QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2014 SKQB 114**

Date: **2014 04 17**
Docket: Q.B.G. 1283 of 2013
Judicial Centre: Regina

BETWEEN:

MELINDA HORSTMAN

PLAINTIFF

- and -

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

DEFENDANT

- and -

NICOLE BRITTIN

NON-PARTY RESPONDENT

Counsel:

Ward Branch and Ted Charney — for the plaintiff
Marlon Miller — for the defendant
E.F. Anthony Merchant, and Q.C., Roch Dupont — for the non-party respondent

---

JUDGMENT
April 17, 2014

SCHWANN J.

INTRODUCTION

[1] Ms. Horstman brings a two-fold application before this Court. She seeks an order staying the action styled as *Brittin v. Minister of Human Resources and Skills Development Canada and the Attorney General of Canada,* Q.B.G. 107 of 2013 (the

"Brittin Action") until the certification application is heard and decided in a matter proceeding in the Federal Court styled as *Condon v. Her Majesty the Queen in Right of Canada*, Federal Court file No. T-132-13 (the "Federal Court Action"). Further, or in the alternative, Ms. Horstman seeks an order granting her carriage of her proposed class action proceedings in the Province of Saskatchewan.

[2] The core issue presented by Ms. Horstman's application is whether her law firm and her action should be preferred over the law firm and action in the Brittin Action. Ms. Horstman urges this Court to grant her carriage in spite of the fact she has no intention of advancing her claim in the Saskatchewan courts.

BACKGROUND

[3] On January 21, 2013, Nicole Brittin, through her legal counsel, the Merchant Law Group ("MLG"), commenced proceedings on her own behalf and on behalf of a proposed national class of persons whose personal and private information contained in a portable hard drive went missing from the Minister of Human Resources and Skills Development Canada ("HRSDC"). The portable hard drive was either lost or stolen from an HRSDC office on or about November 5, 2012. It contained the personal information of more than 500,000 Canadian student loan program participants.

[4] MLG is also counsel for plaintiffs in similar multi-jurisdictional class proceedings launched in British Columbia, Alberta, Manitoba and Ontario.

[5] Several weeks prior to Ms. Brittin's action being filed in Saskatchewan, class proceedings in relation to the same subject matter, same defendant and same proposed class had been commenced across Canada by four separate law firms. Counsel for those claimants banded together and agreed to pursue their action in the Federal Court on a consolidated basis. This is the Federal Court Action referred to above. For ease of reference, the law firms representing the proposed plaintiffs in the Federal Court Action will be referred to as the "Consortium".

[6] The Federal Court Action has been actively case managed by Gagne J. of the Federal Court, leading to a certification hearing on December 17/18, 2013 in the Federal Court. (A decision in the matter has now been rendered (2014 FC 250).

[7] Concurrent with the progression of proceedings in the Federal Court Action, the Brittin Action was taking form in Saskatchewan. It was scheduled along a parallel procedural track as the Federal Court Action, with a certification hearing scheduled for the week of December 10, 2013 in Saskatchewan.

[8] Several months prior to the date scheduled for the certification hearing in the Brittin Action, the defendant ("Canada") brought a pre-certification motion seeking to strike out Brittin's statement of claim for want of jurisdiction, and in the alternative, to stay the action pending the outcome of certification in the Federal Court Action. The Federal Court plaintiffs, through the Consortium, concurrently applied to stay the Brittin Action along similar lines and lent their support to Canada's motion.

[9] A decision was rendered by this Court on August 30, 2013 on the combined motions of the Federal Court plaintiffs and Canada (cited at 2013 SKQB 318, [2013] S.J. No. 540 (QL)). Essentially, the Federal Court plaintiffs were denied standing on a without prejudice basis to advance their arguments at the time of certification of the Brittin Action. Canada's motion for a stay on jurisdictional grounds was dismissed. The other grounds advanced by Canada (i.e. abuse of process, *forum non conveniens*) were deferred until the time of the Brittin certification hearing with the expectation they would be argued at that time.

[10] Having decided those pre-certification motions, the Brittin Action was scheduled to proceed to certification on December 10, 2013, provided, of course, all other procedural steps were taken within the time frame established by an earlier scheduling order.

