Federal Court of Appeal  Cour d'appel fédérale

Date: 20160624

Docket: A-343-15

Citation: 2016 FCA 191

CORAM: **RYER J.A.**
BOIVIN J.A.
DE MONTIGNY J.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

JOHN DOE AND SUZIE JONES

Respondents

Heard at Ottawa, Ontario, on April 5, 2016.

Judgment delivered at Ottawa, Ontario, on June 24, 2016.

REASONS FOR JUDGMENT BY: DE MONTIGNY J.A.

CONCURRED IN BY: RYER J.A.
BOIVIN J.A.

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REASONS FOR JUDGMENT

DE MONTIGNY J.A.

[1] This is an appeal from the Crown of an Order rendered on July 27, 2015 by Justice Phelan (the motions judge) of the Federal Court, certifying a class action proceeding against the Crown brought by two anonymous plaintiffs on behalf of participants in the Marihuana Medical Access Program (the Program). In their motion for certification the plaintiffs allege that from November 12 to 15, 2013, Health Canada sent them oversized envelopes addressed to their

name, with a return address to the Program, thereby giving rise to: (1) breach of contract and warranty, (2) negligence, (3) breach of confidence, (4) intrusion upon seclusion, (5) publicity given to private life, and (6) breach of the right to privacy under sections 7 and 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 [Charter]. The Crown opposed certification mainly on the basis that the claim did not disclose a reasonable cause of action, that the common questions were overwhelmed by individual issues, and that a class action was not the preferable procedure. The motions judge granted the certification motion with costs, subject to amendment of the Charter-based claim and the naming of at least one, publicly-identified class representative. The Crown now appeals the certification order, and the plaintiffs cross-appeal on the requirement that they name a publicly-identified class representative.

[2] For the reasons that follow, I am of the view that the appeal should be granted in part, to the extent that the motions judge erred in finding that the pleadings were sufficient to ground all the causes of action raised in the Third Amended Statement of Claim.

I. Background

[3] The respondents (also referred to as the plaintiffs) are two individuals who suffer from health conditions for which their physicians have prescribed marihuana as part of their treatment plan. Given that their claim is for breach of privacy, they were permitted to proceed under the pseudonyms “John Doe” and “Suzie Jones”. John Doe resides in Nova Scotia and is employed in the health care field. Suzie Jones resides in Ottawa and is employed in the legal profession.

[4] The plaintiffs applied for authorization to possess marihuana for personal medical use or to produce marihuana for the medical use of an individual with such authorization. Marihuana is generally categorized as a controlled substance, regulated in Canada under the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19. With few exceptions, it is not legal to grow or possess marihuana, except with legal permission under the *Marihuana Medical Access Regulations*, S.O.R./2001-227 [the Regulations] (since repealed and replaced with the *Marihuana for Medical Purposes Regulations*, S.O.R./2013-119). At the relevant time, the Program granted access to marihuana for medical use to persons treating symptoms for compassionate end-of-life care or certain symptoms of medical conditions such as multiple sclerosis, cancer, HIV/AIDS, arthritis, epilepsy and other debilitating symptoms.

[5] Pursuant to the Regulations then in force, the plaintiffs provided a mailing address to Health Canada. In these forms, Health Canada made the following privacy commitments:

> **A3 Appointed Representative**
>
> **This section is optional**
>
> You may appoint a representative to speak to Health Canada on your behalf. Health Canada will be authorized to exchange information about your case - including personal data and material contained in your medical records - with an appointed representative that you choose (for example, a family member or friend).
>
> Should you **not** provide this consent, Health Canada will communicate only with and through you. […]
>
> **A5 Authority to Communicate to Canadian Police**
>
> To reduce the possibility of police intervention when you engage in activities allowed under your authorization or licence, if asked, Health Canada will communicate limited authorization and licence information to Canadian police in response to a request in the context of an investigation under the *Controlled Drugs and Substances Act*, or the *Marihuana Medical Access Regulations*. [Emphasis in original]

[6] Contrary to its prior practice of simply indicating “Health Canada” on correspondence, between November 12 and 15, 2013, Health Canada sent the respondents and approximately 40,000 individuals registered in the Program envelopes visibly marked with a return address to the Program. The purpose of that mail-out was to inform current participants in the Program of the impending change from the Regulations to the *Marihuana for Medical Purposes Regulations* and alert them to the new circumstances under which they could access marihuana for medical purposes. A letter inside the envelope recognized the high value of marihuana on the illegal market and acknowledged that this created a risk of violent home invasion and diversion to the black market. The plaintiffs claim that by delivering letters revealing their association with the Program, Health Canada perpetuated these security risks. On November 21, 2013, the Deputy Minister of Health Canada issued a statement describing the inclusion of the phrase “Marihuana Medical Access Program Health Canada” on the envelopes as an “administrative error”.

[7] In their Statement of Claim, the plaintiffs alleged many causes of action. They claimed that, in completing their applications, they entered into an agreement with Health Canada with express and implied confidentiality obligations, which Health Canada breached. They also alleged that Health Canada was negligent in that it breached its duty of care to the plaintiffs regarding the protection of their personal information, particularly by failing to respect their statutory duty to protect that information, and causing reasonably foreseeable damage. For similar reasons, they alleged that Health Canada committed a breach of confidence, committed an intentional and reckless intrusion on seclusion in a manner that would be highly offensive to a reasonable person, gave publicity to their private life in a manner highly offensive to a

reasonable person, and infringed their reasonable expectation of privacy under sections 7 and 8 of the Charter.

[8] As a result of these infringements, the plaintiffs claim to have suffered the following damages: costs incurred to prevent home invasion, theft, robbery and/or damage to property, costs incurred for personal security, damage to reputation, loss of employment, reduced capacity for employment, mental distress, out of pocket expenses, as well as inconvenience, frustration and anxiety from having to take security precautions.

