Federal Court  Cour fédérale

Date: 20200619

Docket: T-541-18

Citation: 2020 FC 714

Ottawa, Ontario, June 19, 2020

PRESENT: The Honourable Mr. Justice Southcott

CERTIFIED CLASS ACTION

BETWEEN:

EUGENE KELLY TIPPETT

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

ORDER AND REASONS

I. Overview

[1] This decision relates to a motion filed by the Plaintiff on January 17, 2020, seeking an order under Rule 233 of the *Federal Courts Rules*, SOR/98-106, requiring Her Majesty the Queen in Right of the Province of British Columbia [British Columbia], who is not a party to this class action, to produce documents the Plaintiff asserts are relevant to the issues herein. The

Defendant, Her Majesty the Queen (in Right of Canada), supports this motion in part. British Columbia opposes the motion in its entirety.

[2] This class action involves allegations of abuse suffered by participants in the so-called "DASH Program" operated at HMCS Quadra, British Columbia, in the 1980s. This program was intended to represent an alternative to incarceration for young persons. HMCS Quadra was a sea cadet training centre operated by the Canadian Armed Forces [Armed Forces] near Comox on Vancouver Island, British Columbia [Quadra].

[3] For the reasons explained in greater detail below, the Plaintiff's motion is granted in part. My Order will direct production by British Columbia of documents related to the creation, operation, and administration of the DASH Program operated at Quadra, including documents that relate to any youth who attended that program. However, in relation to documents that fall within the scope of the required production, but which are also subject to a statutory protection, a claim of privilege, or an interest in protecting personal information, British Columbia will be required to disclose a list of such documents, but not copies of the documents. This list should provide the parties with information as to the existence of such documents, and enough detail as to their nature, the nature of the information contained therein, and the reason a copy is not being produced, to allow the parties to consider and potentially pursue next steps towards their production. Such steps may include an application to a youth justice court judge for access to records under the *Youth Criminal Justice Act*, SC 2002, c 1 [YCJA].

II. **Background**

[4] On December 15, 1981, following a charge for break and entry and theft, the Juvenile Court sitting in Courtenay, British Columbia adjudged the Plaintiff to be a juvenile delinquent (in the parlance of the day), imposed a disposition of probation for twelve months, and required the Plaintiff to attend what is referred to in the Plaintiff's juvenile convictions record as the "DASH Programme".

[5] The Plaintiff's participation in this program entailed being sent to Quadra, along with certain other young persons, to work on building a replica tall ship to be used as a training vessel for the cadets. The intention was for the young persons to develop skills and contribute meaningfully to society as a result. The young persons were not themselves cadets.

[6] The Plaintiff's action alleges that one of the Armed Forces officers who supervised the DASH Program at Quadra abused him sexually, physically, and emotionally. On March 20, 2018, the Plaintiff filed a Statement of Claim, asserting an action on behalf of a proposed class of persons who suffered abuse in similar circumstances.

[7] On November 26, 2018, the Plaintiff filed a motion seeking certification of his action as a class action. On June 26, 2019, I issued an Order and Reasons, certifying the action, including defining the applicable class and identifying certain common issues [the Certification Order]. The class was defined as follows [the Class]:

> All persons who participated in the juvenile delinquent sentencing program "Developing Adolescence Strengthening Habits" operated

> at HMCS Quadra in British Columbia [the DASH Program] and suffered injury due to sexual abuse, assault, or harassment by Canadian Armed Forces members while participating in said juvenile delinquent sentencing program.

[8] At the hearing of the certification motion, the parties agreed that any order granting the motion and certifying this matter as a class proceeding should reserve on the specifics for providing notice to Class members, including the opt-out procedure. This matter is under case management, and the parties jointly proposed that details surrounding notice be developed through the case management process following the decision on certification. I agreed with this approach, and the Certification Order so provided.

[9] Through subsequent case management, the Defendant advised it had little documentation in its possession relevant to the DASH Program and none that identified participants who could potentially be members of the Class. The parties jointly took the position that the next step in the proceeding should be efforts to obtain such documentation from British Columbia, including a motion for that purpose under Rule 233 if necessary. The present motion ensued.

[10] Both the Plaintiff and the Defendant take the position that British Columbia should be in possession of relevant documentation, asserting the DASH Program was a joint initiative of the Armed Forces and the Province of British Columbia. In describing the DASH Program, the "Background" section of the Certification Order states that, in or before the early 1980s, the British Columbia Department of Youth and Child Development partnered with the Armed Forces to offer at Quadra a program called "Developing Adolescence Strengthening Habits", known as "DASH" (at para 4). That characterization of the DASH Program, as an undertaking in which

both British Columbia and the Armed Forces were involved, appeared to be common ground between the Plaintiff and the Defendant during the certification motion.