[11] Unbeknownst to this Court, when the combined motions were argued on July 12, 2013, Mr. Branch, on behalf of Ms. Horstman, had filed a statement of claim in the Court of Queen's Bench for Saskatchewan on July 9, 2013, three days prior to the motions. Pursuant to that claim, Ms. Horstman seeks to be certified as a representative plaintiff on her own behalf and on behalf of Saskatchewan resident persons whose personal information was contained in an encrypted external hard drive in the possession of the HRDSC. Her claim involves the same subject matter and same defendant as the Brittin Action. It is substantially (but not entirely) the same cause of action as the Brittin Action.

[12] Legal counsel for Ms. Brittin was unaware of the Horstman statement of claim when the stay motions were argued on July 12, 2013. Mr. Branch, who argued the motions on behalf of the Consortium and Federal Court plaintiffs, did not inform this Court of the existence of the Horstman claim.

[13] As mentioned, the certification hearing in the Brittin Action was scheduled to begin on December 10, 2013. One month prior to that hearing date, I was apprised of the parallel Saskatchewan proceedings brought by Ms. Horstman. Noting that the litigation landscape had changed with two plaintiffs and two actions launched in Saskatchewan, this Court determined that only one could proceed to certification. Accordingly, the dates set for the certification hearing in the Brittin Action were vacated and in its place the Horstman carriage/stay motion was heard. This is my decision on that motion.

JURISDICTION

[14] It is beyond question that this Court has jurisdiction and authority to deal with both the matters of carriage and stay. Section 29 of *The Queen's Bench Act, 1998*, S.S. 1998, c. Q-1.01 empowers this Court to grant any and all remedies to which the parties may be entitled so that all issues and controversy between the parties are determined, and multiplicity of issues is avoided:

> 29(1) The court shall grant to the parties to an action or matter all remedies to which the parties appear to be entitled with respect to any legal or equitable claims that they have properly brought forward so that:
>
> ...

> (b) a multiplicity of legal proceedings concerning the issues is avoided.
>
> ...

[15] Relief pursuant to ss. 29(1)(b) may be granted either absolutely or on any terms and conditions considered appropriate.

[16] Furthermore, this Court is empowered by s. 37 of *The Queen's Bench Act, 1998* to direct a stay of proceedings in any action or matter where considered appropriate.

> 37(1) Nothing in this Act prevents a judge from directing a stay of proceedings in any action or matter before the court if the judge considers it appropriate.
>
> (2) Any person, whether a party or not to an action or matter, may apply to the court for a stay of proceedings, either generally or to the extent that may be necessary for the purposes of justice, if the person may be entitled to enforce a judgment, rule or order, and the proceedings in the action or matter or a part of the proceedings may have been taken contrary to that judgment, rule or order.
>
> (3) On an application pursuant to subsection (2), a judge shall make any order that the judge considers appropriate.

[17] The referenced statutory provisions are designed to promote efficiency and empower this Court to control its own proceedings. They supplement this Court's inherent jurisdiction in relation to such matters. (*Englund v. Pfizer Canada Inc.*, 2007 SKCA 62, 299 Sask. R. 298)

STAY APPLICATION

[18] Although Ms. Horstman did not press the point in argument, her materials nonetheless seek to renew the earlier motion brought by the Federal Court plaintiffs in July, 2013, i.e. that the Brittin Action should be stayed on the basis of *forum non conveniens* and abuse of process principles. In so doing, Ms. Horstman simply adopts and advances the same arguments made by the Federal Court plaintiffs (Consortium) on that motion.

[19] To the extent Ms. Horstman's stay motion attempts to re-visit this court's earlier ruling on Canada's stay motion, it is denied. In any event, as Ms. Horstman only sought a stay of the Brittin Action until the Federal Court certification application was heard and decided, her application is now moot given the Federal Court's decision rendered on March 17, 2014 (2014 FC 250).

CARRIAGE MOTION

[20] The second aspect of Ms. Horstman's motion is for carriage of the action in Saskatchewan and a stay of the Brittin Action. Where overlapping class actions are being pursued and plaintiff counsel are unable or unwilling to agree to work together, a carriage motion may be brought. The effective result of a successful carriage motion is to stay all other class proceedings.