[9] In their motion for certification pursuant to Rules 334.16(1) and 334.17 of the *Federal Courts Rules*, S.O.R./98-106 [the Rules], the plaintiffs sought to certify their claim as a class action on behalf of the following proposed class:

> All persons who were sent a letter from Health Canada in November 2013 that had the phrase Marihuana Medical Access Program or Programme d'accès à la marihuana à des fins médicales visible on the front of the envelope.

[10] On March 3, 2015, the Privacy Commissioner released a Report of Findings from its investigation and concluded that Health Canada violated the *Privacy Act*, R.S.C. 1985, c. P-21 by referencing the Program on the envelope in combination with the name of the addressee. At the outset of the certification hearing, the Crown moved for the exclusion of that Report, on the basis that it was not relevant and could not be admitted for the truth of its contents.

II. The impugned decision

[11] In laying out the facts, the motions judge commented on the relevance of some of the evidence filed in support of the certification motion. After referring to the affidavits of the plaintiffs, he noted that "[w]hile reliance on proven facts is not a relevant matter for the issue of whether the pleadings disclose a "reasonable cause of action" […], some factual basis must be established […] to support the motion" (para. 7). He noted that the plaintiffs had spent considerable effort and evidence establishing the breach of privacy, while the defendant had invoked Canada Post's code of conduct and argued that disclosure of names and return addresses were not actionable. However, the motions judge found that he need not consider the "ins and outs" of the breach at the time of the motion, and that the defendant's arguments should be raised as defences at trial. Regarding the Privacy Commissioner's Report, the motions judge noted that the defendant objected to its disclosure and argued that in any event, it did not establish bad faith, without which the action was barred by section 74 of the *Privacy Act*. The motions judge found that the Report was relevant to establish whether there was "some basis in fact" in support of the certification motion, and found that it was not plain and obvious that the action was barred for lack of bad faith (para. 17).

[12] The motions judge then began his analysis by laying out the approach to be taken on a certification motion, referring to the standard of proof of "some basis in fact" from *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, [2013] 3 S.C.R. 477 [*Pro-Sys*] . He then cited a passage from *Pro-Sys Consultants Ltd. v. Infineon Technologies A.G.*, 2009 BCCA 503 at paras. 64-65, 312 D.L.R. (4th) 419, which emphasized that class action certification provisions should be construed broadly so as to achieve judicial economy, access to justice and

behaviour modification, and stated that the burden was on the plaintiff to show "some basis in fact" for each of the certification requirements, other than the requirement that the pleadings disclose a reasonable cause of action. The motions judge then found at paragraph 27:

> On the threshold question of "some basis in fact", I find that the Plaintiffs have established sufficient basis for this Court to consider the other elements of the certification analysis. The Privacy Commissioner's Report, a public document, is itself sufficient for these purposes, as is the other evidence filed.

[13] The motions judge then considered whether the claim disclosed a reasonable cause of action, noting that the test was whether it was "plain and obvious" that the action could not succeed. He found that contrary to the defendant's arguments, the plaintiffs had specifically pleaded bad faith by using the words "high-handed, wanton, callous, etc." at paragraph 22 of their Third Amended Statement of Claim. On breach of contract, he found that the plaintiffs had pleaded that there was an implied or expressed agreement or undertaking and that this was sufficient. On negligence, he found that the plaintiffs had pleaded duty of care, statutory duty, breach of the duty and the nature of the harm, and that this was sufficient as there was no requirement to plead tangible damages. On breach of confidence, he found that the plaintiffs had pleaded the confidence relied on, and the breach of it, and that this was sufficient. For intrusion upon seclusion, the motions judge found that the claim was somewhat novel, but followed the reasoning in *Jones v. Tsige*, 2012 ONCA 32, 346 D.L.R. (4th) 34 [*Tsige*] and found that the plaintiffs had sufficiently pleaded the bad faith required for this tort. For publicity given to private life, the motions judge found that this was a truly novel claim in Canada, but found that it should not be readily dismissed at such an early stage of litigation. Regarding the Charter claim, the motions judge found that the plaintiffs had not pleaded how their section 7 interest had been engaged, or infringed in a manner contrary to the principles of fundamental justice. He also

noted that the section 8 claim was at best opaque. The motions judge stated that were it not for the need to make some other amendments to the Statement of Claim, he would have struck this claim, but as it was, he allowed the plaintiffs to amend the pleadings or withdraw it.

[14] Regarding common questions of law and fact, he noted that the question was whether allowing certification would avoid duplication of fact-finding or legal analysis. After citing the list of common questions proposed by the plaintiffs, he found that the common issues would move the litigation forward, and that the individual issues would not detract from the advantage of resolving the common issues. He acknowledged the defendant's concern that there was no support for a punitive damages award by indicating that bad faith had been sufficiently pleaded.

[15] On the preferable procedure, the motions judge noted that the defendant had legitimate concerns, but stated that "the prospect of several thousand individual claims being processed in this Court should cause the Defendant to rethink that administrative burden on itself" (at para. 54). The motions judge indicated that access to justice is enhanced by resolving common questions, particularly where amounts at issue are small such that individuals might be deterred from bringing their claims alone. He indicated that the benefits of a class action to judicial economy are significant by preventing a plethora of individual claims, many of which could be self-represented, across the country. He noted that behaviour modification should be considered from the perspective of the federal government as a whole on the communication process, and from the perspective of the public. He found that there were few practical alternatives, since the Privacy Commissioner could not award damages and had a principally recommendatory function. He therefore concluded that the class action was the preferable procedure.

[16] On the naming of a representative plaintiff, the motions judge noted that the defendant had suggested that there were individuals willing to be publicly-identified as a class representative, and that plaintiffs' counsel suggested this would be feasible. He found that at least one public class representative should be identified.

[17] The motions judge therefore granted the motion, with costs, subject to amendments as discussed in the reasons.

III. Issues

[18] In its factum, counsel for the appellant contended that the motions judge erred by failing to make a determination on the Crown's motion to have the Report of the Office of the Privacy Commissioner excluded from evidence. At the hearing, however, counsel abandoned that argument.

