Federal Court Cour fédérale

Date: 20150224

Docket: T-1931-13

Citation: 2015 FC 236

Ottawa, Ontario, February 24, 2015

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

JOHN DOE AND SUZIE JONES

Plaintiffs

and

HER MAJESTY THE QUEEN

Defendant

ORDER AND REASONS

I. Nature of the Matter

[1] The Attorney General of Canada moves for an order striking paragraphs 20-23 of the affidavit of David Robins sworn October 8, 2014. The grounds of the objection are that the paragraphs contain hearsay information pertaining to contentious issues that are central to the plaintiffs' case. For the reasons that follow the motion is dismissed.

II. Facts

[2] The affidavit was filed on behalf of the plaintiffs in support of a motion for certification of a proposed class proceeding. Briefly, the proceeding relates to correspondence said to have been mailed by Health Canada in November, 2013, to the class in an envelope that displayed a return address identifying Health Canada's Marihuana Medical Access Program. The claim alleges that the inclusion and display of this return address constituted a breach of contract, negligence, breach of confidence and privacy as well as infringement of the class's *Charter* rights. Approximately 40,000 individuals are said to have received this correspondence.

[3] On February 25, 2014, Prothonotary Milczynski granted the plaintiffs' motion for an order protecting the identities of the representative plaintiffs and permitting them to use the pseudonyms "John Doe" and "Suzie Jones". The defendant's appeal of this order was dismissed.

[4] On October 24, 2014, the plaintiffs filed their certification motion record. Mr. Robins, of counsel representing the plaintiffs, swore the affidavit to address the criteria that must be satisfied for certification of the proposed class proceeding. Paragraph 20-23 of that affidavit contain Mr. Robins' summary of information provided by a self-selected and unidentified group of potential class members in response to a questionnaire on counsel's website. The paragraphs in dispute read:

> 20. As stated above, Class Counsel created a Database from the secure online system maintained by my firm, Sutts, Strosberg LLP, in which 1,805 individuals have registered as of October 7, 2014.
>
> 21. In response to a questionnaire, registrants on the Database have provided the following information:

(a) 1, 579 registrants (or approximately 87.5% of the registrants) reported that someone discovered that they were a participant in the Program as a result of seeing the Envelope;

(b) 1,383 registrants (or approximately 76.6% of the registrants) reported that someone discovered that they possess or consume marihuana as a result of seeing the Envelope;

(c) 1,020 registrants (or approximately 56.5% of the registrants) reported that someone discovered that they suffer from a medical condition as a result of seeing the Envelope;

(d) 1,009 registrants (or approximately 55.9% of the registrants) reported that there has been an impact on their reputation as a result of delivery of the Envelope to the Class Member;

(e) 241 registrants (or approximately 13.4% of the registrants) reported that they experienced a home invasion or security breach which they attributed to receipt of the Envelope;

(f) 1,085 registrants (or approximately 60.1% of the registrants) reported that they took steps to improve security at their residence or elsewhere as a result of receipt of the Envelope;

(g) 795 registrants (or approximately 44.0% of the registrants) reported that they incurred a loss or expense to improve security at his or her residence or elsewhere as a result of receipt of the Envelope;

(h) 391 registrants (or approximately 21.7% of the registrants) reported that they moved or attempted to move as a result of receipt of the Envelope;

(i) 247 registrants (or approximately 13.7% of the registrants) reported that their employment or ability to be employed has been impacted by the receipt of the Envelope;

(j) 366 registrants (or approximately 20.3% of the registrants) reported that they sought treatment for mental distress as a result of receiving the Envelope; and

(k) 159 registrants (or approximately 8.8% of the registrants) reported that they incurred out of pocket expenses for treatment of mental distress as a result of receiving the Envelope).

