Federal Court  Cour fédérale

Date: 20211220

Docket: T-982-20

Citation: 2021 FC 1449

Ottawa, Ontario, December 20, 2021

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

ANNE CAMPEAU

Plaintiffs

and

HER MAJESTY THE QUEEN

Defendant

ORDER AND REASONS

I. Overview

[1] This decision relates to a motion by the Defendant, seeking an order under s 50.1 or s 50(1) of the *Federal Courts Act*, RSC 1985, c F-7 [the Act], staying this proposed class proceeding on the basis that the Defendant intends to bring a claim for contribution and indemnity against a third party. The Federal Court would not have jurisdiction over the third

party claim, which the Defendant intends to bring in British Columbia under the provincial *Negligence Act*, RSBC 1996, c 333.

[2] The Defendant's motion is dismissed. As explained in more detail below, the motion for a mandatory stay under s 50.1 of the Act fails because, based on the Plaintiff's limitation of its claim to damages for only the Defendant's several liability, the Defendant's proposed third party claim has no possibility of success. The motion for a discretionary stay under s 50(1) also fails, as the interests of justice do not support staying this action based on the speculative possibility of related proceedings being commenced in the future in a provincial superior court.

II. **Background**

[3] The Plaintiff, Anne Campeau, is a Canadian taxpayer. On August 24, 2020, she (and other Plaintiffs who have since been removed from the style of cause) filed this proposed class action against the Defendant, Her Majesty the Queen. This action seeks damages and other relief arising from alleged data breaches and resulting unauthorized disclosure to a third party [the Data Breaches] of personal and financial information of a proposed class of Canadian taxpayers from their online accounts with the Government of Canada including the Canada Revenue Agency [CRA].

[4] This proceeding is under active case management, pursuant to which the parties have been taking steps leading to the hearing of a motion to certify this matter as a class action, currently scheduled for late January 2022.

[5] In or about early April 2021, the Plaintiff's law firm, Murphy Battista LLP [Murphy Battista], experienced a cybersecurity incident in which unauthorized parties were able to gain access to the firm's networks in what is commonly known as a ransomware attack [the Ransomware Attack]. The parties' counsel subsequently engaged in communications surrounding this incident and its implications for this proceeding.

[6] On October 8, 2021, the Defendant advised the Court and Murphy Battista that it intended to bring a motion to stay this action, because the Federal Court lacks the jurisdiction to hear a third party claim that the Defendant intended to pursue against Murphy Battista, seeking contribution and indemnity in relation to any liability the Defendant has to those member of the proposed class who may have had their information compromised in both the Data Breaches and the Ransomware Attack.

[7] The Defendant also informed the Court and Murphy Battista that it would be bringing a motion seeking to remove Murphy Battista as counsel due to an alleged conflict of interest resulting from these circumstances. However, on December 8, 2021, the Plaintiff filed a Notice of Change of Solicitor, replacing Murphy Battista as the Plaintiff's solicitors of record. As such, that motion became moot.

[8] The parties filed motion records in support of their respective positions on the Defendant's stay motion, including affidavit evidence, a transcript of the cross-examination of one of the Plaintiff's affiants, and written submissions, and the Defendant has filed written reply submissions.

[9] The Defendant's motions materials assert arguments under s 50.1 of the Act, seeking a mandatory stay based on the Court lacking jurisdiction over the intended third party claim. These materials also invoke s 50(1) of the Act, seeking in the alternative a discretionary stay on the basis that the interests of justice warrant this litigation proceeding in a provincial superior court, which would have jurisdiction over both claims against the Defendant and claims against Murphy Battista.

[10] The Plaintiff's motion materials rely principally on pleading amendments, made in the course of responding to this motion, which are intended to narrow the proposed class and the scope of its claim such that the Defendant would no longer have a basis to claim contribution and indemnity from Murphy Battista.

[11] First, the Plaintiff filed a Further Amended Statement of Claim dated October 19, 2021, which amended components of the requested relief sought to claim damages only for the Defendant's several liability.