[21] The test for carriage is well established in Canada. The Ontario Superior Court, in *Vitapharm Canada Inc. v. F. Hoffmann-La Roche Ltd.*, (2000) 4 C.P.C. (5th)

169, [2000] O.J. No. 4594 (QL) (Ont. Sup. Ct.) set out the relevant factors and considerations to be applied in the face of overlapping class actions. At paras. 48 and 49, Cumming J. outlined the appropriate criterion and considerations:

> 48 In my view, the main criterion for the determination of the issue must be keeping in mind the policy objectives of the CPA, what resolution is in the best interests of all putative class members while at the same time fair to the defendants?
>
> 49 Factors to consider in determining who should be appointed as solicitor of record in a class action include: the nature and scope of the causes of action advanced, the theories advanced by counsel as being supportive of the claims advanced; the state of each class action, including preparation; the number, size and extent of involvement of the proposed representative plaintiffs; the relative priority of commencing the class actions; and the resources and experience of counsel. See generally *Newberg on Class Actions* (West Group, 1992), 3rd ed, s. 9.35, pp. 9-96 and 9-97.

[22] A carriage motion is a comparative exercise. One action, including its strengths and weaknesses, is compared to the other. One law firm is compared to the other, and the overall state of preparedness and advancement of the respective claims is assessed as against each other. It stands to reason, therefore, that the exercise must be an "apples to apples" exercise.

[23] Mr. Merchant urges this Court to approach Ms. Horstman's carriage motion having regard to the context in which it was brought and her intentions for the proposed class on a go forward basis. He contends Ms. Horstman's action was commenced without any intention of proceeding to certification in Saskatchewan, and that it merely exists as part of a larger strategy by the Consortium to stay the Brittin Action, either directly or indirectly, so that the Federal Court Action can proceed unfettered. He argues Ms.

Horstman's approach is disingenuous in the sense that the Consortium, while arguing against multiplicity of proceedings, have themselves commenced proceedings in Saskatchewan where they have no office, and more significantly, profess no intention of proceeding. He characterizes the whole of their approach as an abuse of process.

[24] Mr. Branch positions the Horstman claim as if it were subsumed within the Federal Court Action. To his credit, Mr. Branch was up front with his intentions. He informed this Court that if Melinda Horstman was granted carriage, most likely he would do nothing on a procedural front because Ms. Horstman's cause of action would be swept up in the Federal Court Action. He maintains the Federal Court Action will represent Saskatchewan plaintiffs on a multi-jurisdictional basis thereby protecting and advancing her interests. Finally, he attempted to answer Mr. Merchant's characterization of his so-called clandestine July 9, 2013 statement of claim by describing it as a "protective filing" pending this Court's decision on the standing issue.

[25] Under the rubric of the recognized carriage test, Mr. Branch invites a comparative analysis of the law firms and state of preparedness essentially between the Federal Court Action and the Consortium on the one hand, and the Brittin Action and her counsel, MLG, on the other hand.

[26] On a related point, while touting the attributes, skill and expertise of the Consortium, Mr. Branch failed to explain why comparisons should be drawn between MLG and the Consortium (which brought the motion on behalf of Ms. Horstman) when in fact the Branch McMaster law firm, not the Consortium, is the solicitor of record in

Saskatchewan. There is nothing on the court file to show a change in this regard *vis-a-vis* Ms. Horstman.

[27] According to the *Queen's Bench Rules* a "lawyer of record" is:

> 2-36(1) The lawyer or firm of lawyers whose name appears on a commencement document, pleading, affidavit or other document filed or served in an action as acting for a party is a lawyer of record for that party.

[28] Pursuant to *The Queen's Bench Rules* for Saskatchewan, the lawyer of record within the meaning of Rule 2-36(1) continues to be the lawyer of record on a file until that lawyer ceases to be the lawyer of record pursuant to the Rules. (Rule 2-36(3), 2-40-44, *Queen's Bench Rules*) A simple application of the Rules suggests the comparison on this carriage motion must be between the Branch McMaster law firm, not the Consortium, but that is not how Ms. Horstman positioned her argument.

[29] The more compelling point, though, is that the Consortium asks this Court to give Ms. Horstman carriage of a putative class action which she has no intention of proceeding with. Mr. Branch has made it quite clear that Ms. Horstman's intention is to defer to the Federal Court Action which has different representative plaintiffs and is proceeding in a different court.

[30] Ms. Horstman's intention in this regard is amply demonstrated by her supporting material. The affidavit of Emily Unrau, sworn on October 10, 2013, highlights the efforts of the Consortium and the progress of the Federal Court Action. She points out, for instance, that unlike the Brittin Action where there is only one representative plaintiff, there are three plaintiffs in the Federal Court Action. Each has been cross-

examined on their affidavits and each has made valuable contributions to the litigation effort. Ms. Walker and Ms. Piggott (the Federal Court plaintiffs), in particular, have been active in efforts to ensure the Federal Court Action is allowed to proceed efficiently. Moreover, over 30,000 individuals have already contacted and registered with the Consortium and of that number, over 700 are Saskatchewan residents. Of course, all of these speaks to the progress of the Federal Court Action, not Ms. Horstman's Saskatchewan action.

