Federal Court  Cour fédérale

Date: 20150727

Docket: T-1931-13

Citation: 2015 FC 916

Ottawa, Ontario, July 27, 2015

PRESENT: The Honourable Mr. Justice Phelan

PROPOSED CLASS ACTION

BETWEEN:

JOHN DOE AND SUZIE JONES

Plaintiffs

and

HER MAJESTY THE QUEEN

Defendant

ORDER AND REASONS

I. Introduction

[1] This is a motion for certification as a class proceeding pursuant to Rules 334.16(1) and 334.17 of the *Federal Courts Rules*, SOR/98-106.

[2] In this action, the Plaintiffs plead that the Defendant publicly identified them as participants in the Marihuana Medical Access Program [MMAP or the Program] by sending

letters in oversized envelopes through the mail system in November 2013 with the return address "Marihuana Medical Access Program".

[3] At the hearing of this motion, the Plaintiffs tendered a Third Amended Statement of Claim, which for purposes of this motion will be considered the pleading at issue.

[4] The pertinent Rule for consideration here is R 334.16(1):

334.16 (1) Subject to subsection (3), a judge shall, by order, certify a proceeding as a class proceeding if	**334.16** (1) Sous réserve du paragraphe (3), le juge autorise une instance comme recours collectif si les conditions suivantes sont réunies :
(*a*) the pleadings disclose a reasonable cause of action;	*a*) les actes de procédure révèlent une cause d'action valable;
(*b*) there is an identifiable class of two or more persons;	*b*) il existe un groupe identifiable formé d'au moins deux personnes;
(*c*) the claims of the class members raise common questions of law or fact, whether or not those common questions predominate over questions affecting only individual members;	*c*) les réclamations des membres du groupe soulèvent des points de droit ou de fait communs, que ceux-ci prédominent ou non sur ceux qui ne concernent qu'un membre;
(*d*) a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact; and	*d*) le recours collectif est le meilleur moyen de régler, de façon juste et efficace, les points de droit ou de fait communs;
(*e*) there is a representative plaintiff or applicant who	*e*) il existe un représentant demandeur qui :
(i) would fairly and adequately represent the	(i) représenterait de façon équitable et adéquate les

interests of the class,	intérêts du groupe,
(ii) has prepared 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 as to how the proceeding is progressing,	(ii) a élaboré un plan qui propose une méthode efficace pour poursuivre l'instance au nom du groupe et tenir les membres du groupe informés de son déroulement,
(iii) does not have, on the common questions of law or fact, an interest that is in conflict with the interests of other class members, and	(iii) n'a pas de conflit d'intérêts avec d'autres membres du groupe en ce qui concerne les points de droit ou de fait communs,
(iv) provides a summary of any agreements respecting fees and disbursements between the representative plaintiff or applicant and the solicitor of record.	(iv) communique un sommaire des conventions relatives aux honoraires et débours qui sont intervenues entre lui et l'avocat inscrit au dossier.

II. Background

[5] John Doe (an obvious cover for his real name as both Plaintiffs do not wish to be further publicly identified) resides in Nova Scotia and is employed in the health care field. He holds an authorization under the *Medical Marihuana Access Regulations*, SOR/2001-227 (now replaced by the *Marihuana for Medical Purposes Regulations*, SOR/2013-119) to possess and produce marihuana for his own use. His affidavit in support of this motion outlines some of the impact on his privacy – the Defendant argued that the Statement of Claim did not disclose any instances of damage.

[6] Suzie Jones resides in Ottawa, Ontario, and holds an authorization to possess marihuana. Her affidavit also lays out her privacy concerns flowing from disclosure of her circumstances being a participant in the Program.

[7] While reliance on proven facts is not a relevant matter for the issue of whether the pleadings disclose a "reasonable cause of action" (see *Condon v Canada*, 2015 FCA 159 [*Condon*]), some factual basis must be established – *Pro-Sys Consultants Ltd v Microsoft Corporation*, 2013 SCC 57, [2013] 3 SCR 477 [*Pro-Sys*] – to support the motion.