22. Some registrants on the Database described the manner in which the Envelope was delivered as follows:

(a) to a residential mailbox shared with others living in the same residence;

(b) to a common mailbox shared with others who reside in the same building;

(c) to a community mailbox shared with others who see the mail;

(d) left in the open near tenant mailboxes in a building where the Envelope was too large to fit in the mailbox;

(e) to a neighbour's mailbox by error;

(f) to a post office or general delivery box in a small community where Canada Post employees see and handle the mail; and

(g) to a post office box located in a local coffee shop or pharmacy where the clerks see and handle the mail.

23. Some registrants on the Database provided the following anecdotal accounts:

(a) *"I feel like my reputation has been ruined in my home town. My boss and co workers now know about me having my medical marihuana. Word seems to travel fast in the town with my family knowing and the mail man knowing. I guess it was only a matter of time before everyone knew. My family now does not talk to me and I find everyone looking at me differently. My boss does not let me go for cigarette breaks anymore, and I feel like I am constantly being watched by my boss and co-workers. Police have been asking people they know if anyone knows what the guy in the blue truck does...It is simple, I work full time as a [], I support myself through working full time! These police*

officers who now know because of this envelope have harassed me while at work and continue to harass me by asking people questions about my medical needs, which no one ever had the right to know of."

(b) *"It has caused a great deal of stress and fear to myself and my family. We are afraid of being robbed or home invaded and are afraid of being evicted from our rental home. My son is considering moving out due to the stress, my daughter is angry with me for putting her at risk and the whole incident has taken a toll on my health. My daughter is being teased by other teens calling her mother a pothead and this further adds to my fear of robbery. I was forced to make the difficult decision to dismantle my garden due to the potential risk posed by this letter, leaving me short of medicine with no time left to produce more. This has further added to my stress levels, caused sleeplessness, anxiety and an increase in pain levels which has exacerbated my medical condition. My kids are embarrassed that the neighbours are aware that I have a medical license and we are living in fear of robbery or violence."*

(c) *"The neighbourhood mailman, friends and family saw letter. I was in the hospital at the time undergoing [surgery]. Family/Friends visited me in hospital and told/asked me...Am asked or questioned about this wherever I go, visit, frequent. This has made me wary of leaving the house for any amount of time, meet new people or have friends to the house. I'm physically disabled and have to use aides to walk, it's already challenging going out in the public settings. This has made it that much more of a mental struggle. The first thing usually introduced about me meeting people is I can use cannabis medicinally. I have two university degrees, world traveller, former high level athlete. None of this matters as I am now seen as a stoner, pot head."*

(d) *"Yes I have had an impact on my reputation as a result of the delivery of the envelope. My friend has communicated to others that I am a participant in the Medical Marihuana program and that I use*

Medical Marihuana for illnesses they were previously unaware of. They make derogatory comments and joke at my expense. My Mother in laws attitude has changed since she became aware of my participation in the program and consumption of Marihuana."

(e) *"My address is to a Rural Route and community mail box system where the use of locks are not in place. My neighbours all found out and I had never told a soul. I also live close to where I work which is a golf course and like I said everyone seemed to know. All it takes around here is for someone to hear about what someone else is doing and everyone will hear about it. My neighbour brought the envelope to me and asked what this was for?...He also told me that other people had seen and know. What bothers me is the fact that I work close to where I live and everyone at the golf course found out about it also."*

(f) *"Yes my employment has been impacted. I am self-employed, I do [omitted] work and [omitted]. I have been told by a previous customer that he will no longer use my services due to the fact that he is now aware of my Medical marihuana use. He stated that he felt that I could not provide him with reliable service because I used Medical Marihuana. He became aware of my participation in the Medical Marihuana Program and my consumption of Marihuana via the house guest who saw the envelope while staying with us. It also remains to be seen if other locals become aware and subsequently do not use my services."*

(g) *"Postal service people in a small community talk and have clearly known negative views on marijuana use, and I was very shamed by public knowledge of my personal medical usage, and suffered an attempted break-in with window frame damage, within a few days of receiving the mail out...because of the nature of the medical classification people now know that I have chronic medical conditions and marihuana use makes me undesirable to work with the public as a nurse despite personal controls in place."*