[31] Although not evidence on this application, the applicant's Brief of Law describes Ms. Horstman's approach in the following way:

> 54. Conversely, Horstman and the Federal Court Plaintiffs seek to avoid such jurisdictional conflicts by proceeding first in a court that has a unified national scope.
>
> ...
>
> 57. In addition to the theories advanced, the approach of the Consortium in advancing litigation first through the Federal Court Action offers considerable strategic and procedural advantages... [Emphasis added].

[32] As made clear in *Fantl v. Transamerica Life Canada,* (2008) 60 C.P.C. (6th) 326, [2008] O.J. No. 1536 (QL) (Ont. Sup. Ct.), a class action requires more than a "place-holder" plaintiff; the plaintiff must be genuine. Quoting with approval from *Western Canadian Shopping Centres Inc. v Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534, at para. 41 thereof: "...The proposed representative plaintiff need not be "typical" of the class, nor the "best" possible representative. The court should be satisfied, however, that the proposed representative will vigorously and capably prosecute the interests of the class. ..."(emphasis added)

[33] The same point has been made forcefully in this jurisdiction. In *Hoffman v. Monsanto Canada Inc.,* 2007 SKCA 47, 293 Sask. R. 89, the Saskatchewan Court of Appeal, at para. 91, adopted the following point made by the trial judge:

> 91. ...
>
> > [337] The representative plaintiff under *The Class Actions Act* has the responsibility to prosecute the lawsuit, once certified, in the interests of the members of the class. Their duty is akin to that of a fiduciary. They must have adequate knowledge and ability to instruct counsel and they must act in the interests of the members of the class. They are answerable to the Court for the adequate performance of these obligations. These are duties that cannot, in my view, be delegated to another party who is not answerable to the Court.

(See also *Englund v Pfizer Canada Inc*, *supra*, at para. 51)

[34] The practical effect of giving Ms. Horstman carriage is an abandonment of any action in Saskatchewan in deference to the Federal Court Action. Although Ms. Horstman has filed material for a certification application in this jurisdiction, as previously noted, her intention is to shelve her Saskatchewan action in favour of pursuit of her personal interests under the rubric of the Federal Court Action. This, frankly, is not the requisite "vigorous prosecution" expected and required of a representative plaintiff, nor does it meet the overarching criterion of *Vitapharm*, *supra*, that the resolution (carriage) be in the best interests of the class members.

[35] This point is underscored by the actions of the Consortium in filing the Horstman statement of claim yet not disclosing this fact to this Court at the time of the

July stay motion. It was only when the issue of standing was raised by MLG that the Horstman Action was commenced. While Mr. Branch describes it as a "protective filing", his carriage motion is little more than an alternate route to achieve the Consortium's underlying desire to have the Brittin Action stayed in favour of the Federal Court Action.

CONCLUSION

[36] Ms. Horstman's submissions point to the unmistakable conclusion that she intends to defer to the Federal Court Action and has no real interest in pursuing her proposed class action in Saskatchewan. Viewed in this context, and having regard to the obligations of representative plaintiffs and the principal criterion for assessment of carriage motions, I fail to see how she can discharge her duties as the representative plaintiff nor act in the interests of the members of the proposed class. As noted in *Hoffman, supra*, the representative plaintiff bears the responsibility of pursuing the lawsuit and acting in the best interest of the members of her class. She is answerable to this Court, and her duties cannot be delegated to another party who is not otherwise answerable to this Court.

[37] For these reasons, I find it unnecessary to proceed further with the recognized test for carriage motions. Ms. Horstman's application for carriage must be denied. MLG and Ms. Brittin shall have carriage of the action in Saskatchewan.

[38] Having reached this conclusion, the Brittin Action faces the reality that the Federal Court plaintiffs were granted certification of their action as a class proceeding based on an alleged breach of contract and warranty, and on the tort of intrusion upon

seclusion. Thus, insofar as the Brittin Action is different from the Federal Court Action, Ms. Brittin and MLG shall have carriage in respect of any differences between the Brittin Action and the causes of action not certified in the Federal Court Action.

J.
L. M. SCHWANN