[11] However, in responding to the Rule 233 motion, British Columbia disputes this characterization. It notes the Plaintiff relies on the Province of British Columbia's Corrections Branch Annual Report for the period of January 1, 1979 to March 31, 1980 [the Corrections Report], which refers to British Columbia's role in a program referred to as the "DASH Program". British Columbia points out, *inter alia*, that the Corrections Report employed the acronym "DASH" for a program named "Developing Attitudes, Skills and Habits", not "Developing Adolescence Strengthening Habits" (the name of the program that forms the basis of the Plaintiff's action). British Columbia takes the position there is no connection on the facts between the "Developing Adolescence Strengthening Habits" program and the "Developing Attitudes, Skills and Habits" program, describing the former as a federally operated program and the latter as a provincially operated program. It asserts there is no basis for a conclusion that British Columba is in possession of documents relevant to the issues in this action.

[12] British Columbia also raised issues of this Court's jurisdiction to order production of certain documents within the scope of the Plaintiff's motion. British Columbia argues some of the records the Plaintiff is seeking would identify young persons whose identities are protected under the YCJA or predecessor legislation and that only a "youth justice court judge", not the Federal Court, can grant access to such records. The Defendant agrees with British Columbia's position on this issue.

[13] The Plaintiff acknowledges that a judge of this Court is not a youth justice court judge as contemplated by the YCJA. However, he argues that records relating to the formerly named "juvenile delinquents" or "young offenders" who participated in the DASH Program in the 1980s are not subject to the protections in the YCJA. Rather, the Plaintiff submits that earlier youth justice legislation (either the *Juvenile Delinquents Act*, RSC 1970, c J-3 [JDA] or its successor, the *Young Offenders Act*, RSC 1985, c Y-1 [YOA]) applies and that those statutes do not prevent disclosure of records to the same extent as the YCJA.

[14] The Defendant also takes the position that the Plaintiff's production request is overly broad, in that it is framed in terms that extend to programs beyond the DASH Program operated at Quadra. The Defendant does not adopt British Columbia's position that the Province had no role in the DASH Program. Rather, it relies on the Certification Order, which restricts the Class to participants in the DASH Program operated at Quadra and does not apply to other locations.

[15] Otherwise, the Defendant supports the Plaintiff's motion. Both the Plaintiff and the Defendant have provided the Court with draft Orders, reflecting their respective positions including how they propose to protect confidential information that may be produced pursuant thereto. As previously noted, British Columbia opposes the motion in its entirety.

III. **Issues**

[16] Having considered the various arguments advanced by the parties in support of their positions, and the parties' respective articulations of the issues, I conclude the arguments can be analyzed under the following broad issues identified by British Columbia:

A. Has the Plaintiff satisfied the threshold test for third party disclosure under Rule 233 by showing there are likely relevant documents in British Columbia's possession?

B. If so, should the Court exercise its discretion to order third-party disclosure?

IV. **Analysis**

A. ***Has the Plaintiff satisfied the threshold test for third-party disclosure under Rule 233 by showing there are likely relevant documents in British Columbia's possession?***

[17] This motion is governed by Rule 233(1), which provides as follows:

Federal Courts Rules, **SOR/98-106**	***Règles des Cours fédérales,*** **DORS/98-106**
Production from non-party with leave	**Production d'un document en la possession d'un tiers**
233 (1) On motion, the Court may order the production of any document that is in the possession of a person who is not a party to the action, if the document is relevant and its production could be compelled at trial.	**233 (1)** La Cour peut, sur requête, ordonner qu'un document en la possession d'une personne qui n'est pas une partie à l'action soit produit s'il est pertinent et si sa production pourrait être exigée lors de l'instruction.

[18] In *Hospira Healthcare Corporation v Kennedy Institute of Rheumatology*, 2018 FC 992 [*Hospira*], affirmed 2019 FCA 188 [*Hospira FCA*], case law relied upon by both the Plaintiff and British Columbia, I described as follows the analysis contemplated by a Rule 233 motion (at para 13):

> [13] I disagree with Janssen's position that the Court's analysis under Rule 233(1) should be narrowly confined to the requirements expressly prescribed by the Rule. As argued by Innomar, the language of Rule 233(1) is permissive, stating that the Court "may" order production if the express requirements are met. I agree with Innomar's submission that the Rule contemplates a discretion on the part of the Court, available to be exercised if the express requirements are met, but that the factors to be considered in the exercise of that discretion may extend beyond the express requirements of the Rule. […]

[19] The first issue identified by British Columbia relates to the express requirements of Rule 233, i.e. that the moving party establishes the existence of documentation in the possession of a non-party, which documentation is relevant to the action and could be compelled at trial. British Columbia takes the position the Plaintiff has not satisfied this test, because its request for production is framed too broadly and it is unclear how many, if any, of the documents requested are relevant to this action.