[19] Similarly, there is no need to rule on the motions judge's finding that the respondents' claims in respect of sections 7 and 8 of the Charter are defective for failing to plead how these interests are engaged, but nevertheless should not be struck since the respondents will have an opportunity to correct this pleading in the process of making further amendments to the Statement of Claim as a result of his decision. The respondents have abandoned this claim and have since withdrawn it in their Fourth Amended Statement of Claim.

[20] Accordingly, the parties are in agreement that this case raises the following issues:

A. What is the applicable standard of review?

B. Did the judge err in applying the proper test for certification?

C. Did the judge err in determining that the Statement of Claim disclosed a reasonable cause of action?

1) Did the judge err in finding that the issue of whether there is an enforceable contract is a matter for trial?

2) Did the judge err in finding that the pleadings set out a viable cause of action in negligence and breach of confidence in the absence of an adequate pleading of tangible damages?

3) Did the judge err in finding that a free-standing tort in publicity given to private life exists in Canada?

4) Did the judge err in finding that the test for intrusion upon seclusion was met on the facts as pleaded?

D. Did the judge err in determining that a class action is the preferable procedure?

E. Did the judge err in awarding costs?

[21] On cross-appeal, the only issue is whether the judge erred in requiring that there be at least one identified representative plaintiff.

IV. Analysis

General principles regarding certification of class action proceedings

[22] The conditions for certifying a class action are provided for at Rule 334.16 of the Rules. According to that provision, a class action proceeding shall be certified if the following conditions are met: (a) the pleadings disclose a reasonable cause of action, (b) there is an

identifiable class of two or more persons, (c) the claims raise common questions of law or fact, (d) a class proceeding is the preferable procedure for just and efficient resolution of those common questions, and (e) there is a representative plaintiff who would fairly and adequately represent the interests of the class. These criteria are essentially the same ones applicable in provincial court proceedings in Ontario and British Columbia, such that the Federal Court's jurisprudence on certification relies substantially on Supreme Court cases arising in those provinces: *Buffalo v. Samson Cree Nation*, 2010 FCA 165, 405 N.R. 232, at para. 8.

[23] For the purposes of the first criterion - that the pleadings disclose a reasonable cause of action - the principles are the same as those applicable on a motion to strike. The facts alleged in the statement of claim are assumed to be true, and no evidence may be considered. The test is whether it is "plain and obvious" that the pleadings, assuming the facts pleaded to be true, disclose no reasonable cause of action. Or, to put it differently, the plaintiffs must establish that there is a reasonable prospect of success should the claim be permitted to proceed towards trial: see *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158, at para. 25 [*Hollick*]; *Pro-Sys*, at para. 63; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at p. 980, 74 D.L.R. (4th) 321 [*Hunt*]; *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45, at paras. 17, 70. While the facts alleged are assumed to be true, they must still be pleaded in support of each cause of action. Bald assertions of conclusions are not allegations of material fact and cannot support a cause of action: *Merchant Law Group v. Canada Revenue Agency*, 2010 FCA 184, 321 D.L.R. (4th) 301, at para. 34; *Mancuso et al. v. Canada (Minister of National Health and Welfare) et al.*, 2015 FCA 227, 476 N.R. 219, at para. 27.

[24] For the other four certification criteria (identifiable class, common questions, preferable procedure and class representative), the plaintiffs have the burden of adducing evidence to show "some basis in fact" that these criteria have been met: *Hollick*, at para. 25; *Pro-Sys*, at para. 99; *AIC Ltd. v. Fischer*, 2013 SCC 69, [2013] 3 S.C.R. 949, at para. 40 [*Fischer*]. These criteria are concerned with the form of the action, not its merits. This threshold is lower than a balance of probabilities, as certification is not the appropriate stage to resolve conflicts in the evidence: *Pro-Sys*, at para. 102.

[25] As stated by the Supreme Court in *Hollick* (at para. 15), the certification criteria are to be assessed while keeping in mind the purposes of class action proceedings:

> The Act reflects an increasing recognition of the important advantages that the class action offers as a procedural tool. As I discussed at some length in *Western Canadian Shopping Centres* (at paras. 27-29), class actions provide three important advantages over a multiplicity of individual suits. First, by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. Second, by distributing fixed litigation costs amongst a large number of class members, class actions improve access to justice by making economical the prosecution of claims that any one class member would find too costly to prosecute on his or her own. Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers modify their behaviour to take full account of the harm they are causing, or might cause, to the public. […] In my view, it is essential therefore that courts not take an overly restrictive approach to the legislation, but rather interpret the Act in a way that gives full effect to the benefits foreseen by the drafters. [Emphasis added]

[26] In determining whether the class action is the "preferable procedure", the plaintiff has the burden of showing that the class action would be a fair, efficient and manageable process that would be preferable to other reasonably available means of resolving the class members' claims (*Hollick*, at paras. 28, 31). Rule 334.16(2) provides a list of factors to be considered in the analysis, including the extent to which common questions predominate over individual

questions, whether a significant number of class members have an interest in individually controlling the proceedings, whether the same claims have been the subject of other proceedings, whether other means of resolving the claims are less practical or efficient, and whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means. Comparison may be made to individual court actions, but also to alternatives to court actions such as administrative and regulatory bodies or no-fault compensation regimes. The court must assess and compare the available recourse by reference to the objectives of class action proceedings to determine which process best achieves those objectives.

A. *What is the applicable standard of review?*

[27] The parties disagree as to the applicable standard of review. The appellant argues that the decision of the motions judge according to which the pleadings disclose a reasonable cause of action is a pure question of law reviewable on a standard of correctness. The respondents, on the other hand, insist on the deference owed to motions judges' decisions to grant a certification order. In my view, both of these positions are substantially true to the extent that they address the issue from different angles.

