Federal Court  Cour fédérale

Date: 20231005

Docket: T-529-23

Citation: 2023 FC 1331

Ottawa, Ontario, October 5, 2023

PRESENT: The Honourable Mr. Justice Southcott

PROPOSED CLASS PROCEEDING

BETWEEN:

PASCAL DUGAS, MARCO VACHON, and LUC BELLIVEAU

Plaintiffs

and

ATTORNEY GENERAL OF CANADA

Respondent

ORDER AND REASONS

I. Overview

[1] This Order and Reasons address a motion dated September 6, 2023, brought in writing by the Defendant, the Attorney General of Canada, seeking an order under Rule 8 of the *Federal Courts Rules*, SOR/98-106 [Rules], extending the deadline to serve and file the statement of

defence until after final disposition of the motion for certification of this proposed class proceeding.

[2] As explained in greater detail below, the Defendant's motion is granted, because requiring the Defendant to serve and file a statement of defence, prior to adjudication of the certification motion in this proposed class proceeding, would not achieve the just, most expeditious and least expensive determination of this proceeding.

II. **Background**

[3] The representative Plaintiffs are three members of the Royal Canadian Mounted Police [RCMP] who allege that their right to privacy has been violated by the RCMP, and others for which it is responsible, and consequently claim damages and other relief against the federal Crown [Canada].

[4] On March 16, 2023, the Plaintiffs filed their Statement of Claim in this proposed class proceeding. The Statement of Claim alleges that, between October 2017 and early 2020, Canada's agents recorded 557 days of audio conversations between the Plaintiffs and other members of the RCMP, without the consent of the Plaintiffs or other parties to the conversations, and without the benefit of a court order, and subsequently shared those recordings with other authorities.

[5] The Plaintiffs allege that these activities violated section 184(1) of the *Criminal Code*, RSC 1985, c C-46, the Plaintiffs' right to privacy, Canada's fiduciary duties, and section 8 of the

Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

[6] The Statement of Claim proposes certification of a class defined as follows [Proposed Class]:

> all members of the RCMP who allege that their right to privacy has been violated by the servants, contractors, officers and employees of Canada and the operators, managers, administrators, police officers, and other staff members at the various local RCMP police stations and offices operated by Canada and were alive as of March 18, 2023

[7] The allegations in the Statement of Claim relate to a class period defined as the period from April 17, 1982 to the present [Proposed Class Period].

[8] This proposed class proceeding is in its early stages. Associate Judge Steele and I have been assigned to case manage this matter, and the first case management conference [CMC] has been scheduled for November 14, 2023. In the course of scheduling that CMC, the parties' counsel conferred with a view to providing the Court with an update on the status of this matter. In providing that update by letter dated July 18, 2023, the Defendant's counsel advised that it intended to seek to defer the filing of a defence until after certification. Counsel explained that the Plaintiff did not consent to this relief and that the Defendant would therefore file a motion in writing under Rule 369, seeking such deferral.

[9] The Defendant filed its motion record on September 6, 2023, and the Plaintiffs filed their responding motion record on September 18, 2023. The Defendant did not file a reply motion record.

III. **Issue**

[10] The parties agree that the sole issue raised by this motion is whether the Court should grant the Defendant an extension of time to file a statement of defence until after the final disposition of the motion for certification of this proposed class proceeding.

IV. **Analysis**

[11] The parties' written submissions focus significantly on the applicable jurisprudence of this Court and the Supreme Court of British Columbia [BCSC], including the evolution of such jurisprudence in the BCSC.

[12] In support of its motion, the Defendant explained that it had identified four contested motions before the Federal Court, in which a defendant had sought to defer a statement of defence in the context of a proposed class action. In each of those cases, the Court granted the motion, finding that a statement of defence before certification would not lead to a more just, less costly, and more speedy resolution in the circumstances of those proceedings (see *Always Travel Inc v Air Canada*, 2003 FCT 212 at paras 6, 9 and 12; Order and Endorsement dated December 3, 2012, in Docket T-1784-12, *Horseman v Canada*; *Poundmaker Cree Nation v Canada*, 2017

FC 447 [*Poundmaker*] at para 40; *Kahnapace v Canada (Attorney General)*, 2021 FC 543 [*Kahnapace*]).

