



[2021] 4 F.C.R. D-13

PRACTICE

CLASS PROCEEDINGS

Preliminary questions — Appeals from certification order resulting from Federal Court decision (2020 FC 1074) — Specifically, appellant objecting to Federal Court's refusal to include in certification order three preliminary questions of fact and law, one common question — Respondents former federal inmates eligible for accelerated parole review under statutory scheme in place at time they committed their offences — *Abolition of Early Parole Act*, S.C. 2011, c. 11 (Act) abolished availability of early parole — Respondents' statements of claim seeking damages pursuant to *Canadian Charter of Rights and Freedoms*, s. 24(1) because retrospective application of Act infringed their Charter rights — In *Canada (Attorney General) v. Whaling*, 2014 SCC 20, [2014] 1 S.C.R. 392, Supreme Court ruling that retrospective application of Act violating respondents' rights — Respondents representative plaintiffs for classes of former inmates similarly affected by Act — Appellant agreeing to four common questions of law and fact to be determined at trial — Arguing that another common question (CQ), three preliminary questions of law (PQOL) be added to certification order — Federal Court finding that CQ not determinative of cases, not advancing them in any significant way — Finding PQOLs hypothetical, not assisting in determining Crown's liability — Whether Federal Court erred in failing to take proper account of commonality, preferability criteria set out in *Federal Courts Rules*, SOR/98-106, r. 334.16 — Federal Court not erring in any way justifying intervention when holding that PQOLs should not be certified as such — Asking purely hypothetical questions as preliminary questions can preclude leading of evidence — Pure question of law one that can be decided without Court having to engage in fact-finding — Federal Court's characterization of PQOLs as "hypothetical" misleading — PQOLs appropriate questions but only once appropriate evidentiary foundation laid — Nothing then preventing appellant from putting these questions to Court, arguing its position — Result being that PQOLs not appropriately preliminary questions of law, but remaining legitimate question — Federal Court not erring in failing to certify appellant's CQ — Relevant question here whether proposed CQ adding anything to common question certified by Federal Court — On understanding that CQ designed to identify actors, behaviour to satisfy test of clearly wrong, bad faith or abuse of power, difficult to see how CQ adding anything to existing common questions — Overlap between commonality, preferability factors under r. 334.16(1),(2) — Connection between commonality, preferability analyses — Given powers of trial judge to amend certification order or to treat questions not certified as common questions, every possible common question need not be certified as such — Certification of PQOLs as common questions not assisting in achieving goals sought by r. 334.16 — Appeals dismissed.

CANADA V. WHALING (A-299-20, A-300-20, 2022 FCA 37, Pelletier J.A., reasons for judgment dated March 4, 2022, 21 pp.)