[28] It is no doubt true that courts across the country have recognized in a number of cases that the unique nature of certification orders calls for substantial deference: see, for ex., *Jer v. Royal Bank of Canada*, 2014 BCCA 116, (*sub. nom. Jer v. Samji*) [2014] B.C.J. No. 535, at para. 61; *Wright Medical Technology Canada Ltd. v. Taylor*, 2015 NSCA 68, [2015] N.S.J. No. 285, at paras. 30-31. As explained by the Ontario Court of Appeal in *Pearson v. Inco Ltd. et al.*, 78

O.R. (3d) 641, 2006 Can LII 913 [*Pearson*], (cited with approval by the Supreme Court of Canada in *Fischer*, at para. 65), such deference is warranted by the special expertise developed by motions judges on certification motions and the necessity of weighing a number of factors when assessing the certification criteria:

> The decision of the motion judge on a certification motion is entitled to substantial deference. The judges hearing these motions have developed a special expertise. Furthermore, the judges have often case-managed the proceedings and are therefore especially familiar with the factual context, as was the motion judge in this case. The decision as to preferable procedure is, in my view, entitled to special deference because it involves weighing and balancing a number of factors.
>
> *Pearson*, at p. 657.

[29] Accordingly, the assessment of the last four certification criteria (i.e. whether there is some basis in fact to conclude that the claim has identified a proper class, raises sufficient common questions, is a preferable procedure and is represented by an adequate class representative) will be entitled to substantial deference as they raise questions of mixed fact and law involving an appreciation of the evidence on the motion and a certain field-sensitivity in trial management: see *Hinton v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 215, [2009] 1 F.C.R. 476, at para. 36.

[30] The assessment of the first certification criterion - whether the claim discloses a reasonable cause of action - raises an entirely different type of question. As previously mentioned, the analysis of this criterion excludes the appreciation of evidence and involves essentially legal reasoning, that is, whether the applicable legal criteria to make out a certain claim have been met. The same will be true when determining whether the motions judge applied the proper test for the cause of action requirement. These are questions of law that must be

reviewed on a standard of correctness. As the Supreme Court stated in *Fischer* (at para. 65), "…deference does not protect the decision against review for errors in principle which are directly relevant to the conclusion reached …".

[31] This approach is entirely consistent with the usual appellate standard developed by the Supreme Court of Canada in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. The fact that the decision of a motions judge to certify an action as a class proceeding is largely discretionary does not justify a separate standard of review analysis. The most recent case law from this Court recognizes the need for a uniform approach with respect to all appeals of orders, whether they are considered discretionary or not: see *Imperial Manufacturing Group Inc. v. Decor Grates Incorporated*, 2015 FCA 100, [2016] 1 F.C.R. 246 rev'g *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, [1995] 1 F.C. 588 at p. 594, 58 C.P.R. (3d) 209 (C.A.); *Turmel v. Canada*, 2016 FCA 9, [2016] F.C.J. No. 605; *Teva Canada Limited v. Gilead Sciences Inc.*, 2016 FCA 176 at para. 23, [2016] F.C.J. No. 605. I also note that this is the standard applied by this Court in dealing with an order certifying an action as a class proceeding: see *Condon v. Canada*, 2015 FCA 159, [2015] F.C.J. No. 803, at para. 7 [*Condon*].

[32] As a result, a standard of correctness will be applied to questions B and C, whereas questions D and E will be reviewed on the standard of palpable and overriding error.

B. *Did the judge err in applying the proper test for certification?*

[33] As previously mentioned, material facts must be pleaded in support of each cause of action alleged. Bare assertions of conclusions are insufficient and cannot support a cause of

action. Counsel for the appellant contends that the motions judge erred in that respect in applying the "some basis in fact" test, which only applies to the other four elements of certification. I agree. A careful reading of the decision leads me to believe that the motions judge conflated the test for determining whether the pleadings disclose a reasonable cause of action with the standard of proof applicable to the other four certification requirements.

[34] At paragraph 22 of his reasons, the motions judge characterizes as a "factual dispute" the arguments made by the respondents, including the argument that no supporting facts were alleged in the claim that personal information was disclosed and that there are no material facts alleged to show that Health Canada was high-handed, outrageous, reckless, wanton, entirely without care, deliberate, callous, disgraceful, wilful and in disregard of the rights of the plaintiffs and other class members. He adds, moreover, that this "factual dispute" is only relevant to the issue of "some basis in fact".

[35] Even more troublesome is paragraph 27 of the motions judge's reasons, which reads as follows:

> On the threshold question of "some basis in fact", I find that the Plaintiffs have established sufficient basis for this Court to consider the other elements of the certification analysis. The Privacy Commissioner's Report, a public document, is itself sufficient for these purposes, as is the other evidence filed.

[36] There are two problems with this statement. First, as the Crown suggests, it is erroneous to treat "some basis in fact" as a kind of threshold question to be passed, before the Court considers the latter four certification requirements. Rather, it is the standard of proof applicable to the analysis of those four factors themselves.

[37] Second, to the extent that the motions judge turned his mind to the requirement of pleading material facts in support of each cause of action, he seems to be satisfied with the Privacy Commissioner's Report and the other evidence filed. This is clearly an error, as he failed to draw a distinction between elements in the pleadings and those that are in evidence on the motion. In fact, his reasons disclose no analysis of what, if any, pleaded material facts exist to support the various claims. While he made no particular reference to affidavit evidence in his actual analysis of each cause of action, and generally stated that the pleading was sufficient in reaching his conclusions on each cause of action, he does not go through any thorough analysis of the allegations in the Third Amended Statement of Claim either.

[38] For all of these reasons, I am of the view that the motions judge did not apply the correct test to the reasonable cause of action criteria, and in fact applied the "some basis in fact" test applicable to the four other elements of certification. This error, as discussed below, is fatal for most of the causes of action.