[5] The question at the certification stage is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action: *Hollick v Toronto (City)*, 2001 SCC 68 at para 16. Certification does not address substantive rights or make final determinations as to the truth of the allegations; *Fanshawe College of Applied Arts and Technology v LG Philips LCD Co., Ltd.*, 2009 CanLII 65376 (ON SC). Those remain with the trial judge. As the Supreme Court of Canada said in *Hollick*, para 16:

> It is particularly important to keep this principle in mind at the certification stage. In its 1982 report, the Ontario Law Reform Commission proposed that new class action legislation include a "preliminary merits test" as part of the certification requirements. The proposed test would have required the putative class representative to show that "there is a reasonable possibility that material questions of fact and law common to the class will be resolved at trial in favour of the class": *Report on Class Actions, supra*, vol. III, at p. 862. Notwithstanding the recommendation of the Ontario Law Reform Commission, Ontario decided not to adopt a preliminary merits test. Instead it adopted a test that merely requires that the statement of claim "disclos[e] a cause of action": see *Class Proceedings Act, 1992*, s. 5(1)(a). Thus the certification stage is decidedly not meant to be a test of the merits of the action: see *Class Proceedings Act, 1992*, s. 5(5) ("An order certifying a class proceeding is not a determination of the merits of the proceeding"); see also *Caputo v. Imperial Tobacco Ltd.* (1997), 1997 CanLII 12162 (ON SC), 34 O.R. (3d) 314 (Gen. Div.), at p. 320 ("any inquiry into the merits of the action will not be relevant on a motion for certification"). **Rather the certification stage focuses on the form of the action. The question at the certification stage is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action**: see generally *Report of the Attorney General's Advisory Committee on Class Action Reform*, at pp. 30-33. [Emphasis added]

[6] The proposed representative plaintiffs bear the burden of establishing that the action should be certified as a class proceedings based on the criteria set out in Rule 334.16(1) of the *Federal Courts Rules*. The plaintiffs must show that there is "some basis in fact" for each

criterion: *Hollick* at para 16. Rule 334.16(1) of the *Federal Court Rules* establishes the preconditions for certification. The plaintiffs assert that the purpose of the impugned paragraphs is to demonstrate that class members exist who wish to advance claims and who allege injury, and to respond to the certification requirement of the Rule 334.16(1)(b).

[7] The plaintiffs argue that the evidence provided in paragraphs 20-23 of the affidavit is not hearsay. Mr. Robins has first-hand knowledge of the content of the database maintained by his law firm. Further, he does not attest to the truth of what was reported by the individuals who claim to have been impacted by the privacy breach. Evidence that is not tendered for the truth of its contents is not hearsay: *R v Khelawon*, 2006 SCC 57.

[8] The evidence provided at paragraphs 20-23 is tendered at this preliminary stage to satisfy the requirements for certification to establish that a class of individuals exists who claim to have suffered common damages caused by the privacy breach. Since the motion for certification is procedural and does not address the merits of the plaintiffs' claim, questions regarding whether the privacy breach did in fact or law cause the plaintiffs and putative class members to suffer damages and whether they in fact suffered damages are not relevant at this stage. The evidence is not being tendered to establish that putative class members *have* suffered damages, but that the individuals claiming to be class members *allege* that they suffered damages.

[9] Certification orders do not settle substantive rights, but are procedural in nature, courts have regularly accepted affidavits sworn on information and belief on certification motions: *Fanshawe*.

[10] Specifically, if the paragraphs are found to be hearsay, the Court should follow the "principled approach" and admit the summary of information. Given the sensitivity of putative class members to the disclosure of their identity as participants in the Marihuana Medical Access Program, which is the subject of this action, it would be both impractical and unjust to require the filing of separate affidavits in support of certification.

