Federal Court  Cour fédérale

Date: 20131227

Docket: T-132-13

Citation: 2013 FC 1289

Ottawa, Ontario, December 27, 2013

PRESENT: The Honourable Madam Justice Gagné

BETWEEN:

GAELEN PATRICK CONDON
REBECCA WALKER AND
ANGELA PIGGOTT

Plaintiffs

and

ATTORNEY GENERAL OF CANADA

Defendant

REASONS FOR ORDER AND ORDER
(Order rendered orally on December 17, 2013)

[1] On December 13, 2013, Ms. Nicole Brittin [the Proposed Intervener], through her counsel, the Merchant Law Group LLP [Merchant], filed a Notice of motion to intervene in the present Motion for certification of a class action. In the proposed class action, first filed before the Court on January 18, 2013, the plaintiffs, represented by a consortium of counsel, are seeking compensation for damages allegedly sustained as a result of the loss of an external hard drive, by the defendant

representing the Government of Canada, and more particularly the Minister of Human Resources and Skills Development Canada, which contained the personal information of 583,000 Canadian Student Loan Program participants [the Class]. These participants are residents of every Canadian province save for Quebec.

[2] In her motion, dated December 9, 2013, the Proposed Intervener is asking the Court to acknowledge that, as the proposed representative of the Class in a similar action instituted before the Court of Queen's Bench for Saskatchewan, *Nicole Brittin v The Minister of Human Resources and Skill Development Canada and The Attorney General of Canada*, Saskatchewan Q.B. No. 107 of 2013 [the Brittin Action], she has standing as of right to be heard in the present proceedings on the issues of the scope of certification and the differences between the two class actions.

[3] Ms. Brittin notes that she is presently being served with all filed court materials in a second proposed class action currently before the Court of Queen's Bench for Saskatchewan, brought by the plaintiffs' counsel (*Melinda Horstman v Her Majesty The Queen in Right of Canad*a, Saskatchewan, Q.B. No. 1283 of 2013) [the Horstman action].

[4] In the alternative, should the Court find that she does not have standing as of right before it, she is asking for an order:

- Granting her leave to intervene pursuant to Rule 109 of the *Federal Courts Rules* [the Rules] in order to present submissions on points of law and facts "especially with respect to the aforementioned Saskatchewan class action

pursued by [her] […] and the conduct of Plaintiff's counsel in provincial court";

- That she be deemed a party but not be subject to any order for costs pursuant to *Campbell v Canada (Attorney General*), 2012 FCA 45;
- That she be served with all materials already filed and those to be filed by the parties before the Court;
- That, should this Court grant certification, Saskatchewan residents be excluded from the Class so that the Brittin Action may proceed to certification.

[5] As indicated above, the present proceedings were first brought before the Court on January 18, 2013. As the judge overseeing its special case management, I scheduled, during a conference call held on April 15, 2013, the certification proceeding to be heard in Toronto on December 17 and 18, 2013.

[6] The Proposed Intervener was informed of this hearing date during the first week of June 2013, yet she has failed to provide a proper explanation as to why she has waited until the week before the hearing to file her Notice of motion to intervene.

[7] In her affidavit, sworn on December 9, 2013, the Proposed Intervener brings three issues to the Court's attention in order to justify her intervention before it:

- First, she questions the appropriateness of the plaintiffs' counsel's conduct in the two proposed Saskatchewan class actions. She alleges that they presented a motion

to stay the Brittin Action without advising the presiding judge that, on July 9, 2013, three days prior to the hearing of that motion, they had instituted their competing Horstman action. As a result, she declares herself "suspicious of their intentions" before this Court;

- Secondly, she goes on at great length as to how Merchant has extensive experience with regard to managing class actions. Moreover, and unlike the plaintiffs' counsel, Merchant has offices in Saskatchewan. Without properly substantiating her remarks, she is of the belief that Merchant will provide more effective representation of the Class than plaintiffs' counsel will. She also fears that the defendant's counsel is working in tandem with the plaintiffs in order to stay the Brittin Action, as this has transpired in the eight other proposed class actions before the provincial Superior Courts, which have been stayed pending the result of the certification before the Court;
- Thirdly, she was informed by her counsel that the Court of Queen's Bench for Saskatchewan is a preferred forum for this action as the laws of Saskatchewan – the provincial statutes and common law, as well as equity– provide for remedies otherwise unavailable in the Federal Court.

[8] Pursuant to the Rules, the Proposed Intervener does not have a standing as of right to be heard in the present proceedings. The issues on which she seeks to be heard (the carriage of justice and the proposed certification in Saskatchewan) are not relevant to the pending certification hearing, as expressed in the criteria set forth in Rule 334.16 of the Rules.