[20] The Plaintiff's motion seeks production of the following:

> All documents (including records, reports, correspondence, memoranda, photographs, films, sound recordings, or any other record of a permanent or semi-permanent character whether recorded on paper or stored by means of any device or other medium) in the control of Her Majesty the Queen in right of the Province of British Columbia relating to or arising from the "Developing Adolescence, Skills, and Habits" program, also known as the "DASH" program, any programs involving juvenile defenders to which the "DASH" program, its facilities or personnel were adjunct or, any other program operated by British Columbia or to which British Columbia referred or diverted juvenile defenders, which provided alternative, community-based sentencing options for juvenile defenders, including but not limited to the DASH Program operated at HMCS Quadra between approximately 1979 and 1987.

[21] While the Defendant largely supports the Plaintiff's motion, it proposes a narrower scope of production:

> [A]ny document that relates to the creation, operation, and administration of the DASH Program at HMCS Quadra, British Columbia, (Program) including documents that relate to any youth that attended the Program.

[22] As British Columbia observes, to be relevant, a requested document must relate to the issues between the parties, be useful, and be likely to contribute to resolving the issues (see *Imperial Oil v Jacques*, 2014 SCC 66 [*Imperial Oil*] at para 30). British Columbia asserts that the Certification Order confines the claims in this action to torts committed by Armed Forces members at Quadra. It notes that Quadra is a naval base and argues that it was not involved in how Quadra was managed or in the conduct of Armed Forces members carrying out their duties.

[23] British Columbia notes the Plaintiff's reliance on the Corrections Report. However, it submits this evidence does not support a conclusion that there is any relationship between the "Developing Attitudes, Skills and Habits" program identified in that report and the "Developing Adolescence Strengthening Habits" program operated at Quadra. British Columbia points to the differences in the two names, the fact the Corrections Report refers to programs operated at other locations in the province, and the absence of any mention of the program operated at Quadra. It also submits the two programs have different descriptions and goals, one being a wilderness skills program, and the other a military program.

[24] Finally, British Columbia refers to the finding in the Certification Order of insufficient evidence to establish some basis in fact for the existence of youth sentencing programs,

operated by or in conjunction with the Armed Forces, other than the DASH Program operated at Quadra (at para 57). British Columbia submits that the Court has already considered whether the Corrections Report shows any connection between the "Developing Attitudes, Skills and Habits" program identified in that report and the Quadra program, and it argues the Plaintiff is attempting to disturb the Court's finding. British Columbia asserts that, in the absence of any such connection, there is no basis to conclude it holds documents likely to resolve issues between the parties.

[25] This submission misinterprets the Court's finding in the Certification Order. The Court did not conclude there was no connection between the provincially run programs identified in the Corrections Report and the DASH Program operated at Quadra. Rather, the conclusion was that there was no evidence of the Armed Forces' involvement in any youth sentencing program, other than the one at Quadra.

[26] I take British Columbia's point that the Corrections Report employed the acronym "DASH" for a name different from that of the program operated at Quadra. I do not recall this point being made during the hearing of the certification motion. It could be that two different programs existed, with no operational relationship between them, notwithstanding they employ the same acronym. The minimal evidence currently before the Court makes it impossible to reach a conclusion on this question. However, the combination of the Plaintiff's juvenile convictions record, which notes the Juvenile Court sitting in Courtenay, British Columbia placed him in the "DASH Programme", and the Plaintiff's evidence of his subsequent participation in the program operated at Quadra, demonstrates that the program operated at

> Quadra was intended to function as an alternative to traditional sentencing measures, like the DASH Program referenced in the Corrections Report. British Columbia's youth criminal justice system clearly had a role in the DASH Program at Quadra, and I would expect British Columbia to have records of participants in the program.

[27] As such, my view is that the evidence satisfies the threshold test under Rule 233, showing that there are documents in British Columbia's possession relevant to the DASH Program at Quadra. Whether those documents will support British Columbia's assertion, that the Quadra program was operationally distinct from the DASH Program operated by the Province, remains to be seen. However, it is partly for purposes of understanding the nature of the DASH Program at Quadra, including the Defendant's role, involvement, and participation in its design, operation, and administration, that the Plaintiff seeks production of the requested documents.