[11] In my view, the evidence is not tendered for the truth of its contents and is not, at this stage of the proceedings, hearsay. As noted in *Hollick*, the plaintiffs must simply demonstrate that "there is some basis in fact" for each element of the certification requirement, and it is against that criteria that the admissibility must be gauged.

[12] Justice MacDonald of the Nova Scotia Court of Appeal considered the distinction between statements tendered for the truth of their contents, and those not tendered for the truth of their contents in *R v Valtzer* (1974), 27 CCC (2d) 118, 143 (NSCA):

> Essentially it is not the form of the statement that gives it its hearsay or non-hearsay characteristics **but the use to which it is put**. Whenever a witness testifies that someone said something, immediately one should then ask, "what is the relevance of the fact that someone said something". If, therefore, the relevance of the statement lies in the fact that it was made, it is the making of the statement that is the evidence – **the truth or falsity of the statement is of no consequence**: if the relevance of the statement lies in the fact that it contains an assertion which is, itself, a relevant fact, then it is the truth or falsity of the statement that is in issue. The former is not hearsay, the latter is. [Emphasis added]

[13] Evidence that is not tendered for the truth of its contents is not hearsay; *Khelawon*. The purpose of tendering the evidence in this case is to establish the fact the statements were made, not the truth of the statements: *Subramaniam v Public Prosecutor*, [1956] 1 WLR 965, 970 (PC).

The plaintiffs, in my view, are not attempting to establish that injury or embarrassment occurred, but rather that a group of claim members exists who claim to have suffered the damages and will testify to that effect. Whether these allegations are established at trial rests with the trial judge who will hear the evidence of the witnesses in direct and cross-examination.

[14] Counsel for the Attorney General notes that the deponent has no knowledge of the veracity of the underlying complaints of those who responded to counsel's questionnaire. In *Pollack v Advanced Medical Optics, Inc.*, 2011 ONSC 850, the court described information from a database showing that complaints were made that the defendants' product resulted in eye infections as "clearly hearsay" if used for the purpose of showing that users of the product reported that it caused eye infections generally. This case does not assist the defendant, as Strathy J made very clear that the decision to exclude hearsay evidence on a certification was discretionary.

[15] The Attorney General relies on *Fresco v Canadian Imperial Bank of Commerce*, [2009] OJ No 2531. In *Fresco*, the Ontario Superior Court held that an affidavit of counsel which gave evidence on the basis of a sample of unidentified potential class members registered on counsel's website to be hearsay. However, the evidence tendered in *Fresco* was to be used for the truth of its contents. The decision at para 8 states:

> The plaintiff also tendered an affidavit from Charlene Wiseman, one of Ms. Fresco's lawyers in this case, which purports to be evidence of CIBC's overtime practices based on a self-selected survey sample of potential class members registered on plaintiff's counsel's website. Prior to the motion, Ms Fresco's counsel provided CIBC's counsel with an unsworn copy of the affidavit so that CIBC could advise whether it consented to the admission of that evidence or whether a motion would be required. CIBC

> objected to the affidavit as inadmissible hearsay. The affidavit was nonetheless filed as evidence on this motion without bringing a motion or seeking the court's direction. **Ms Fresco's response is that this is the best available survey evidence of CIBC's unpaid overtime practices**, given that CIBC rejected both the plaintiff's request to provide her with information on the class members to allow the plaintiff to conduct its own random sample and the plaintiff's proposal to conduct a joint random survey of the putative class. This is not a compelling answer. The evidence constitutes hearsay and does not meet either the test of necessity or of reliability: *R. v Smith*, [1992] 2 S.C.R. 915 at 933-934; *R. v Khan*, [1990] 2 S.C.R. 531 at 541. [Emphasis added]

[16] The focus of the inquiry is on the purpose for which the evidence is tendered. That purpose is informed by the language of the affidavit itself, but also the context. In this case, the context is that of a motion for certification under Rule 334 addressing the procedural pre-conditions for certification. The evidence is directed only to the appropriateness of a class proceeding; put more simply, the evidence is not tendered to prove that these individuals suffered the loss or damage claimed, rather that there is a sufficient number of people who claim to have suffered damages from the same conduct. The evidence is therefore, admissible.

