

Class action lawsuit certified over loss of 583,000 student loan files

Federal government could be liable for \$1B in damages

By Don Butler, OTTAWA CITIZEN, March 28, 2014



Chantal Bernier Assistant Privacy Commissioner of Canada speaks at a Regina & District Chamber of Commerce luncheon at the Ramada Plaza in Regina on January 23, 2013.

Photograph by: Don Healy, Regina Leader-Post

OTTAWA — A Federal Court judge has given a green light to a class-action lawsuit against the federal government for losing a hard drive from an office in Gatineau in 2012 containing personal information about 583,000 Canadians who applied for student loans between 2000 and 2007.

Based on the sheer numbers involved, the government could conceivably face a damage award of \$1 billion or more if the lawsuit is successful.

The class action suit is by far the largest involving a digital privacy breach in Canada. “It’s 583,000 people. It’s big,” said Ted Charney, one of the lawyers representing the class plaintiffs. “Certainly there’s been nothing of this scale against anyone (in Canada).”

Litigating privacy law claims in Canada is still in its infancy, said Charney, who hopes the case will come to trial within a year.

“There’s been almost no litigation in Canada yet on this topic, and it’s really becoming an increasingly difficult issue for anybody who does any kind of volume electronic Internet business.”

The government revealed in January 2012 that a portable hard drive containing the names, dates of birth, loan balances, social insurance numbers and addresses of 583,000 Canada Student Loan borrowers had vanished from a Human Resources and Skills Development Canada office in Gatineau.

In a report to Parliament this week, Chantal Bernier, the interim federal privacy commissioner, said the hard drive had been left unsecured for extended periods, often in an unlocked filing cabinet in an open cubicle.

The government has since beefed up its policies for the secure storage of personal information, banned the use of portable hard drives and toughened discipline for employees who violate privacy and security policies.

It also set up an information line that received more than 250,000 calls and sent letters to 333,000 of those affected, offering to put a notation on their credit file for up to six years at no cost. As of last June, more than 88,000 people had signed up for that credit protection.

Four law firms initiated the proposed class action lawsuit in 2013, using three people who obtained student loans — Gaelen Condon of St. John’s, N.L., Rebecca Walker of Sydney, N.S., and Angela Piggott of Toronto — as representative plaintiffs.

In a decision dated March 17, Federal Court Justice Jocelyne Gagné certified the case as a class proceeding.

Everyone whose name was on the hard drive is part of the class unless they sign a form opting out, Charney said. “So my guess is we’re going to have at least 582,000.”

When it hears the case, the Federal Court will consider whether the government breached its contract with student loan recipients by failing to protect their personal information, retaining it too long and failing to destroy it as the loan agreement required.

It will also decide whether the government is guilty of “intrusion upon seclusion,” a new tort for invasion of personal privacy first recognized by the Ontario Court of Appeal in 2012.

If the court rules against the government, it could be liable for “nominal” damages. It could also be assessed punitive damages if its loss of the hard drive arose from reckless behaviour.

Under contract law, nominal damages are awarded when the court rules there has been a breach of contract but those affected by it didn’t actually lose money, Charney said. “You can still recover damages for all your wasted time and frustration.”

Nominal damages typically range from \$500 to \$2,000, Charney said. If all 583,000 people in the class received \$500, the government would be on the hook for \$291 million. If they received \$2,000 each, that would balloon to more than \$1.1 billion. “If you do the math,” Charney said, “it’s quite significant.”

The massive size of the affected class means even small numbers can multiply into huge ones. If those affected by the data loss spent four hours on average trying to deal with the problem, “you’re talking about hundreds of years of lost time,” Charney said.

One issue that arises with class actions is whether they can modify the behaviour of those being sued. In the hearing before Gagné, the federal government argued that it had already done everything it could to prevent a recurrence, so there was no need for behaviour modification.

But lawyers for the plaintiffs pointed out that the government had hundreds of privacy breaches in the previous two years. The class action might force the government to better protect personal information, they argued. “The judge bought that and certified it,” Charney said.

He said some of those affected have suffered identity theft since the loss of the hard drive. “The question is, when you have this huge size of a class, whether it’s just part of the usual percentage of people who experience identity theft on an annual basis, or if it’s connected to this specific hard drive.

“We’re not at the stage yet where we’re able to make those decisions,” he said.

Class action information

People whose Canada Student Loan files were on the portable hard drive that went missing from an office in Gatineau in 2012 can get information about the class action lawsuit and follow its progress by going to a dedicated website, www.studentloansclassaction.com.

They can also register with the site so that lawyers can contact them quickly if information is needed or class members are required to fill out forms.

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