[8] The MMAP required that each person seeking an authorization a) to possess (ATP); b) to grow for a person holding an authorization to possess (DPPL); or c) to possess and produce marihuana for their personal medical use (PUPL), had to apply to the Minister of Health.

In so doing, an applicant (including these Plaintiffs) had to provide a mailing address and to notify Health Canada of any changes to their mailing address.

[9] Based on the application form required by Health Canada, the Plaintiffs rely on what they call the privacy commitments:

> A3 Appointed Representative
> This section is optional
>
> You may appoint a representative to speak to Health Canada on your behalf. Health Canada will be authorized to exchange information about your case – including personal data and material contained in your medical records – with an appointed representative that you choose (for example, a family member or friend)
>
> Should you not provide this consent, Health Canada will communicate only with and through you.

> A5 Authority to Communicate to Canadian Police
>
> To reduce the possibility of police intervention when you engage in activities allowed under your authorization or licence, if asked, Health Canada will communicate limited authorization and licence information to Canadian police in response to a request in the context of an investigation under the *Controlled Drugs and Substances Act* or the *Marihuana Medical Access Regulations*. [emphasis added]

[10] The Plaintiffs also rely on Info Source, the Canadian Government publication detailing the data banks governed by the *Privacy Act*, RSC 1985, c P-21, and the *Access to Information Act*, RSC 1985, c A-1; specifically the description of the MMAP database, which details very limited circumstances for disclosure, none of which are applicable in this litigation.

[11] Contrary to past practice where Health Canada addressed correspondence with the Plaintiffs and proposed Class Members in relation to the MMAP without reference to the Program or to marihuana, between November 12 and 15, 2013, Health Canada sent correspondence to approximately 40,000 individuals registered in the MMAP. The envelope made visible the name of the individual and the name of the program. This is known as the "Privacy Breach".

[12] The Plaintiffs spent considerable effort and evidence establishing how Health Canada caused the breach. The Court need not consider the ins and outs of this issue now.

[13] The Plaintiffs have established and the Defendant has essentially acknowledged that on November 21, 2013, the Deputy Minister of Health Canada issued a statement on its website

acknowledging an administrative error on the labelling of the envelope and that this was not a standard of Health Canada.

[14] The Defendant in argument attempted to explain away the incident, that individuals were protected by Canada Post Corporation's code of conduct (at least in respect to privacy disclosure to its employees), that all parties relied on Canada Post and that disclosure of names and addresses is not actionable.

All of that may be true but those matters may be appropriate defences at trial, not on this motion.

[15] On March 3, 2015, the Privacy Commissioner, following the receipt of 339 complaints from individuals who alleged the Privacy Breach had adverse impact on their lives, concluded that the complaints were well-founded and that Health Canada had violated the *Privacy Act* by referencing the Program in conjunction with the addressee.

[16] The Defendant objected to the introduction of the Privacy Commissioner's Report but argued that the Report does not establish malice or bad faith. In the absence of malice, the Defendant says that s 74 of the *Privacy Act* acts as a bar to recovery.

[17] The Privacy Commissioner's Report is relevant to the issue of "some basis in fact" in support of the certification motion. As to malice or bad faith and whether there is some legislative bar to any of the causes of action, that has not been established as "plain and

obvious". The Defendant may rely on that position in defence or on some other motion at a later date.

[18] The Plaintiffs wish to define the Class as:

> All persons who were sent a letter from Health Canada in November 2013 that had the phrase "Marihuana Medical Access Program" or "Programme d'acces a la marihuana a des fins medicales" visible on the front of the envelope.

[19] The Plaintiffs claim Health Canada perpetuates the risk to the safety and security of Canadians by:

a) delivering the letter to the Plaintiffs and other Class members in the envelope which discloses the association with the MMAP and the entitlement to possess and/or produce marihuana; and,

b) disclosing the same to Canada Post and/or others who are not bound by confidentiality obligations.

[20] The Plaintiffs further claim that a reasonable person viewing the envelope would conclude that the addressee is associated with the Program, holds an authorization, suffers a grave or debilitating medical condition and possesses/consumes marihuana [the Personal Information].