C. *Did the judge err in determining that the Statement of Claim disclosed a reasonable cause of action?*

[39] Before dealing with the causes of action, a word must be said about an argument raised by the appellant on the basis of the *Privacy Act*. Section 74 of that Act provides as follows:

74 Notwithstanding any other Act of Parliament, no civil or criminal proceedings lie against the head of any government institution, or against any person acting on behalf or under the direction of the head of a government institution, and no proceedings lie against the Crown or any government	74 Nonobstant toute autre loi fédérale, le responsable d'une institution fédérale et les personnes qui agissent en son nom ou sous son autorité bénéficient de l'immunité en matière civile ou pénale, et la Couronne ainsi que les institutions fédérales bénéficient de l'immunité devant toute

institution, for the disclosure in good faith of any personal information pursuant to this Act, for any consequences that flow from that disclosure, or for the failure to give any notice required under this Act if reasonable care is taken to give the required notice.	juridiction, pour la communication de renseignements personnels faite de bonne foi dans le cadre de la présente loi ainsi que pour les conséquences qui en découlent; ils bénéficient également de l'immunité dans les cas où, ayant fait preuve de la diligence nécessaire, ils n'ont pu donner les avis prévus par la présente loi.

[40] Counsel for the appellant argued that this provision confers immunity on the Crown from civil proceedings arising from the wrongful disclosure of personal information unless the disclosure was in bad faith. Since the respondents have not specifically pleaded bad faith or malice and relied essentially on bare assertions of high-handedness, callousness, wantonness, etc. unsupported by any material facts, so the argument goes, no cause of action lies against the Crown for the alleged breach.

[41] I find this argument without merit, not because the pleadings are adequately supported by material facts (I shall return to that question below when discussing the tort of intrusion upon seclusion), but because it rests on a misinterpretation of section 74 of the *Privacy Act*. When read carefully, it is clear that the phrase "pursuant to this Act" qualifies the immunity of the Crown from civil or criminal proceedings and restricts its application to disclosure made in compliance with the *Privacy Act*.

[42] The Canadian Oxford Dictionary, 2nd ed. defines "pursuant" as "conforming to or in accordance with". The Black's Law Dictionary, 10th ed. defines "pursuant to" as "in compliance with; in accordance with; under […]", "as authorized by; under […]", or "in carrying out […]". In the same vein, the cases interpreting similar immunity clauses in provincial privacy legislation

cited by the appellant are of no help: either the actions were based on breaches of specific provisions of the privacy legislation itself (*Bracken v. Vancouver Police Board et al.*, 2006 BCSC 189, [2006] B.C.T.C. 189; *Hung v. Gardiner*, 2002 BCSC 1234, 45 Admin. L.R. (3d) 243), or the wording of the immunity clause was broader so as to capture anything done or not done in good faith while carrying out duties or exercising powers under the *Privacy Act* (*Opal v. Boyd*, 2007 ABQB 373, 444 A.R. 216).

[43] In the present case, none of the claims made by the respondents rest on the *Privacy Act*. The only references to that piece of legislation occur in the context of the claim for breach of contract and warranty, where it is alleged that Health Canada did not live up to its privacy responsibilities set out in the *Privacy Act* and in the Treasury Board Privacy Protection Policy. Therefore, the immunity conferred by section 74 of the *Privacy Act* is of no relevance in the case at bar and cannot provide cover for the Crown.

(1) Did the judge err in finding that the issue of whether there is an enforceable contract is a matter for trial?

[44] In their Third Amended Statement of Claim, the Plaintiffs pleaded that they and other Class Members entered into "an express or implied agreement" with Health Canada when they completed an application for a Possession Authorization and/or Production License under the Regulations with respect to the collection, retention, and disclosure of their personal information. The terms of that agreement provided that any such personal information would only be used by Health Canada for internal purposes and would not be publicly disclosed, and that Health Canada would comply with all relevant statutory obligations and policies concerning mailings. That

agreement was breached when Health Canada "recklessly and improperly" disseminated, disclosed and released the personal information and failed to comply with the obligations set out in the *Privacy Act*.

[45] In my view, the motions judge erred in accepting, without much discussion, that this pleading was sufficient to ground the cause of action. First of all, there is a total lack of any material facts to support this pleading, and that is in and of itself a sufficient basis to dismiss that cause of action.

[46] More importantly, I agree with the Crown that the terms of the alleged agreement were entirely determined by statute and regulations, since the plaintiffs filed applications as required by the *Regulations* and Health Canada promised no more than that which it was already bound to do under those *Regulations* and other applicable legislation. For there to be a contract, there has to be an exchange of promises backed by valuable consideration. Here, there was no exchange of consideration, no bargaining or meeting of the minds. The terms of the arrangement were entirely imposed by statute. This is why there is a tendency in contract law to refuse to enforce agreements that simply reflect a pre-existing statutory duty, and nothing more: see S.M. Waddams, *The Law of Contracts*, 6th ed. (Toronto: Canada Law Book, 2010), at § 135, p. 98. Yet, the motions judge's reasons do not demonstrate any consideration of the statutory nature of Health Canada's obligations regarding the confidentiality of information.

[47] The law of contract does not fit well with a statutory licensing regime. The licensing regime is offered for reasons of public policy, as a matter of public law. Applying contract law

principles to the statutory regime contained within the *Regulations* would "contort those principles beyond all recognition": *Cervinus Inc. v. Canada (Minister of Agriculture)*, 2000 CanLII 16750, at para. 28, 198 F.T.R. 187.

[48] It is true that contracts lacking consideration may nonetheless be enforceable for other reasons, such as subsequent reliance (Waddams, at § 189, p. 138). Here, however, the Third Amended Statement of Claim makes no allegation of any particular reliance beyond some "peace of mind" (at para. 33). In the absence of any material fact supporting the argument that Health Canada made promises going beyond their pre-existing statutory duties and broader in scope than their statutory obligations, the motions judge could not find that the plaintiffs had sufficiently pleaded a breach of contract or warranty.

(2) Did the judge err in finding that the pleadings set out a viable cause of action in negligence and breach of confidence in the absence of an adequate pleading of tangible damages?

[49] The only objection of the appellant with respect to this cause of action is the lack of an adequate pleading of damages. More specifically, the appellant argues that no material facts are pleaded in support of the allegation that either of the representative plaintiffs suffered any of the damages described in their Third Amended Statement of Claim as follows:

a) costs incurred to prevent home invasion, theft, robbery and/or damage to personal property including marijuana plants and related paraphernalia;

b) costs incurred for personal security;

c) damage to reputation;

d) loss of employment;

e) reduced capacity for employment;

> f) mental distress;
>
> g) out of pocket expenses;
>
> h) inconvenience, frustration and anxiety associated with taking precautionary steps to reduce the likelihood of home invasion, theft, robbery and/or damage to personal property and to obtain personal security; and
>
> i) such further or other damages as counsel may advise.
>
> Third Amended Statement of Claim, para. 56.