[28] Contrary to British Columbia's argument, the Certification Order does not confine the claims in this action to torts committed by Armed Forces members at Quadra. The Certification Order describes the nature of the claims made on behalf of the Class as asserting negligence, including systemic negligence, and breaches of the *Canadian Charter of Rights and Freedoms* by the Defendant. The Certification Order further identifies common issues, to be addressed in the class action, as including whether the Defendant owed a duty of care to the Class in the administration of the DASH Program at Quadra, the nature of any such duty, and whether the Defendant breached any such duty. While British Columbia is not the subject of the allegations in this action, documentation in its possession may inform an understanding and ultimately a resolution of these issues.

[29] I turn now to British Columbia's argument that the Plaintiff's request for production is framed too broadly. As previously noted, the Defendant supports this position and, on this point, I agree the scope of the Certification Order is relevant. The Certification Order restricts the Class to participants in the DASH Program operated at Quadra. It also certifies as a common issue the question whether the Defendant owed a duty of care to that Class, including a duty of care in the administration of the DASH Program operated at Quadra. In seeking production of documents related to programs other than that program, the request extends beyond the bounds of relevance to the issues in this action.

[30] I have also considered British Columbia's argument that the Plaintiff's request for all documents "relating to or arising from" the program is framed too broadly and would encompass irrelevant documents. British Columbia argues the Plaintiff should be required to articulate particular categories of documents that it is seeking. I accept the Plaintiff's response to this argument that he does not know, and cannot know, what specific documents or categories of documents may be in British Columbia's possession (see, e.g., *Supynuk Estate v Hagen*, 2015 SKQB 145 [*Supynuk*] at para 34). However, I do find the request as articulated by the Plaintiff to be unduly broad. I prefer the Defendant's proposed articulation, referring to any document "that relates to the creation, operation, and administration" of the DASH Program at Quadra. In my view, this language is well tailored to the Plaintiff's interest in understanding the role, involvement, and participation of the Defendant in the design, operation, and administration of the program.

[31] The Plaintiff also seeks information to assist it in identifying potential members of the Class. I have no difficulty concluding that documentation that achieves this objective is relevant to this action. While documentation of this sort raises concerns of privacy and statutory protection, I will consider these concerns under the next issue in this Analysis.

[32] In conclusion on this issue, I find there are relevant documents in British Columbia's possession, but the boundaries of documents relevant to the issues in this action should be defined by the scope of production articulated by the Defendant.

B. ***Should the Court exercise its discretion to order third party disclosure?***

[33] As previously noted, Rule 233 contemplates discretion on the part of the Court, available to be exercised if the express requirements of the Rule are met. The factors considered in the exercise of that discretion may extend beyond those express requirements. British Columbia identifies a number of factors for the Court's consideration in assessing whether or how to exercise its discretion to order production. With the benefit of some re-formulation, I will assess these factors.

(1) **The Non-Party's Involvement in the Matter Under Dispute**

[34] In the context of so-called *Norwich* orders (an order against a third party to a proceeding, compelling disclosure of information and documentation that assists in identifying a wrongdoer), the Supreme Court in *Rogers Communications Inc v Voltage Pictures LLC*, 2018 SCC 38 [*Rogers*] required the moving party to show, *inter alia*, that the person from whom discovery

was sought was in some way involved in the matter under dispute, not an innocent bystander (at para 18). As noted in *Hospira* at paragraph 20, I would not suggest that the Court should necessarily import the test for obtaining a *Norwich* order into all motions under Rule 233. However, as the Plaintiff engaged with British Columbia's submissions on this point, I will consider it as a factor.

[35] British Columbia argues it is an innocent bystander to this dispute between the parties. It repeats its submission there is no evidence that any provincial sentencing programs bear any connection to the program operated at Quadra. I have already considered this point, in assessing whether the Plaintiff has met the express requirements of Rule 233, and I concluded there is at least some connection, in that British Columbia's youth criminal justice system clearly had a role in the DASH Program at Quadra.

[36] As the Plaintiff submits, while British Columbia is not a party to this litigation, the evidence is that British Columbia referred the Plaintiff to the program at Quadra. To the extent this factor is relevant to the exercise of the Court's discretion, it favours ordering production.

(2) **Whether the Non-Party is the Only Source of Information**

[37] I accept that the availability of the requested documentation from a party to the litigation through the normal discovery process is a factor that would weigh against ordering production (see *Hospira FCA* at para 10).