[13] In contrast, the Plaintiffs refer the Court to relatively recent jurisprudence of the BCSC, identifying that the practice of permitting the late filing of responses (similar to statements of defence in the Federal Court) in BCSC class actions has fallen out of favour in British Columbia, absent good reason for granting such permission (see *British Columbia v Apotex Inc*, 2020 BCSC 412 [*Apotex*] at paras 82-91). In *Shaver v Mallinckrodt Canada ULC*, 2021 BCSC 404 [*Shaver*] at paragraph 30, Justice Matthews concluded that, if there was in British Columbia a weight of authority, or a common practice of judicial sanction, to delay delivery of responses until after certification, the tide turned on that approach with the decision in *Pro-Sys Consultants Ltd v Microsoft Corporation*, 2015 BCSC 74 [*Pro-Sys*].

[14] The Defendant recognizes the BCSC jurisprudence, noting the finding in *Shaver* that there is a presumption that a response will be useful (at para 37). However, the Defendant argues that no such presumption exists in the jurisprudence of the Federal Court.

[15] Having reviewed these authorities and others cited therein, I have not identified any fundamental divergence in the principles that have been applied by the Federal Court and the BCSC.

[16] As Justice Strickland explained in *Poundmaker*, the Rules do not contemplate the filing of a statement of defence subsequent to the determination of a motion for certification of a

proposed class proceeding (at para 19). However, Rule 8 provides that the Court may extend a period provided by the Rules, and Rule 3 states that the Rules shall be interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits (see para 20). Ultimately, it is a matter of judicial discretion as to whether, in any given circumstance, the time for filing of a statement of defence should be extended until after the determination of the certification motion (see para 21).

[17] Similarly, the BCSC has the discretion to direct the timing of the filing of responses (see *Apotex* at para 82), and the legal principles impacting that discretion include the overarching object of the *Supreme Court Civil Rules*, BC Reg 168/2009, which is to secure the just, speedy and inexpensive determination of every proceeding on its merits (see R. 1-3).

[18] In identifying a jurisprudential framework for the application of these broad principles to the question whether to defer the filing of a defence until after certification, again the authorities of the Federal Court and the BCSC identified by the parties demonstrate significant commonality in the two jurisdictions.

[19] In *Kahnapace*, the most recent of the Federal Court authorities cited by the Defendant, Justice Fothergill set out (at para 15) and relied upon the framework that had been provided by Justice Strickland in *Poundmaker* (at para 30):

> 15. In *Poundmaker*, Justice Cecily Strickland provided the following helpful framework for determining motions to extend the time for filing a statement of defence until after a certification motion has been decided (at para 30, citations omitted):
>
> > i) whether a defendant must file a defence prior to certification is purely a matter of judicial discretion;

ii) whether that discretion should be exercised is fact specific in each case and should be approached in a flexible and liberal manner seeking a balance between efficiency and fairness;

iii) while deferred filing may reflect a general practice or convention, it is not automatic or to be granted as a matter of course […] and the burden of persuading the Court lies with the moving party;

iv) in that regard, the motion must be grounded on sound reasons which will generally include an evidentiary basis, however, the Court may also rely upon the content of [the] statement of claim in appropriate circumstances;

v) factors to be considered in considering such a motion can include:

> a. whether the statement of defence would serve any useful purpose at this stage in the proceeding. That is, is the statement of defence essential to a determination of the issues to be addressed at the certification motion or likely to be of assistance to the Court;
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> b. whether the relief sought will advance the most just, efficient and least costly resolution of the litigation;
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> c. whether the nature of the proceedings and the rights asserted are relevant contextual factors;
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> d. the complexity of the matter;
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> e. the amount of time and effort involved to prepare the statement of defence;
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> f. whether the statement of defence may have to be entirely reformulated in response to the outcome of the certification hearing; and
>
> g. whether there is any obvious prejudice to the plaintiff.