[50] The decision of this Court in *Condon* is a complete answer to this argument. At issue in that case was a motion to certify an action as a class proceeding for the loss of a hard drive containing personal information of student loan recipients. The Federal Court Judge had certified the action relating to the claims for breach of contract and the tort of intrusion upon seclusion, but had rejected the claims for negligence and breach of confidence for lack of compensable damages. On appeal to this Court, Justice Webb, with whom Justices Ryer and Near agreed, overturned the Federal Court on this point, finding that Rule 182 (a) of the Rules only requires that the claim indicate the "nature of any damages claimed", and that a general description was sufficient (*Condon*, at para. 20).

[51] In the case at bar, this is precisely what the respondents have done. They have identified the nature of the damages that they are claiming, including costs incurred to prevent home invasion, theft, robbery and/or damage to personal property, loss of employment and reduced capacity for employment. These damages are not negligible inconveniences nor entirely speculative, and it is to be assumed that these costs have been incurred in light of the principle that a statement of claim is to be read as generously as possible at the certification stage of a class action: *Biladeau v. Ontario (Attorney General)*, 2014 ONCA 848, [2014] O.J. No. 5679, at

para. 15. Of course, it will be up to the trial judge to determine whether those damages were truly suffered, and to what extent they were in fact caused by the appellant's conduct. This is no reason, however, to dismiss this cause of action, and the motions judge did not err in finding that the pleading was sufficient in this respect.

(3) Did the judge err in finding that a free-standing tort in publicity given to private life exists in Canada?

[52] Canadian courts have been generally reluctant to recognize a separate common law right to privacy giving rise to actionable torts: A.M. Linden and B. Feldthusen, *Canadian Tort Law*, 10th ed. (Toronto: LexisNexis Canada, 2015), at §2.78, p. 64. That being said, the Ontario Court of Appeal opened the door in *Tsige*, recognizing the existence of a right of action for intrusion upon seclusion. In coming to that conclusion, the Court relied in part on American tort law, which recognizes four torts related to privacy. Besides intrusion upon seclusion, the American jurisprudence appears to recognize three other torts relating to privacy, among which the tort of public disclosure of embarrassing private facts about the plaintiff: *Restatement of the Law, Second, Torts*, §652 (1977) [*Restatement*]. While the Ontario Court of Appeal ultimately focussed on intrusion upon seclusion and explicitly refrained from broader pronouncements, some of its reasoning would appear to apply equally to other privacy-related wrongs. Its concluding paragraphs relating to the recognition of a tort of intrusion upon seclusion were particularly expansive:

> [66] The case law, while certainly far from conclusive, supports the existence of such a cause of action. Privacy has long been recognized as an important underlying and animating value of various traditional causes of action to protect personal and territorial privacy. *Charter* jurisprudence recognizes privacy as a fundamental value in our law and specifically identifies, as worthy of protection, a right to informational privacy that is distinct from personal and territorial privacy.

> The right to informational privacy closely tracks the same interest that would be protected by a cause of action for intrusion upon seclusion. Many legal scholars and writers who have considered the issue support recognition of a right of action for breach of privacy: […]
>
> […]
>
> [68] It is within the capacity of the common law to evolve to respond to the problem posed by the routine collection and aggregation of highly personal information that is readily accessible in electronic form. Technological change poses a novel threat to a right of privacy that has been protected for hundreds of years by the common law under various guises and that, since 1982 and the *Charter*, has been recognized as a right that is integral to our social and political order.

[53] Bearing in mind that the novelty of a cause of action should not prevent the respondents from proceeding with their case, and that the Court should give a generous reading to the Statement of Claim, I am inclined to agree with the motions judge that it should not be dismissed for that reason: see *Attis v. Canada (Health)*, 2008 ONCA 660, at para. 23, 300 D.L.R. (4th) 415; *Hunt* at pp. 979-980. That being said, I am of the view that this cause of action should nevertheless have been rejected because it is not supported by any material facts.

[54] According to the American *Restatement*, the tort of publicity given to private life requires the following elements:

> § 652D Publicity Given to Private Life
>
> One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that
>
> a) would be highly offensive to a reasonable person, and
>
> b) is not of legitimate concern to the public.

[55] According to the same treatise published by the American Law Institute, the concept of "publicity" means that "the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge" (*Restatement*, at §652D). It goes on to add that communicating a fact concerning a plaintiff's private life to a single person or even to a small group of persons is not an invasion of the right of privacy.

[56] In the case at bar, there is nothing on the facts as pleaded that might satisfy such criteria. The only material facts pleaded to support the disclosure of the plaintiffs' personal information is to Canada Post, whose employees have confidentiality obligations, and to other persons who would have no obligation of confidentiality including family members, spouses, roommates, persons who sort mail in multi-resident facilities, and persons to whom the mail was misdirected. I agree with the appellant that this is far from sufficient to establish that the private information was communicated to the public at large. The examples provided in the treatise as to what would be sufficient to give publicity within the meaning of the term as it is used in this type of tort - a publication in a newspaper or a magazine, or in a handbill distributed to a large number of persons, or any broadcast over the radio, or statement made in an address to a large audience - suffice to understand that the publicity required would have to be of a much broader scale than what took place here. Accordingly, the motions judge erred in failing to turn his mind to this requirement and to the absence of sufficient material facts to support this claim.

(4) Did the judge err in finding that the test for intrusion upon seclusion was met on the facts as pleaded?