[9] Meanwhile, in her Notice of motion to intervene and in her affidavit, the Proposed Intervener does not indicate how her participation in this file would assist the Court in the determination of factual or legal issues relating to certification (Rule 109 of the Rules). Rather, she seeks to convince the Court that her counsel would better represent her interests and those of the Class members from Saskatchewan, and that the Court of Queen's Bench for Saskatchewan is a preferred forum for this national class action, as the Brittin Action also proposes certification on behalf of a national class.

[10] This Court has clear jurisdiction to hear a class action brought by a national class against the federal government. With all due respect for the contrary opinion, it is also the preferred forum to hear this matter. The present Motion for certification brought by the plaintiffs was instituted before January 21, 2013 when the statement of claim for the Brittin Action was brought before the Court of Queen's Bench for Saskatchewan. It has been specially case managed since then, with a clear schedule set out and followed by the parties. Both parties have provided the Court with comprehensive and well argued submissions with regard to certification. Considering these developments, if this Court was to exclude the class members from Saskatchewan, and perhaps in the future exclude class members of other provinces based on similar reasons, then it would inexplicably lose its jurisdiction over the matter.

[11] In this light, even the Proposed Intervener should recognize that it is completely understandable that the defendant prefers to defend one class action before this Court rather than eight similar class actions before different forums, with the risk of inconsistent rulings such a situation could bring.

[12] Moreover, when asked what rights and/or remedies were available under the laws of Saskatchewan, which are otherwise unavailable in other Canadian jurisdictions (including that of the Court), counsel acting on behalf of the Proposed Intervener for the purpose of her motion could not provide the Court with an answer, as he is not a member of the Saskatchewan Bar. Counsel for the plaintiffs suggested that, as this argument was also submitted before the Court of Queen' Bench for Saskatchewan, the Proposed Intervener is likely referring to Saskatchewan's *Privacy Act*, RSS 1978, c P-4, which provides punitive damages for an intentional violation of a privacy right. However, unlike what they had pled in their Consolidated Statement of Claim, the plaintiffs no longer submit before the Court that the defendant intentionally violated their privacy as such a finding would not be supported by the facts here.

[13] Furthermore, the judges of this Court routinely apply provincial common law and civil law, as well as provide equitable remedies when required. In fact, I note that plaintiffs in this case are relying on certain provisions of the Civil Code of Québec - even though none of the class members are Québec residents - simply because the external hard drive was lost in Gatineau, Québec. The question as to whether or not these provisions apply to the proposed class action will require an analysis based on Quebec's private international law.

[14] In a certification hearing, the Court is concerned with the identity of the proposed class representative, his or her ability to represent the best interests of the class members, and the absence of conflicts of interest. The Court is not concerned with any kind of "beauty contests" between competing counsels seeking to certify their respective class actions. It is not the role of the Court to

assess which counsel is most experienced and competent to represent the plaintiff(s) in a class action. While the Proposed Intervener suggests that the plaintiffs do not adequately represent her interests, she nonetheless has alleged the same negligent conduct on the part of the defendant and, aside from the issue of punitive damages as noted above, seeks similar compensation for damages allegedly suffered as a consequence. As a result, I fail to see how the plaintiffs cannot fairly and adequately represent her interests or those of other Saskatchewan Class members, as is required by Rule 334.16(1)(e)(i).

[15] Furthermore, if counsel for the plaintiffs acted inappropriately before the Court of Queen's Bench for Saskatchewan, then it behoves that Court to remedy counsel's conduct. I note, however, that their conduct has been appropriate before this Court.

[16] Sadly, the Proposed Intervener's motion has consumed valuable time at the hearing and has shifted the debate away from the three objectives of a class action proceeding, which are favouring i) access to justice, ii) judicial economy and iii) behaviour modification (on the defendant's part).

[17] For these reasons, the Motion to intervene will be dismissed, with costs in favour of both the plaintiffs and the defendant.

ORDER

THIS COURT ORDERS that:

1. The Motion to intervene is dismissed;
2. Costs are awarded in favour of the plaintiffs and the defendant in the amount of $750 respectively, inclusive of fees and disbursement.

"Jocelyne Gagné"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-132-13
STYLE OF CAUSE:	GAELEN PATRICK CONDON, REBECCA WALKER AND, ANGELA PIGGOTT v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	TORONTO
DATE OF HEARING:	DECEMBER 17 & 18, 2013
REASONS FOR ORDER AND ORDER:	GAGNÉ J.
DATED:	DECEMBER 27, 2013

APPEARANCES:

Ward K. Branch Ted Chamey Samantha Schreiber	FOR THE APPLICANT
Paul Vickery Catharine Moore	FOR THE DEFENDANT
Eli Karp	FOR THE PROPOSED INTERVENER

SOLICITORS OF RECORD:

Ward K. Branch Vancouver BC Ted Chamey Toronto, Ontario Samantha Schreiber Toronto, Ontario	FOR THE APPLICANT

Paul Vickery Ottawa, Ontario Catharine Moore Ottawa, Ontario	FOR THE DEFENDANT
Eli Karp Toronto, Ontario	FOR THE PROPOSED INTERVENER