[20] In *Shaver*, Justice Matthews considered the *Poundmaker* factors and arrived at the following conclusions as to the relationship between those factors and the jurisprudence of the BCSC (at para 37):

> 37. These factors may be applied in accordance with the decision of Myers J. in *Pro-Sys*, and Griffin J. in *Shaver* to answer the questions of whether there is a "good reason" to not require responses to be filed before certification materials being delivered and whether that good reason outweighs the benefits of having a complete set of pleadings to inform the certification, the identification of certification issues, and the analysis of certification issues. In that regard, I would not apply factor (a) in the manner described by Strickland J. in *Poundmaker*. It is not a question of whether the response to civil claim is "essential" to a determination of the issues to be addressed at a certification motion. It is enough that it be useful to determine the issues to be addressed at the certification motion. The presumption is that it will be useful. The burden is on the defendant to establish that the circumstances are such that the responses ought not to be required when they are due: *Poundmaker* at para. 21.

[21] In that passage, Justice Matthews concludes that a court should assess whether a defence or response would be useful, rather than essential, to determine the issues to be addressed at the certification motion. However, factor (a) as set out in *Poundmaker* includes consideration whether the statement of defence would likely be of assistance to the court. As such, in my view, there is likely to be little divergence in the application of factor (a) as articulated in *Poundmaker* and *Shaver*. Moreover, in stating the presumption that a response or defence will be useful, Justice Matthews (at para 37) references the conclusion in *Poundmaker* (at para 21) that the burden is on the defendant to establish that the circumstances are such that the response ought not to be required when it is due under the applicable rules of court.

[22] The commonality in the two courts' jurisprudence is also evident in the *Shaver* characterization of the *Poundmaker* factors as applicable to an overall assessment whether there is a good reason not to require a response before certification materials are delivered and whether that good reason outweighs the benefits of having a complete set of pleadings to inform the certification, the identification of certification issues, and the analysis of certification issues. As I turn to the parties' particular submissions on the facts of the case at hand, I find that both the *Poundmaker* factors and the balancing exercise articulated in *Shaver* can be of assistance to the Court in the consideration of those submissions.

[23] The Plaintiffs argue that, without the benefit of a statement of defence, they are left to guess which defences the Defendant will raise. The Plaintiffs note that the Defendant's written representations on this motion raise the operation of section 9 of the *Crown Liability and Proceedings Act*, RSC 1985, c C-50 [CLPA]. The Defendant notes that the Statement of Claim alleges that class members have suffered an impairment of mental and emotional health amounting to a severe and permanent disability. In that context, the Defendant identifies that section 9 of the CLPA precludes proceedings against the Crown in respect of a claim for an injury in respect of which a pension has been paid or is payable. The Plaintiffs submit that, without knowing whether the Defendant will plead this provision as a defence, they will be required to spend time and resources in preparing certification materials to address issues that may or may not be relevant.

[24] I accept that this argument raises an example of the point made in the BCSC jurisprudence, that filing a defence before certification assists to clarify the issues in dispute

between the parties (see *Apotex* at para 90), including identifying common issues and their prevalence to assist in the assessment of certification criteria (see *Shaver* at paras 31-32). Applying the *Poundmaker* factors, I conclude that a statement of defence would serve a useful purpose prior to certification and that, in the absence thereof, uncertainty as to the issues in dispute could operate to the prejudice of the Plaintiffs.

[25] Turning to the Defendant's submissions, I find its most compelling argument to arise from the fact that, although the three representative Plaintiffs allege recording of their communications between 2017 and 2020, the Statement of Claim asserts a Proposed Class based on allegations across the entire RCMP and a Proposed Class Period commencing in April 1982. The Defendant argues that, as the Statement of Claim provides no factual or legal basis for a claim in relation to a class period prior to 2017, it is unlikely that the Proposed Class Period will be certified.

[26] The Defendant submits that, as the Statement of Claim is currently formulated, it raises factual questions about the extent to which communications were recorded across the entire RCMP for a nearly 40-year time span, the extent of RCMP members' knowledge of such recordings, and consideration of the employment and public interest purposes for recording such communications. As such, preparation of the defence would require extensive gathering of information and fact-finding. The Defendant argues that, before knowing whether the Plaintiffs will be successful in certifying a class proceeding on the terms currently proposed, it should not be required to expend the significant resources to conduct the investigations necessary to prepare a defence to allegations of this geographic and temporal breadth.