[12] Second, the Plaintiff swore an affidavit on November 10, 2021, stating that, if the Defendant succeeds in it stay motion, she proposes amending the proposed class definition to exclude all persons who contacted Murphy Battista about this class action prior to June 24, 2021 (the date by which the security of Murphy Battista's networks is said to have been restored). The intended effect of this change would be to exclude from the class anyone with claims against the Defendant that could give rise to the Defendant having a third party claim against Murphy Battista resulting from the Ransomware Attack.

[13] Related to this second category of amendments, the Plaintiff's motion record also includes affidavits sworn by Murphy Battista's managing partner, Irina Kordic, one of which confirms the Plaintiff's instructions, if the Defendant is successful in its stay motion, to amend the proposed class definition to exclude anyone who contacted Murphy Battista prior to June 24, 2021. Ms. Kordic attaches a draft Third Amended Statement of Claim, which sets out this amendment. The Plaintiff's written submissions state that, while this amended pleading is not yet filed, the class definition reflected therein is the definition the Plaintiff intends to propose to the Court when seeking certification.

[14] Subsequently, in anticipation of a December 10, 2021 case management conference [CMC] held in advance of the hearing of this motion, the Plaintiff's new counsel wrote to the Court on December 9, 2021, attaching a draft Third Amended Statement of Claim, which would replace the Plaintiff, Anne Campeau, with a new Plaintiff named Todd Sweet, who would fall within the new proposed class definition. The Plaintiff's counsel requested case management orders permitting the filing of this amended pleading, substituting Mr. Todd for Ms. Campeau as the proposed representative Plaintiff, and permitting the filing of evidence by Mr. Todd and the Plaintiff's new counsel in support of, *inter alia*, the upcoming certification motion. The Defendant opposed this relief at the CMC, and those requests were deferred pending dialogue between counsel, a further CMC, and a hearing of a contested motion if necessary.

[15] The Defendant's stay motion was then argued orally on December 14, 2021.

III. **Issues**

[16] This motion raises the following two issues for the Court's determination:

A. Whether this action should be stayed pursuant to s 50.1 of the Act; and

B. Whether this action should be stayed pursuant to s 50(1) of the Act.

IV. **Analysis**

A. *Whether this action should be stayed pursuant to s 50.1 of the Act*

(1) General Principles

[17] Section 50.1 of the Act provides as follows:

Stay of proceedings	**Suspension des procédures**
50.1 (1) The Federal Court shall, on application of the Attorney General of Canada, stay proceedings in any cause or matter in respect of a claim against the Crown where the Crown desires to institute a counter-claim or third-party proceedings in respect of which the Federal Court lacks jurisdiction.	**50.1 (1)** Sur requête du procureur général du Canada, la Cour fédérale ordonne la suspension des procédures relatives à toute réclamation contre la Couronne à l'égard de laquelle cette dernière entend présenter une demande reconventionnelle ou procéder à une mise en cause pour lesquelles la Cour n'a pas compétence.

[18] Thus, s 50.1 provides for a mandatory stay of proceedings in the Federal Court where the Crown intends to institute third party proceedings that the Federal Court lacks the jurisdiction to adjudicate. As explained in *Stoney Band v Canada (Minister of Indian and Northern Affairs)*,

2006 FC 553, the purpose of s 50.1 is to prevent issues for determination in litigation against the federal Crown from being split between the Federal Court and provincial courts (at para 25).