[57] The essential elements for the tort of intrusion upon seclusion were described as follows in *Tsige*, at para. 71:

> The key features of this cause of action are, first, that the defendant's conduct must be intentional, within which I would include reckless; second, that the defendant must have invaded, without lawful justification, the plaintiff's private affairs or concerns; and third, that a reasonable person would regard the invasion as highly offensive causing distress, humiliation or anguish. However, proof of harm to a recognized economic interest is not an element of the cause of action. I return below to the question of damages, but state here that I believe it important to emphasize that given the intangible nature of the interest protected, damages for intrusion upon seclusion will ordinarily be measured by a modest conventional sum.

[58] I agree with the appellant that in the case at bar, the respondents have not pleaded any material facts in support of the necessary elements of the claim. At best, the material facts pleaded support the notion that an isolated administrative error was made. This is a far cry from the situation in *Tsige*, where a bank employee accessed private financial information of the plaintiff at least 174 times over a four-year period in order to maintain surveillance over her former spouse and his new partner; moreover, Ms. Tsige was aware that her actions were wrong. Here, there are no material facts pleaded to support an allegation of bad faith or recklessness.

[59] Accordingly, it is plain and obvious that this cause of action could not possibly succeed. The motions judge erred in failing to dismiss this cause of action.

[60] As a result, I find that the only cause of action disclosed by the Third Amended Statement of Claim is negligence and breach of confidence.

D. *Did the judge err in determining that a class action is the preferable procedure?*

[61] As previously mentioned, the respondents must show some basis in fact that a class proceeding would be the preferable procedure for resolving the common issues. Rule 334.16(2) of the Rules sets out the factors which must be considered in determining whether a class proceeding is the preferable procedure:

(2) All relevant matters shall be considered in a determination of whether a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact, including whether	(2) Pour décider si le recours collectif est le meilleur moyen de régler les points de droit ou de fait communs de façon juste et efficace, tous les facteurs pertinents sont pris en compte, notamment les suivants :
(a) the questions of law or fact common to the class members predominate over any questions affecting only individual members;	a) la prédominance des points de droit ou de fait communs sur ceux qui ne concernent que certains membres;
b) a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate proceedings;	b) la proportion de membres du groupe qui ont un intérêt légitime à poursuivre des instances séparées;
(c) the class proceeding would involve claims that are or have been the subject of any other proceeding;	c) le fait que le recours collectif porte ou non sur des réclamations qui ont fait ou qui font l'objet d'autres instances;
(d) other means of resolving the claims are less practical or less efficient; and	d) l'aspect pratique ou l'efficacité moindres des autres moyens de régler les réclamations;
(e) the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.	e) les difficultés accrues engendrées par la gestion du recours collectif par rapport à celles associées à la gestion d'autres mesures de redressement.

[62] Counsel for the appellant submits that in the case at bar, the questions of law or fact common to the class members do not predominate over any questions affecting only individual members. It is no doubt true that there are significant individual issues and factual determinations, relating more particularly to causation and damages, that will remain once the common issues have been decided. That being said, it is an oversimplification to assert, as the appellant does, that the only true commonality among the class members is that they all received a letter from Health Canada by Canada Post in an envelope containing the return address for the Program.

[63] The respondents have advanced a number of common issues, many of which are of no relevance as a result of having dismissed most causes of action. However, there are some common questions relating to negligence and breach of confidence, including whether Health Canada owed the class members a duty of care in its collection, use, retention and disclosure of their personal information, whether Health Canada breached that duty of care when it sent the envelope, and whether Health Canada breached the confidence of the class members in its collection, use, retention and disclosure of their personal information. The resolution of those questions, as found by the motions judge, will move the litigation forward. Even if individual issues predominate over common issues, Rule 334.16(1)(c) expressly states that this does not preclude certification.

[64] The motions judge acknowledged the Crown's concerns on this score, and found that any concern related to having to resolve a number of issues individually would be multiplied if there were no common resolution of certain questions (motions judge's reasons, at paras. 54, 57).

Moreover, this is only one of the criteria to be applied. As required by the jurisprudence and the Rules, the motions judge considered the objectives of class action - judicial economy, access to justice and behaviour modification - and emphasized that individuals may be discouraged from defending their rights precisely when damages may be nominal or modest.

[65] It may be, as argued by the Crown, that the concern about thousands of individual claims is exaggerated since it is unlikely, given the nominal amount of damages per claimant at issue, that this would ever happen. This argument, however, disregards the access to justice objective. It is indeed precisely when individual damage awards may be low that a class action becomes the preferable, and sometimes the only mechanism that truly ensures access to justice. For that reason, the motions judge could find that there was some basis in fact for finding that a class action was preferable to individual claims, particularly from an access to justice standpoint. Otherwise, only those claimants who have actually lost their employment could potentially have the incentive to bring an action for negligence.

[66] Finally, the appellant argued that Parliament has created with the *Privacy Act*, a comprehensive regulatory regime for the protection of personal information under the control of a government institution. Sections 4 to 8 of that Act set out a code of fair information practices, which regulates the collection, retention, use, disclosure and disposal of personal information by government institutions, and the Privacy Commissioner has been given broad powers to investigate complaints including the power to compel evidence on oath, enter any government premises and examine or obtain copies of records. According to the appellant, Parliament could

have chosen to create a regime that contemplates awarding damages, but it chose not to and this choice should be respected in evaluating the preferable procedure.

[67] The short answer to that argument is that the Privacy Commissioner only has a recommendatory function and cannot award damages (*Privacy Act*, section 35). A report concluding that the government institution has contravened the *Privacy Act* will no doubt have some impact and may provoke some behavioural modification, but this will be of little comfort for those who may have lost their job when their employer found out that they have a medical condition that they treat with marihuana, or for those who may have felt compelled to leave the community they grew up in because everyone now knows and criticizes their decision to treat their illness by consuming and producing marihuana. If a class action can address some of these harms, then it may be a preferable procedure.

[68] I note that a similar argument was made before the Federal Court in *Condon* (2014 FC 250, [2014] F.C.J. No. 297) and was flatly rejected as being "woefully inadequate" because the alternative procedures found in the *Privacy Act* and a variety of other government policies, directives and guidelines do not allow for an award of damages. An appeal of that decision was granted, but only with respect to the erroneous dismissal of a ground of action.