[38] British Columbia notes the Plaintiff has brought this motion, with the support of the Defendant, without having completed the discovery process between the parties. The Defendant has attached to its written submissions a draft copy of Schedule 1 of its Affidavit of Documents, which it says lists the relevant documents in its possession, custody and control. It submits that this Schedule indicates the Defendant has limited documents in relation to the DASH Program at Quadra and that the documents the Defendant is able to produce do not overlap with the documents requested from British Columbia in this motion.

[39] Schedule 1 includes the Province of British Columbia Ministry of Attorney General Corrections Branch Annual Reports for two consecutive years, three reports resulting from inquiries or investigations, and three personnel files. I accept that, if Schedule 1 is to be taken at face value, it demonstrates the Defendant has identified little relevant documentation and that it is reasonable to turn to British Columbia to identify additional material, including documentation identifying potential Class members.

[40] However, British Columbia argues there is no evidence establishing whether, how, and to what extent the Defendant has searched for relevant documents. British Columbia submits the Court should make a common sense inference that the Defendant is best placed to provide whatever information exists about who attended the DASH Program at Quadra. It refers the Court to *Hospira*, where the moving party sought third party production before first party production had been completed (at para 28):

> [28] It is therefore significant that Janssen's motion was brought and heard before it had received initial documentary production from Hospira and before any examinations for discovery were performed. I appreciate that, as productions and discoveries

> between the parties proceed, disputes surrounding requests for further productions and their relevance may develop. However, the potential for such disputes is inherent in the litigation process. To the extent that such disputes develop, their parameters will presumably be identified through the parties' documentary productions and discoveries, and any unresolved disputes, including, potentially, third-party productions if required, can be addressed by the Court with the benefit of the increased definition of the outstanding issues that will then be available. It is also my view that the upcoming steps in the proceeding, including the deadlines associated with those steps, provide an appropriate framework to address any such issues in a timely manner.

[41] In *Hospira*, one of the parties to the litigation had a contractual relationship with the non-party and advised that, pursuant to that relationship, it would request from the non-party the information at issue and produce that information to the moving party. The non-party also accepted it was obliged to provide this information under the contract. I therefore concluded the Court should not exercise its discretion to order third-party production where there was presently no necessity for such an order, because of the availability of production between the parties. In my view, *Hospira* is distinguishable from the circumstances of the present case, where the Defendant has advised it does not possess documents beyond those listed in Schedule1, and it has no relevant information-sharing relationship with British Columbia.

[42] I appreciate that the Defendant has not filed affidavit evidence to establish the diligence with which it searched for relevant documents. Indeed, the draft Schedule 1 is attached to counsel's submissions, rather than to an affidavit. The Defendant could have filed a better record to establish the limits of the material in its possession. However, I accept the Plaintiff's submission that, given the role counsel plays in the process of identifying documentation for production, it is reasonable to rely to some extent on counsel's representations. I would be

reluctant to conclude that affidavit evidence establishing the details of a party's searches for documentation is a pre-requisite to a Rule 233 order.

[43] In reaching this conclusion in this particular case, I note British Columbia's counsel also made representations to the Court in the course of her oral submissions, to the effect that British Columbia has searched for relevant documents, thus far to no avail. As with the Defendant, no evidence was filed in support of this submission. However, the Plaintiff's counsel encourages the Court to take both sets of submissions at face value, and I am prepared to do so.

[44] There is presently no basis to conclude the documentation sought from British Columbia is available from another source. I appreciate that, based on the representations from counsel, British Columbia may, like the Defendant, meet with limited success in locating relevant documents. However, I understood its counsel's submissions to be that searches had been pursued, not that they had been completed. On balance, I consider this factor to favour issuance of a production order.

(3) **Whether the Request For Disclosure is Objectively Described**

[45] British Columbia submits that whether the moving party seeks specific documents, as opposed to broad classes of documents, should be considered in the exercise of the Court's discretion. It relies on *Rovi Guides, Inc v Videotron GP*, 2019 FCA 321 at paragraph 17:

> [17] The Federal Court correctly recognized that, even if the requirements of Rule 233 or 238 had been met, it maintained discretion to dismiss the appellants' motion based on considerations not identified in these rules (see *Janssen* at para. 10). The Federal Court considered several factors in consideration

> of the exercise of its discretion. It noted that Rule 233 contemplates requests for specific documents, in apparent distinction from the appellants' request for broad classes of documents. Noting that some aspects of the appellants' motion were speculative, and the appellants' acknowledgement that they could not even be sure that the alleged infringement had taken place without the requested information, the Federal Court was apparently concerned that the appellants' motion was insufficiently targeted. It was entitled to be so concerned.

