.H.C. file of the relevant time and which were obtained by the plaintiffs directly from O.F.S.I. through a demand under the Access to Information Act. Exhibit "FF" is an internal memo prepared by Sharon Stafford concerning the defendants' workforce re-alignment program and questions to be asked concerning that program. Exhibit "GG" consists of minutes of questions put to the pension plan's actuary, Mr. Lucien Pouliot and his answers concerning various aspects of C.M.H.C.'s workforce downsizing as it relates to the pension plan.

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Exhibit "HH" consists of minutes of a meeting between O.F.S.I. and C.M.H.C. representatives in the form of a memorandum prepared by Sharon Stafford of O.F.S.I. Relevant documents prepared by C.M.H.C. concerning changes to the pension plan are attached to the memorandum.

[3] The defendants argue the impugned paragraphs and exhibits must be struck on the following grounds:

1. They all constitute inadmissible hearsay.
2. It would be an abuse of the court's process to allow them because the defendants will be denied their fundamental right to meaningful cross-examination. This is particularly so because of the manner in which the documents are introduced into evidence and because the evidence is ambiguous and unreliable.
3. The contents of those documents are irrelevant to the issues that the court must decide in the jurisdiction motion and the certification motion. In the former, the issue to be addressed is whether or not the superintendent has exclusive jurisdiction to declare a partial termination. The actual process leading to the decision to order a partial termination and/or the reasons why a particular decision was reached on the issue of partial termination is irrelevant at the jurisdiction motion stage. Indeed the defendants argue that all the allegations of facts put forward by the plaintiffs in support of the plaintiffs' claim, i.e. that the defendants were in a conflict of interest and took actions which were breaches of the defendants' legal duties, must be assumed to be true at this stage. Insofar as the certification motion is concerned, the defendants submit the evidence is irrelevant because a certification motion only deals with whether the action is appropriately prosecuted as a class action and not with the merits of the action. The defendants submit that the impugned evidence only goes to the merits and is therefore irrelevant and will only serve to unnecessarily increase the time required to deal with the motion.

[4] For the reasons that follow, I reject the defendants' contentions and dismiss their motion to strike.

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(A) Hearsay

[5] Rule 39.01(4) allows for hearsay evidence if the source of the information and the fact of the belief of the deponent are specified in the affidavit. Ms. Stewart in her affidavit clearly specified the source of the information and her belief that the information provided is true.

[6] The information provided both in the questions and answers and the documents produced by O.F.S.I. is presumptively reliable as it comes from a governmental institution who is not a party to this proceedings.

[7] Moreover, the bulk of the evidence clearly demonstrates that the documentary evidence produced by O.F.S.I. has always been within the knowledge of the defendants. In fact, a very large portion of those documents contain statements by the defendants' agents, employees or officers and as such would be an exception to the hearsay rule.

[8] The defendants were served with the affidavit of Nicole Lacroix in March 2007. They failed to object to exhibits "FF", "GG" and "HH" on the grounds of hearsay until this summer. I accept the plaintiffs' submission that the defendants had to seek the Court's leave before moving to strike them. The defendants cannot object to these exhibits now that they have completed the cross-examination of Ms. Lacroix.

[9] As I will indicate later, it is not clear to me at this time whether the impugned evidence is irrelevant to either or both of the pending motions. In these circumstances, it may be established later that the statements contained in the documents although inadmissible for the truth of their contents may very well be admissible to show that the statements were in fact made.

(B) Abuse of Process

[10] I find that there will be no prejudice to the defendants if this evidence is admitted.

[11] The evidence was known and in fact largely in the control of the defendants. Indeed, the defendants in large measure controlled what O.F.S.I. could and could not release to the plaintiffs and how much of what was released had to be redacted

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[12] The defendants were at all times aware of the attempts being made by the plaintiffs to settle with O.F.S.I. on the basis of written questions and answers. Although the defendants did not expressly waive any rights to contest this evidence, they acted in such a way that a reasonable person in the plaintiffs' position would believe there would not be objection to the evidence being tendered in that fashion. The defendants could not simply sit back and wait for the settlement process to be completed and then object to the fruit of that settlement process.

[13] Although the answers were not filed by way of affidavit as required by Rule 35, the facts of this case are somewhat exceptional in view of the defendants' clear prior knowledge of the information and position taken by O.F.S.I. in relation to the matters raised. The defendants are certainly in a position to clarify any of the answers by cross-examination or other means. This is clearly a case where the interest of justice requires that adherence to Rule 35 be relaxed. I also rely on the general principle enunciated by Rule 1.04(1) in coming to this decision.

(C) Irrelevance

[14] The defendants have failed to convince me that the impugned evidence is only relevant to the ultimate merits of the plaintiffs' claim.

[15] It must be remembered that both pending motions will be heard together. If the jurisdiction motion is dismissed, one of the issues on the certification motion will be whether it is preferable to proceed with an application to the Superintendent or an action in court. Moreover, there will be an issue as to whether to certify the issue of punitive damages as a common issue. In both cases, the plaintiffs have an obligation to adduce a sufficient evidentiary record to satisfy the court of the correctness of its position. It would be very premature to exclude evidence before hearing the motions unless it is clear and unambiguous that such evidence is irrelevant and superfluous. I am not convinced that such is the case here.

[16] I agree with the defendants that as a general rule irrelevant evidence should be struck at the earliest possible opportunity in order to ensure the fair and expeditious determination of any proceeding. However, the defendants have failed to move to strike the impugned Lacroix' exhibits and have completed the cross-examination of Ms. Lacroix. There is no indication that

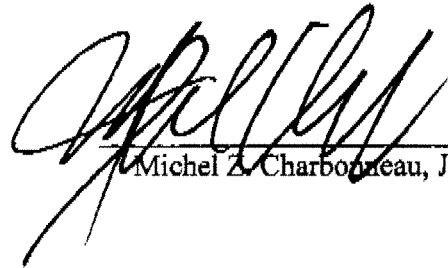
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the defendants will be in any way embarrass by the documentary evidence in question as they are quite familiar with its content. Therefore, allowing this evidence to stand will not create prejudice to the defendants nor cause delay, render the issues more complex or lengthen the proceedings.

[17] On the other hand, the plaintiffs' claim appears to be a novel one and it is very difficult for the court to anticipate all issues which will arise in the context of the jurisdiction motion. I am of the view in all circumstances that the evidence should not be struck at this time. If the jurisdiction motion is allowed, it will likely be a fatal blow to the plaintiffs' action. The plaintiffs submit that this evidence is necessary to properly respond to the defendants' motion. In the circumstances of this case, the motion should, within reasonable limits, proceed on as full an evidentiary record as the parties deem necessary.

[18] For all of the above reasons, the defendants' motion to strike is dismissed and the plaintiffs' cross-motion is allowed.

[19] Counsel may provide me with brief written submissions on costs if so advised.



Michel Z. Charbonneau, Judge

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