[21] Finally, the Plaintiffs claim that the Privacy Breach created reasonable security concerns and neither the Plaintiffs nor any proposed Class Member consented to the disclosure of this Personal Information.

[22] The Defendant generally engages in a factual dispute, which is not relevant in this motion except on the issue of "some basis in fact". In summary, the Defendant contends:

- no supporting facts are alleged in the claim that Personal Information was disclosed;
- the only actual disclosure alleged is to Canada Post and that the Plaintiffs merely fear further disclosure;
- any disclosure to Canada Post employees is protected by its Code of Conduct;
- John Doe made prior disclosure to Canada Post in his mailings;
- the Plaintiffs have not shown that there has been disclosure beyond Canada Post;
- the illness of the Plaintiffs may be visible and any production of marihuana is likely known due to odour and other factors; and,
- there are no material facts alleged to show that Health Canada was "high-handed, outrageous, reckless, wanton, entirely without care, deliberate, callous, disgraceful, wilful and in disregard of the rights of the Plaintiffs and other Class Members". This position is related to the Defendant's argument that the Plaintiffs have not pleaded bad faith/malice to counter the effects of s 74 of the *Privacy Act*.

[23] The sole issue is whether this action should be certified as a class proceeding.

III. Analysis

[24] The Court has already referred to the test of "some basis in fact" and it is referenced to *Pro-Sys*. In *AIC Limited v Fischer*, 2013 SCC 69, [2013] 3 SCR 949, the Court clarified that the

evidentiary record in these motions need not be exhaustive and is not a record on which to argue the merits.

[25] The approach this Court should take and the purpose of the Rule is set out in paragraphs 64-65 of the decision of the BC Court of Appeal in *Pro-Sys Consultants Ltd v Infineon Technologies AG*, 2009 BCCA 503, 312 DLR (4th) 419:

> [64] The provisions of the *CPA* should be construed generously in order to achieve its objects: judicial economy (by combining similar actions and avoiding unnecessary duplication in fact-finding and legal analysis); access to justice (by spreading litigation costs over a large number of plaintiffs, thereby making economical the prosecution of otherwise unaffordable claims); and behaviour modification (by deterring wrongdoers and potential wrongdoers through disabusing them of the assumption that minor but widespread harm will not result in litigation): *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534 at paras. 26-29 [*Western Canadian Shopping Centres*]; *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158 at para. 15 [*Hollick*].
>
> [65] The certification hearing does not involve an assessment of the merits of the claim; rather, it focuses on the form of the action in order to determine whether the action can appropriately go forward as a class proceeding: *Hollick* at para. 16. The burden is on the plaintiff to show "some basis in fact" for each of the certification requirements, other than the requirement that the pleading disclose a cause of action: *Hollick*, at para. 25. However, in conformity with the liberal and purposive approach to certification, the evidentiary burden is not an onerous one -- it requires only a "minimum evidentiary basis": *Hollick*, at paras. 21, 24-25; *Stewart v. General Motors of Canada Ltd.*, [2007] O.J. No. 2319 (S.C.J.) at para. 19. As stated in *Cloud v. Canada (Attorney General)* (2004), 247 D.L.R. (4th) 667 at para. 50, 73 O.R. (3d) 401 (C.A.), leave to appeal ref'd [2005] S.C.C.A. No. 50 [*Cloud*],
>
> > [O]n a certification motion the court is ill equipped to resolve conflicts in the evidence or to engage in finely calibrated assessments of evidentiary weight. What it must find is some basis in fact for the certification requirement in issue.

[26] As the Ontario Court of Appeal noted in *Biladeau v Ontario (Attorney General)*, 2014 ONCA 848, 247 ACWS (3d) 313, the statement of claim is to be read as generously as possible with a view to accommodating any inadequacies in the allegations.

[27] On the threshold question of "some basis in fact", I find that the Plaintiffs have established sufficient basis for this Court to consider the other elements of the certification analysis. The Privacy Commissioner's Report, a public document, is itself sufficient for these purposes, as is the other evidence filed.