[46] I agree the scope of production sought is a relevant factor and that it operates against the Plaintiff in this case, as his request is a broad one. However, I have previously considered this point and accepted the Plaintiff does not know, and cannot know, what specific documents or categories of documents may be in British Columbia's possession. In the circumstances of this case, I afford little weight to this factor in militating against issuance of a production order. However, as explained in consideration of the next factor, the absence of any detail surrounding the documents sought figures significantly in my analysis of the privacy interests at stake and the form of production order that may therefore be appropriate.

(4) Whether the Public Interests in Disclosure Outweigh Privacy Concerns

[47] *Rogers* also identifies as relevant the question whether the public interests in favour of disclosure outweigh legitimate privacy interests (at para 18). In my view, this factor is significant in the present analysis, as the Plaintiff's wish to identify potential members of the Class engages two very significant but competing interests. Favouring the Plaintiff is the interest in the expeditious advancement of class action litigation, including providing effective notice of the action to the Class and affording them the opportunity to opt out of the class action (see, e.g., *Canada Post Corp v Lepine*, 2009 SCC 16 at para 42). On the other hand, the Plaintiff seeks

disclosure of potentially very sensitive personal information, surrounding youth criminality and alleged abuse, which attracts a significant privacy interest. The balancing of these interests is a fact-specific inquiry, which may favour either non-disclosure or disclosure in whole or in part, on the particular facts of a given case (see *Supynuk* at paras 28-29).

[48] In the present case, the Plaintiff's request implicates not only privacy and confidentiality interests, which may be engaged whenever a request is made for disclosure of personal information, but also statutory protections related to youth criminal records and potentially child protection proceedings. British Columbia argues that, in seeking records to identify Class members, the Plaintiff is seeking records that would identify young people whose identities are protected by the JDA, YOA, and/or YCJA. In relation to child protection services, British Columbia also submits that the *Family and Child Service Act*, SBC 1980, c11 [*Child Service Act*] may restrict disclosure of the information. Finally, it raises concerns that the Plaintiff's production request affords no protection for any documentation that may be protected by solicitor-client privilege or some other privilege recognized by law.

[49] For reasons explained below, it is not necessary for me to review in detail the protections afforded by the current youth criminal justice legislation, the YCJA, and its predecessor legislation, the JDA and YOA. In general terms, the YCJA places restrictions on the publication of the name of a young person, or any other information related to a young person, if it would identify the young person as having been dealt with under the YCJA (s 110). More significant for the present case, the YCJA also contains provisions governing records that may be kept for purposes of the Act and restricting access to such records (ss 114-129). Under certain

circumstances, after an initial “access period” has elapsed, access to such records can be granted by a “youth justice court judge”, i.e. a designated judge of a designated court, as decided by each province for purposes of the YCJA. It is common ground among the parties to this motion that the Federal Court is not a youth justice court.

[50] British Columbia therefore submits, and I agree, that this Court does not have the jurisdiction to make an order for production of records protected under the YCJA. The Defendant argues this lack of jurisdiction does not prevent this Court from ordering production of documents, even if relating to youth criminality, that fall outside the statutory protections, such as documents that do not identify a particular young person as a young person dealt with under the YCJA. The Plaintiff argues the protections in the YCJA have no application to the documents sought in the present case, as such documents are historical records governed by predecessor legislation (either the JDA or the YOA). The Plaintiff takes the position that the protections afforded by the predecessor legislation are less robust than those of the YCJA and that they do not apply to records related to a referral to a program such as the DASH Program.

[51] I accept as logical the Defendant’s submission that, if a particular document is not protected by the YCJA, then, subject to other relevant statutory protections, it falls within this Court’s jurisdiction to order it produced. I am less convinced by the Plaintiff’s arguments, particularly given that s 163 of the YCJA states that ss 114-129 of that Act apply in respect of records relating to the offence of delinquency under the JDA and in respect of records kept under ss 40-43 of the YOA. However, I decline to rule on these arguments. In my view, the

Court should not engage in this exercise in statutory interpretation in a factual vacuum, without any evidence as to the particular records being considered.

[52] Indeed, the same concern arises in relation to documents that may be the subject of statutory protections over which this Court does have jurisdiction. It may be that the *Child Service Act* and its successor legislation, the *Child, Family and Community Services Act*, RSBC 1996, c 46 [*Community Services Act*], while imposing protection upon records created under British Columbia's child protection system, empower any court in Canada to order disclosure of such records. However, again I decline to rule on this point in the abstract. There may be documents in existence, relevant to this action and protected under that legislation which, after resolving any jurisdictional concerns and considering the competing interests, this Court would consider appropriate to order disclosed with the benefit of confidentiality protections that could be incorporated into a production order. However, without any evidence as to the particular record in question, the factual vacuum precludes any meaningful assessment of the applicable privacy interest and therefore the necessary consideration of the competing interests.