[27] Applying the *Poundmaker* factors, I find that, as a result of the breadth of the allegations pleaded, the Defendant has raised legitimate concerns surrounding the complexity of the matter, whether the statement of defence may have to be reformulated depending on the outcome of the certification hearing, and in particular the amount of time and effort involved to prepare the statement of defence. In relation to the last of these factors, I emphasize that the principal concern is not the time and effort involved in drafting the pleading itself but rather the investigative effort required to identify the facts to inform that pleading. I recognize that the Defendant has not presented evidence to dimension the extent of the effort that would be required or its cost. However, it is apparent from the content of the Statement of Claim as currently drafted that the dimensions of the Proposed Class and Proposed Class Period are significantly larger than those of the representative Plaintiffs' allegations as to privacy breaches to which they were subjected. In my view, these circumstances are sufficient to support the Defendant's argument.

[28] The *Poundmaker* factor that most directly reflects the Rule 3 considerations is whether requiring a defence prior to certification will advance the just and least costly resolution of the litigation. In the absence of a defence, it is possible that the Plaintiffs will spend time and resources in preparing certification materials to address issues (such as the application of section 9 of the CLPA) that turn out not to be relevant. *Pro-Sys* concluded that, even in the absence of a statement of defence having been filed, the plaintiff ought to have raised during the certification process issues that may have been responsive to an applicable limitation (at para 27). More broadly, in my view the absence of a defence does not eliminate the need for a plaintiff to contemplate defence issues in its certification materials, particularly if those issues have been

identified in other pre-certification materials. Nevertheless, it is possible that proceeding to certification before such issues are crystallized in a statement of defence could result in effort having been wasted.

[29] However, in my view, the risk of such wasted effort by the Plaintiffs is outweighed by the risk of wasted effort by the Defendant, in conducting investigations across the entire RCMP for a nearly 40-year period to file a defence to allegations in a class proceeding that has not yet been certified, particularly where the breadth of such allegations so significantly exceeds the factual assertions of the representative Plaintiffs. Taking into account the *Poundmaker* factors and Rule 3, in the circumstances of the present matter, requiring a defence prior to certification would not achieve the just, most expeditious and least expensive determination of this proceeding.

[30] Viewed alternatively through the language of *Shaver*, the concern raised by the Defendant represents a good reason not to require a response before certification materials are delivered. While there are benefits to having a complete set of pleadings to inform the certification, the identification of certification issues, and the analysis of certification issues, the good reason raised by the Defendant outweighs those benefits.

[31] I will exercise my discretion to grant the Defendant's motion and extend the deadline to serve and file the statement of defence until 30 days after final disposition of the motion for certification of this proposed class proceeding. However, consistent with Justice Strickland's approach in *Poundmaker* (at para 42), this extension can be revisited in the event that, as the matter proceeds, it becomes apparent that a different result is warranted.

[32] Consistent with Rule 334.39(1), neither party claimed costs of this motion, and no costs are awarded.

ORDER IN T-529-23

THIS COURT ORDERS that

1. The Defendant's motion is granted, and the time for service and filing of the Defendant's statement of defence in this proposed class proceeding is, unless otherwise ordered by this Court, extended to 30 days after the final disposition of the certification motion, should that motion be successful.

2. There is no order as to costs.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-529-23
STYLE OF CAUSE:	PASCAL DUGAS, MARCO VACHON, AND LUC BELLIVEAU v ATTORNEY GENERAL OF CANADA

MOTION IN WRITING CONSIDERED PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*

ORDER AND REASONS:	SOUTHCOTT J.
DATED:	OCTOBER 5, 2023

WRITTEN REPRESENTATIONS BY:

Rodney J. Gillis, K.C.	FOR THE PLAINTIFFS
Angela Green Victor Ryan	FOR THE DEFENDANT

SOLICITORS OF RECORD:

Gilbert McGloan Gillis Saint John, New Brunswick	FOR THE PLAINTIFFS
Attorney General of Canada Halifax, Nova Scotia	FOR THE DEFENDANT