[69] I also note that in *Fischer*, the Supreme Court found that a class action was preferable compared to an investigation by the Ontario Securities Commission because certain claimants could not participate in that process. The Court also found that it was unclear on what basis the Commission had calculated their award of damages, such that there was some basis in fact for

the proposition that a court action would provide a better remedy to the claimants. If the suggestion that an alternative remedy might produce a significantly smaller award in damages (admittedly with some participation right concerns) was a sufficient basis to certify a class proceeding, the motions judge clearly did not err in finding that a class action was preferable to complaints under the *Privacy Act* where damages could not be awarded at all.

[70] Considering the substantial deference that is owed to a motions judge with respect to the determination of the preferable procedure to resolve class members' claims, I find that there is no ground to intervene on that aspect of the decision. While the motions judge's reasons could have been more explicit and thorough, I have not been convinced that he made an error in principle in his assessment of this criterion.

E. *Did the judge err in awarding costs?*

[71] The Rules specifically address the issue of costs on a class action certification motion as follows:

334.39 (1) Subject to subsection (2), no costs may be awarded against any party to a motion for certification of a proceeding as a class proceeding, to a class proceeding or to an appeal arising from a class proceeding, unless	334.39 (1) Sous réserve du paragraphe (2), les dépens ne sont adjugés contre une partie à une requête en vue de faire autoriser l'instance comme recours collectif, à un recours collectif ou à un appel découlant d'un recours collectif, que dans les cas suivants :
(a) the conduct of the party unnecessarily lengthened the duration of the proceeding;	a) sa conduite a eu pour effet de prolonger inutilement la durée de l'instance;
(b) any step in the proceeding by the party was improper, vexatious or unnecessary or was taken through	b) une mesure prise par elle au cours de l'instance était inappropriée, vexatoire ou inutile ou a été effectuée

negligence, mistake or excessive caution; or	de manière négligente, par erreur ou avec trop de circonspection;
(c) exceptional circumstances make it unjust to deprive the successful party of costs.	c) des circonstances exceptionnelles font en sorte qu'il serait injuste d'en priver la partie qui a eu gain de cause.

[72] There was no evidence before the motions judge (nor before this Court) tending to establish that the Crown unnecessarily lengthened the proceedings or took any improper steps, and nothing to suggest that any exceptional circumstances justified an award of costs to the respondents. Moreover, the motions judge gave no reasons for this exceptional award of costs and the only plausible explanation for such an award appears to be that he failed to turn his mind to Rule 334.39.

[73] In my view, the motions judge made an error of law in awarding costs in this manner, without making any of the factual findings required to support an exceptional award of costs under Rule 334.39. I would therefore allow the appeal on this point and order no costs throughout.

The cross-appeal

[74] On cross-appeal, counsel for the respondents argued that the motions judge erred in requiring that at least one public class representative be identified. Requiring a plaintiff to be named, it is submitted, would only exacerbate the harm that this proceeding is intended to remedy. Alternatively, steps can be taken to preserve the anonymity of the respondents while ensuring that they are able to carry out their duties as representative plaintiffs.

[75] Rule 334.16(1)(e)(i) requires that representative plaintiffs be able to "fairly and adequately represent the interests of the class". Courts have said that representative plaintiffs have the responsibility to vigorously represent the interest of the class members, and that the interests of those class members should not be vulnerable to the deficiencies in the ability of the named plaintiff to represent them: see *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534, at para. 41; *Heron v. Guidant Corp.*, [2007] O.J. No 3823, at para. 10, 2007 CarswellOnt 9010. I agree with counsel for the appellant that the anonymity of class representatives is at odds with these responsibilities.

[76] It is important that putative class members be able to communicate directly, and not only through lawyers, but also with the representatives, because class actions engage broader interests than ordinary civil actions and serve public purposes going beyond the immediate interests of the parties: *Fairview Donut Inc. v. TDL Group Corp.*, 2010 ONSC 789, 100 O.R. (3d) 510, at para. 51. Class members cannot make an informed decision about the worth and suitability of their representatives if they do not have the ability to communicate with the representative plaintiffs. This may be crucial when the time comes to decide whether to opt out of the class action.

[77] In addition, there is no evidence in the case at bar that there is nobody willing to identify himself or herself publicly as a representative of the class. In fact, both before and after the alleged breach, several class members appeared in the media self-identifying as medical marihuana users and/or producers. In addition, other proposed class actions in connection with the alleged breach have been brought in the Federal Court and provincial superior courts by four separately named representative plaintiffs.

[78] As a result, the motions judge made no palpable and overriding error in ordering that there be at least one named plaintiff in addition to the anonymous ones. Furthermore, I note that his reasons are less definitive than his order, as he stated that "it is the Court's intention that, if feasible, at least one public class representative should be identified" (at para. 63; emphasis added). It would appear, therefore, that the possibility was left open to go back to the Court if ever the identification of a class representative proves to be impossible.

V. Conclusion

[79] As a result, I would allow the appeal in part. I would confirm the Order for certification, but only with respect to the cause of action of negligence and breach of confidence. I would dismiss all the other causes of action raised in the Third Amended Statement of Claim. I would dismiss the cross-appeal as well. I would award no costs in this appeal, and set aside the Order as to costs against the Crown made by the motions judge.

"Yves de Montigny"
J.A.

"I agree
C. Michael Ryer J.A."

"I agree
Richard Boivin J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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APPEARANCES:

Catharine Moore Paul Vickery	FOR THE APPELLANT
Ward Branch David Fraser Theodore Charney	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

William F. Pentney Deputy Attorney General of Canada	FOR THE APPELLANT
Branch MacMaster LLP Barristers and Solicitors Vancouver, British Columbia	FOR THE RESPONDENTS
Sutts, Strosberg LLP Barristers and Solicitors Windsor, Ontario	
McInnes Cooper Barristers and Solicitors Halifax, Nova Scotia	
Charney Lawyers Barristers and Solicitors Toronto, Ontario	