[53] Against that backdrop, I note the Defendant proposed a form of production order, which, with some modifications, has the potential to advance this litigation, while still protecting privacy interests that cannot yet be properly assessed. In relation to documents that fall within the scope of the required production, but which are subject to statutory protections under the YCJA, the Defendant proposes British Columbia disclose a list of such documents (but not copies of the documents) in a manner that does not offend the statutory protections. This list could provide the parties with information as to the existence of the documents and enough detail

surrounding them to allow the parties to consider and potentially pursue next steps towards their production. With the benefit of that information, the parties could pursue an application to a youth justice court judge in relation to documents they consider both relevant and necessary.

[54] In my view, this same approach should apply to documents subject to other statutory protections, such as the *Child Service Act* or the *Community Services Act*, or that otherwise contain personal information or information subject to a claim of privilege. Producing a list of such documents, with sufficient detail to allow the parties to understand the nature of the document and the information contained therein, as well as the reason a copy is not being produced, including identifying expressly the particular reason (i.e. a particular statutory protection, a claim of a particular privilege, or an interest in protecting personal information) will better equip the parties to consider and pursue further production. Similarly, the court that hears a production application with the benefit of that information will be better equipped to balance the competing interests and rule on such application.

[55] It appears to me that the information the Plaintiff seeks, in order to identify Class members, is most likely to be found in records that require an application to a youth justice court judge. In the event of such an application, to avoid multiple proceedings, the parties may wish to consider consolidating that application with a request for relief in connection with any child protection records over which that judge has jurisdiction. If, with the benefit of the list contemplated above, the parties remain interested in compelling production of documents over which the Federal Court has jurisdiction, they may also present a further motion to this Court.

[56] In the context of any such production motion to this Court, a confidentiality order will likely be required in this proceeding to limit access to and use of documents that engage the various categories of privacy interests canvassed in these Reasons. I note the Defendant's proposed form of production order would require the Plaintiff and Defendant to negotiate a confidentiality agreement. In my view, given that third-party privacy interests are involved, a confidentiality order is the better mechanism. However, I agree that the parties (in consultation with British Columbia) should pursue negotiation of a mutually agreed form of confidentiality order for the Court's consideration. My Order will so direct. The Court may be able to facilitate such negotiation through the case management process.

(5) Whether the Non-Party Will Be Reasonably Compensated for the Expenses of Complying with a Production Order

[57] British Columbia argues it should be reasonably compensated for its expenses arising out of compliance with any production order, in addition to its legal costs (see *Rogers* at para 18). The Plaintiff proposes that any expenses incurred by British Columbia in complying with the Order be borne either by British Columbia or by the Defendant. The Defendant takes the positon that British Columbia should bear such expenses.

[58] The Plaintiff accepts that ordinarily, when non-party production is sought, the non-party will be entitled to reimbursement of its expenses and legal costs (see *BMG Canada Inc v John Doe*, 2004 FC 488 at para 32, aff'd 2005 FCA 193 at para 35) . However, the Plaintiff advances several arguments in support of his position that British Columbia should bear its own expenses. He submits that, as a government entity, it is routine for British Columbia to respond to requests

for government documents. He argues British Columbia would not incur any incremental cost, as presumably the work would be performed by salaried employees. The Plaintiff also submits that the Sixties Scoop class action represents a precedent in which British Columbia voluntarily and without charge co-operated with Canada to search for documents in connection with the settlement of that litigation.

[59] Similarly, the Defendant argues it is common for governments to act co-operatively and bear their own costs in searching for documents in litigation like the present class action, to assist class members in addressing their claims.

[60] I accept that, in the context of class action litigation involving allegations of historical abuse, a government might be expected to voluntarily absorb the expenses it incurs in identifying relevant evidence. However, British Columbia has declined to do so, and the parties have not identified precedents supporting their position that the Court should impose on a non-party an obligation to search for and produce documents without compensation for its expenses. In *Imperial Oil*, a case upholding a production order binding a non-party government entity in the context of class action litigation, the Supreme Court considered whether the order imposed an undue financial and administrative burden on the non-party (at paras 85, 87).