A. *Reasonable Cause of Action*

[28] The Plaintiffs plead six causes of action:

- breach of contract and warranty;
- negligence;
- breach of confidence;
- intrusion upon seclusion;
- publicity given to public life; and,
- breach of *Charter* right to privacy.

[29] With respect to the Defendant's submission that s 74 of the *Privacy Act* is a bar because the Plaintiffs have not specifically pleaded bad faith/malice, the Plaintiffs, by using words such as high-handed, wanton, callous, etc., as described in paragraph 22, have pleaded more than sufficiently to raise the matter of bad faith/malice.

[30] The test for striking a cause of action is that it is "plain and obvious" that the action cannot succeed as pleaded.

B. *Re: Breach of Contract/Warranty*

[31] The Plaintiffs plead that there was an implied or expressed agreement or undertaking. That is sufficient basis as a pleading to ground the cause of action. Whether in law a contractual relationship was created is a matter for trial.

[32] It may be that what is at issue is something akin to legitimate expectation and if so, is breach compensable but it would be premature to strike the claim as pleaded.

C. *Re: Negligence and Breach of Confidence*

[33] The Plaintiffs have adequately pleaded the cause of action. The Defendant's complaint is largely that the pleading is deficient on tangible damages.

[34] As the Federal Court of Appeal recently held in *Condon*, at paragraph 20:

> … the Rules only require that the claim specify the nature of the damages claimed. A general description of the nature of the damages claimed was sufficient in *Brazeau v. Canada (Attorney General)*, 2012 FC 648, [2012] F.C.J. No. 1489, to deny a motion to strike that part of the pleadings related to a negligence claim.

[35] The Plaintiffs have, in respect to negligence, pleaded the duty of care, the statutory duty, the breach of the duty and nature of harm. In respect of the tort of breach of confidence, the Plaintiffs have pleaded the confidence relied on and the breach/misuse.

[36] Therefore, these pleadings are sufficient for purposes of this motion. Whether some or all of the Class will be successful is not a basis for striking the claim.

D. *Re: Intrusion upon Seclusion*

[37] This claim is somewhat novel but it follows the reasoning in *Jones v Tsige*, 2012 ONCA 32, 346 DLR (4th) 34 [*Jones*], which recognized the common law tort of invasion of privacy and intrusion upon seclusion.

[38] The nature of the tort is set out at paragraphs 70-71 of *Jones*:

> [70] I would essentially adopt as the elements of the action for intrusion upon seclusion the *Restatement (Second) of Torts* (2010) formulation which, for the sake of convenience, I repeat here:
>
> > One who intentionally intrudes, physically or otherwise, upon the seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the invasion would be highly offensive to a reasonable person.
>
> [71] The key features of this cause of action are, first, that the defendant's conduct must be intentional, within which I would include reckless; second that the defendant must have invaded, without lawful justification, the plaintiff's private affairs or concerns; and third, that a reasonable person would regard the invasion as highly offensive causing distress, humiliation or anguish. However, proof of harm to a recognized economic interest is not an element of the cause of action. I return below to the question of damages, but state here that I believe it important to emphasize that given the intangible nature of the interest protected, damages for intrusion upon seclusion will ordinarily be measured by a modest conventional sum.

[39] The Defendant's objection is the same "bad faith" issue discussed earlier and the absence of sufficient pleading. I cannot accept either argument for reasons given that the Plaintiffs have

pleaded reckless intrusion, highly offensive to a reasonable person, and done without justification.

[40] The pleading is sufficient – its novelty is not a basis for striking. The area of privacy rights, either by statute, contract or tort, is developing rapidly. It is a new area and its development or limitation should not be decided at this stage of the litigation.

E. *Re: Publicity Given to Private Life*

[41] This tort is truly novel in Canada but it appears to be an extension of the tort of intrusion upon seclusion. It is described in the *Restatement (Second) of Torts* as:

> One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that
>
> a) would be highly offensive to a reasonable person and
>
> b) is not of legitimate concern to the public.

[42] There are some parallels to the concept in continental Europe. Like intrusion upon seclusion, it is a concept that should not be readily dismissed at an early stage of litigation. Inferences may have to be drawn or courts may decline to draw inferences (in the future) however that does not justify striking the claim on this matter.