[19] The parties both rely on *Dobbie v Canada (Attorney General)*, 2006 FC 552 [*Dobbie*] as authority for the test that the Defendant must meet to succeed in a motion for a stay under s 50.1. The Defendant must demonstrate both that: (a) it genuinely desires to institute a third party claim; and (b) the third party claim is outside the jurisdiction of the Federal Court (at para 8). In determining whether the first requirement is satisfied, the Court will consider (at para 11):

A. The evidence of the desire to commence a third party proceeding;

B. Whether the information provided about the proposed third party claim is clear or whether it is vague and unparticularized; and

C. Whether the third party claim has any possible likelihood of success.

[20] The Plaintiff accepts that the Defendant's proposed third party claim against Murphy Battista is outside the jurisdiction of the Federal Court. Therefore, only the first requirement of the *Dobbie* test is at issue in this motion. Indeed, under that first requirement, only the final consideration, whether the third party claim has any possible likelihood of success, is at issue between the parties. The Plaintiff argues that the proposed third party claim has no likelihood of success, based on: (a) the pleading amendment to limit the claim against the Defendant to damages for the Defendant's several liability; and (b) the proposed pleading amendment to narrow the proposed class to exclude persons who contacted Murphy Battista prior to June 24, 2021.

(2) Effect of Limiting Claim against Defendant to Defendant's Several Liability

[21] The Plaintiff submits that, in order for a third party claim for contribution and indemnity to succeed, there must be the possibility that the defendant could be found liable to pay a portion of the plaintiff's loss attributable to the fault of the third party.

[22] The Plaintiff relies on *Gottfriedson v Canada*, 2013 FC 1213 [*Gottfriedson*], in which Justice Harrington struck a third party claim for contribution and indemnity as demonstrating no viable cause of action, because the plaintiffs limited their claim against the defendant to its several liability (at paras 3-4). Justice Harrington relied (at paras 17-22) on the decision of the British Columbia Court of Appeal in *British Columbia Ferry Corp v T&N plc*, [1995] BCJ No 2216, 16 BCLR (3d) 115 [*BC Ferries*] and (at paras 23-26) on the reasoning of the Ontario Court of Appeal in *Taylor v Canada (Health)* 2009 ONCA 487 [*Taylor*].

[23] In *Taylor*, Justice Laskin explained that contribution rights arise only where a defendant is required to pay more than its proportionate share of a plaintiff's damages (at para 20). If the plaintiff has limited the claim against the defendant to only those damages attributable to the defendant's fault, the defendant can have no claim over against third parties for the damages claimed by the plaintiff (at para 22).

[24] In response to this argument, the Defendant asserts that the Plaintiff's amendment regarding several liability does not achieve what her counsel suggests it does. The Defendant submits that, although references to "several liability" have been inserted in the Plaintiff's prayer

for relief, the nature of the damages claimed is such that these damages cannot be attributable solely to the Data Breaches that form the basis for the claim against the Defendant.

[25] By way of example, the Defendant submits that claims for damages for time spent calling CRA following the Data Breach (which forms part of the Plaintiff's prayer for relief) would be severable from any claims against Murphy Battista resulting from the Ransomware Attack. However, the Defendant notes that the Plaintiff has not limited the claim to damages of this nature. Rather, the claim includes categories of damages (e.g., mental distress, identity theft, and increased risk of future identity theft) that may have been caused or contributed to by Murphy Battista's Ransomware Attack. The Defendant therefore argues that it cannot be said that there is no possibility that the Defendant could wrongly be found liable to pay for losses that are more properly attributable to Murphy Battista.

[26] In my view, the Defendant's argument is inconsistent with the principle described in the jurisprudence referenced above, which is not premised on a plaintiff restricting a claim for damages against a defendant to categories of damages that have been caused or contributed to solely by that defendant. Rather, in the case of a category of damages that have been caused or contributed to by both a defendant and a potential third party, if the plaintiff is claiming against the defendant only the proportion of those damages attributable to the defendant, the defendant can have no claim for contribution and indemnity against the third party.

[27] To illustrate this point, it is useful to refer to the hypothetical example, taken from a common type of multi-party tort litigation that was discussed at the hearing of this motion.

Consider a plaintiff motorist who has been in two motor vehicle accidents on separate occasions involving two separate defendants. The plaintiff may have claims for categories of damages that were caused by only one of the accidents, as well as claims for categories of damages that were caused or contributed to by both accidents. For instance, the plaintiff may have suffered a broken arm in the first accident, a broken leg in the second accident, and soft tissue injuries resulting from whiplash in both accidents.