[17] I turn next to a second ground for dismissing this motion.

[18] Regardless of the characterization of the evidence as hearsay or not, there is considerable support in the jurisprudence for the use of affidavits sworn on information and belief in the context of certification motions; see *Lambert v Guidant Corporation*, 2009 CanLII 23379 (ON SC) at para 100, the court accepted an affidavit from counsel as to the communications with prospective class members and *Fanshaw*, at para 28-34 the court admitted hearsay evidence on a motion for certification under the principled exception to the hearsay rule. Counsel for the

defendant, properly, concedes this point. Although survey and database records have been admitted as evidence in certification motions, it is subject to the *caveat* that information is not admissible where it relates to a contentious issue and is not consistent with the evidence of other witnesses.

[19] The defendant argues that there is prejudice as the affidavit addresses a central and pivotal aspect to the case – causation and damages. In my view, this objection conflates, again, the substantive and procedural aspects of a class proceeding. Procedurally, certification requires some evidence on the causation and damages, but adducing the evidence in this form causes no prejudice to the defendant. The defendant has the rights of discovery and examination and cross-examination and trial.

[20] On the matter of prejudice, the Attorney General notes that the allegations in the affidavit do not appear in the affidavits of the representative plaintiffs or in the other evidence filed for the certification motion and that the evidence obtained from Mr. Robins' website is not consistent with that of other witnesses. This, to my mind, is not prejudice, but an alleged discrepancy that can be the tested in the ordinary course.

[21] To conclude, there is a third basis upon which the motion is dismissed. In *Sander Holdings Ltd. v Canada (Attorney General)*, 2005 FC 1402, Justice Konrad von Finckenstein considered a motion to strike an affidavit filed on information and belief in support of certification. Justice von Finkenstein dealt with the point summarily, noting that under Rule 81,

affidavits on information and belief are, in the absence of prejudice, admissible on interlocutory motions. The Court wrote:

> [6] The Court does not accept the first point. An application for class certification is ultimately merely a procedural question. As it is an interlocutory matter, affidavits based upon information and belief are permitted.
>
> [7] In *Hoffman v. Monsanto Canada Inc.*, 2003 SKQB 174 (CanLII), a class certification case under Saskatchewan rules, Madam Justice Smith, as she then was, persuasively explained why such affidavits are allowed. She held:
>
> > 54 I have no hesitation in concluding that a certification application is an "interlocutory motion" within the meaning of Rule 319, and that the Court therefore may, in appropriate circumstances, as set out in the rule, receive affidavit evidence sworn on information and belief.
> >
> > 55 Further, it is my view that, in particular, where the Act, the Rules, or the case law make it clear that the evidentiary onus to be satisfied by the affidavit in question is less than that of proof of its contents, this in itself may be sufficient to constitute a "special circumstance" sufficient to justify receiving an affidavit sworn on information and belief.
> >
> > 56 Thus, for example, insofar as courts have suggested that the proposed representative plaintiff has an onus to provide an "evidentiary basis" relevant to aspects of the merits of his or her claim, it is clear that the evidential standard the Court has in mind is not that of "proof", but only of some evidence to support the claim, for example, that the plaintiff has suffered loss and that a class exists of other persons who have suffered the same or a similar loss, sufficient to satisfy the Court of the existence of the requisite common issues.
> >
> > Accordingly, the affidavit is not inadmissible under Rule 81.

[22] As in *Sander*, the affidavit is filed in an interlocutory proceeding, thus engaging Rule 81. I appreciate that in some cases the application of Rule 81 could cause prejudice in respect of certain elements of the certification exercise, in which case the Court would exercise a remedial discretion. Here, however, I see no prejudice having regard to the purpose for which it is tendered.

ORDER

THIS COURT ORDERS that the motion is dismissed.

"Donald J. Rennie"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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