[43] I note that in *Grant v Winnipeg Regional Health Authority*, 2015 MBCA 44, 252 ACWS (3d) 237, the Manitoba Court of Appeal acknowledged this tort in an appeal of an appeal from a

Master who had struck parts of a statement of claim because it disclosed no reasonable cause of action.

The situation with this tort is reminiscent of the motion in *Foss v Harbottle*, where negligence was attempted to be struck out.

F. *Re: Breach of* Charter *Rights*

[44] The Plaintiffs' claim in respect of sections 7 and 8 of the *Charter* is more troublesome. With respect to s 7, the Plaintiffs do not plead how the interest is engaged, infringed or not in accordance with principles of fundamental justice. This is a matter which may be resolved by an amendment to pleadings which, since the Defendant has not filed a Statement of Defence, is a simple matter.

[45] The pleading in respect to s 8 is at least opaque. It is hard to see how the matters in issue are in any way related to the powers of search and seizure.

[46] Were it not for the need to make some other amendments to the Statement of Claim, I would have struck this claim. However, since the Plaintiffs will be amending the action, the Plaintiffs will have an opportunity to correct this pleading or potentially withdraw it.

G. *Identifiable Class of Two or More*

[47] There is no dispute on this issue. The class is not overly broad although it could involve thousands of individuals, approximately 1,805 have already registered with Class Counsel.

[48] The identity of the class representative is a separate issue.

H. *Common Questions of Law and Fact*

[49] Based on *Western Shopping Centres Inc v Dutton*, 2001 SCC 46, [2001] 2 SCR 534, the question is whether allowing certification will avoid duplication of fact-finding or legal analysis.

[50] The Plaintiffs advance the following common questions:

Breach of Contract

1. Did the Class Members enter into a contract with Health Canada (the "Contract")?

2. If yes, did the Contract contain express or implied terms that Health Canada would:

    a. keep the Personal Information confidential?

    b. not to use or disclose the Personal Information except as permitted by the Contract or by applicable statutes, including the *Privacy Act*?

3. If yes, did Health Canada's conveyance of the Envelope breach any of the terms of the Contract listed in paragraph 2 above?

Breach of Warranty

1. Did Health Canada warrant to the Class Members that it would:

    a. keep the Personal Information confidential?

    b. not use or disclose the Personal Information except as permitted by the Contract or by applicable statues, including the *Privacy Act*?

2. If yes, did Health Canada breach its warranty to the Class Members when it conveyed the Envelope?

Negligence

1. Did Health Canada owe the Class Members a duty of care in its collection, use, retention and disclosure of the Personal Information?

2. If yes, did Health Canada breach that duty of care when it sent the Envelope?

Breach of Confidence

1. Did the Class Members communicate the Personal Information to Health Canada?

2. If yes, did Health Canada misuse the Personal Information in its collection, use, retention or disclosure of the Personal Information?

3. If yes, was such misuse of the Personal Information to the detriment of the Class Members?

4. If yes, did Health Canada breach the confidence of the Class Members in its collection, retention or disclosure of the Personal Information?

Intrusion upon Seclusion

1. Did Health Canada wilfully or recklessly invade the privacy of or intrude upon the seclusion of the Class Members in its collection, use, retention or disclosure of the Personal Information in a manner that would be highly offensive to a reasonable person?

2. Did Health Canada commit the tort of invasion of privacy?

3. If the answer to paragraphs 1 or 2 is yes, did Health Canada have a lawful justification for invading the Class Member's privacy?