[61] As British Columbia's counsel notes, the only evidence offered by the Plaintiff about the role of British Columbia in searching for documents in the Sixties Scoop litigation is the affidavit of a legal assistant in the employ of the Plaintiff's counsel. She deposes that she is informed by the Plaintiff's counsel that the provinces co-operated in providing Social Services

documents. However, this evidence does not speak to who bore the expenses of such cooperation.

[62] Nor can it necessarily be presumed that British Columbia will not incur incremental expenses in connection with complying with a production order. Its counsel represents that searches to date have been unfruitful and raises concern that, given the historical nature of the documents requested, it may be necessary to retain an archivist for this process. There is insufficient evidence for the Court to be satisfied as to whether expenses may be incurred and, if so, at what level.

[63] On the other hand, I am sympathetic to the Plaintiff's argument that obliging a representative plaintiff, in a class action raising allegations of historical institutional abuse, to bear a third-party government's costs of identifying relevant documents, could impose a chill on the willingness of claimants to undertake this sort of proceeding. In my view, this argument lends merit to the Plaintiff's alternative position on the expenses of British Columbia's production, i.e. that they should be borne by the Defendant.

[64] The Defendant has the financial capacity to bear these expenses. More significantly, while the Plaintiff filed the within motion, the Defendant supports the motion, and the motion can be fairly characterized as a joint initiative to obtain historical "government" documentation related to the DASH Program. It is therefore not untoward that the Defendant bear the expense of assembling documentation related to a government program in which it was involved that, in the

context of that particular program, happens to be in the possession of another level of government.

[65] In reaching this conclusion, I am conscious that, subject to certain exceptions that are not presently applicable, Rule 334.39 provides that no costs may be awarded against a party to a class proceeding. I do not interpret this prohibition as applicable to the compensation of expenses incurred by a non-party in complying with a Rule 233 production order. However, it does apply in relation to the costs of this motion itself, for which there will be no award.

V. **Conclusion**

[66] Having considered the factors identified by British Columbia, my conclusion is that I should exercise my discretion to grant the Plaintiff's motion in part and order production by British Columbia on terms consistent with the above analysis, as set out in my Order below.

ORDER IN T-541-18

THIS COURT ORDERS that:

1. Subject to paragraph 2 of this Order, Her Majesty the Queen in Right of the Province of British Columbia [British Columbia] shall produce the following documents in its possession:

    a. Any document that relates to the creation, operation, and administration of the DASH Program operated at HMCS Quadra, British Columbia [the Program] including documents that relate to any youth who attended the Program;

    b. The definition of the term "document" employed in paragraph 1(a) of this Order includes but is not limited to: reports, correspondence, notes, memoranda, and photographs, whether recorded on paper or stored by means of any device or other mode or medium.

2. In relation to any document that is required to be produced under paragraph 1 of this Order but:

    a. which is subject to statutory protections under applicable federal or provincial legislation including, without limitation, the *Youth Criminal Justice Act*, SC 2002, c 1; the *Juvenile Delinquents Act*, RSC 1970, c J-3; the *Young Offenders Act*, RSC

1985, c Y-1; the *Child, Family and Community Services Act*, RSBC 1996, c 46; or the *Family and Child Service Act*, SBC 1980, c11;

b. which contains personal information; or

c. over which British Columbia asserts a claim of privilege;

British Columbia shall not be required to produce a copy of the document but shall instead create a list that discloses the existence of such document, details as to the nature of the document and the information contained therein, and the particular reason prescribed by this paragraph 2 that a copy is not being produced. British Columbia shall populate this list in a manner that does not breach the applicable statutory protection or privilege or disclose the applicable personal information.

3. Subject to any motion for an extension of such deadline, British Columbia shall comply with this Order within sixty (60) days of its date.

4. The Defendant shall reimburse British Columbia its reasonable expenses incurred in complying with this Order.

5. If, after receipt of the list produced under paragraph 2 of this Order, the parties remain interested in compelling production of documents from the list over

which the Federal Court has jurisdiction, they may present a further production motion to this Court.

6. If the parties present a further production motion to this Court the parties shall, in consultation with British Columbia, pursue negotiation of a mutually agreed form of confidentiality order, for the Court's consideration, to protect the confidentiality of any such documents that may be produced.

7. There is no order as to costs of this motion.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-541-18
STYLE OF CAUSE:	EUGENE KELLY TIPPETT v HER MAJESTY THE QUEEN
PLACE OF HEARING:	VIA VIDEOCONFERENCE
DATE OF HEARING:	JUNE 4, 2020
ORDER AND REASONS:	SOUTHCOTT J.
DATED:	JUNE 19, 2020

APPEARANCES:

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