Publicity to Public Life

1. Did Health Canada give publicity to the Personal Information?

2. If yes, is the Personal Information of any legitimate concern to the public?

3. If no, is the disclosure of the Personal Information by Health Canada highly offensive to a reasonable person?

4. If yes, is Health Canada liable for publicity given to private life?

Charter Right to Privacy

1. Did the Class Members have a reasonable expectation of privacy pursuant to sections 7 and 8?

2. Did Health Canada violate the Class Members right to life, liberty or security of their persons?

3. If yes to 1, did Health Canada's sending of the Envelopes breach the reasonable expectation of privacy?

4. If yes to either 2 or 3, is such a breach justifiable under section 1?

Damages

1. Is the Defendant liable to pay damages incurred by the Class Members for the causes of actions?

2. Can the Class Members' damages be assessed in the aggregate pursuant to Rule 334.28(1)?

3. Does Health Canada's conduct justify an award of punitive or aggravated damages?

4. Does Health Canada's conduct justify an award of damages under the *Charter*?

5. Are the Class members entitled to pre- and post-judgment interest pursuant to the *Crown Liability and Proceeding Act* RSC c C-50?

[51] In my view, the common issues will move the litigation forward. There will be individual issues but that will not detract from the advantage of resolving these common issues. As recognized by the Ontario Court of Appeal in *Cloud v Canada (Attorney General)*, [2004] 73 OR (3d) 401, [2005]1 CNLR 8, it is accepted that after the trial of common issues, many remaining

aspects of liability and the question of damages would have to be decided individually. Even so, the commonality requirement is met.

[52] The above addresses the Defendant's concern that there are an overwhelming amount of individual issues. As to its other concern that there is no support for a punitive damages award, the pleading read as a whole, including the discussion of "bad faith", is sufficient to address that matter.

I. *Preferable Procedure*

[53] The Defendant's position is that common questions do not predominate the litigation, that breach of privacy (in its broadest context) is individual – how the communication was delivered, where the individual lived (home, apartment, shared mailboxes), whether others had access and what the impacts may have been.

[54] While the Defendant has legitimate concerns, the prospect of several thousand individual claims being processed in this Court should cause the Defendant to rethink that administrative burden on itself. It does cause the Court to think about the comparative merits of a class action versus thousands of individual actions.

[55] The preferability analysis must be viewed keeping in mind the goal of class actions – access to justice, judicial economy and behaviour modification.

[56] Access to justice is enhanced by the resolution of common questions before turning to individual circumstances. In many cases, the amount of damages might be nominal or modest, sufficiently so that individuals might not take on government on their own despite whatever rights that they may have.

[57] The benefits to judicial economy are obvious and significant - a plethora of individual claims, many of which could be self-represented, across the country. The Defendant's concern as to the individual aspects to a class action is multiplied enormously if there were not some class resolution of common issues.

[58] Behaviour modification must be considered from the perspective of the federal government as a whole, not just one department, and on the process of communication as a whole not just one alleged slip-up.

It must also be considered from the perspective of the public - its awareness and enforcement of privacy interests.

[59] There are few practical alternatives. The Defendant's suggestion of an adequate remedy under the *Privacy Act* fails to recognize that the Privacy Commissioner cannot award damages – the function is principally recommendatory.

J. *Appropriateness of Representative Plaintiffs*

[60] The only issue is the anonymity of the Plaintiffs. The Defendant questions how an anonymous representative can carry out the obligations of a representative to other Class Plaintiffs.

[61] The situation here raises the tension between not wishing to have one's privacy interests further injured and the principle of an open court and the role of a class representative.

[62] The Defendant has suggested that there are one or more individuals who would be prepared to be publicly identified as a class representative. The Plaintiffs' counsel suggested that this arrangement might be feasible.

[63] If this is the only problem to arise in the course of this litigation, one would be thankful but naïve. However, it is the Court's intention that, if feasible, at least one public class representative should be identified.

K. *Litigation Plan*

[64] There is no dispute as to the Litigation Plan.

IV. Conclusion

[65] The Court concludes that this is a proper case for certification generally as proposed by the Plaintiffs, subject to the matters discussed, which require amendment.

[66] The motion is granted with costs. The formal order will issue upon completion of the matters pending.

ORDER

For the Reasons given, a formal order for certification will issue subject to:

a) the Plaintiffs are to amend the Statement of Claim in accordance with these Reasons within 60 days of the issuance of the Order including naming an identified class representative;

b) the Plaintiffs are to file with the Court, within the same period, a draft Certification Order; and

c) any issues arising shall be addressed to the Court promptly.

"Michael L. Phelan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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