[28] Clearly, this plaintiff can claim damages for the broken arm only against the defendant who caused the first accident and can claim damages for the broken leg only against the defendant who caused the second accident. This is analogous to the Plaintiff's claim for damages for time spent calling the CRA following the Data Breach, which the Defendant argues is the sort of damages to which the Plaintiff must restrict her claim if she wishes to preclude the Defendant from having any claim for contribution and indemnity against Murphy Battista.

[29] However, the plaintiff in the motor vehicle example may also be able to claim damages for the whiplash against both defendants, as a result of which the court adjudicating these claims may be required to apportion liability between the defendants. For instance, the court might conclude that the defendants are concurrent tortfeasors, jointly and severally liable for the plaintiff's soft tissue injuries, and apportion liability 50% to the first defendant and 50% to the second defendant. Then, the plaintiff can collect 100% of this liability from either defendant. If, for instance, the plaintiff collects the full 100% from the first defendant, that defendant will then have a claim for contribution and indemnity against the second defendant for 50% of the damages.

[30] However, if the plaintiff chooses to claim against only the first motorist and limits that claim to the defendant's several liability for the soft tissue injury (and 50% of the liability for that injury is apportioned to the defendant), then the defendant be obliged to pay only that 50% to the plaintiff and will have no basis to assert a third party claim for contribution and indemnity against the second motorist. As explained in *Taylor*, contribution rights arise only where a defendant is required to pay more than its proportionate share of a plaintiff's damages.

[31] When these principles were canvassed at the hearing of this motion, the Defendant's counsel raised concern that, without Murphy Battista as a third party to this action, both the Defendant and the Court would be without the evidence necessary to apportion liability for relevant categories of damages as between the Defendant and Murphy Battista. The Defendant also relies on evidence adduced in this motion which it submits demonstrates past efforts by Murphy Battista to thwart the Defendant's initiatives to obtain evidence related to the Ransomware Attack.

[32] The Plaintiff's counsel responded to this concern by noting that Rules 233 and 238 of the *Federal Courts Rules*, SOR/98-106 [the Rules] provide that, on motion, this Court may order the production of any document in the possession of a non-party and may order the examination for discovery of a non-party. While the Plaintiff disagrees with the Defendant's characterization of the evidence of Murphy Battista's responses to the Defendant's inquiries surrounding the Ransomware Attack, the Plaintiff's counsel also submits that Murphy Battista was then under no legal obligation to respond to those inquiries. He argues that the Court should not infer from any

past events in that context that the members of Murphy Battista, who are officers of the Court, would fail to cooperate with non-party production and discovery processes under the Rules.

[33] It is not necessary for the Court to delve into the evidence surrounding Murphy Battista's responses to the Defendant's past efforts to explore the Ransomware Attack. The Defendant has advanced no arguments as to why the processes to compel evidence from a non-party under the Rules would be ineffective in providing the Defendant or the Court with the evidentiary foundation necessary to apportion liability between the Defendant and Murphy Battista (for purposes of limiting any liability imposed on the Defendant in this proceeding to its several liability). In *Gottfriedson* at paragraph 27, Justice Harrington noted that the Court may apportion fault against a person who is a non-party to a proceeding and endorsed the statement in *Taylor* that undertaking such apportionment without adding parties will mean fewer parties at trial, a shorter trial, and reduced costs. Justice Harrington also noted the availability of Rules 233 and 238 to order non-party production of documents and examination for discovery (at para 30).

[34] I also note that, in responding to the Plaintiff's arguments surrounding the limitation of the claim to the Defendant's several liability, the Defendant attempts to distinguish the jurisprudence on which the Plaintiff relies (and on which Justice Harrington relied in *Gottfriedson*). In *BC Ferries*, the plaintiffs and third parties had entered into an agreement, whereby the plaintiffs agreed to waive their right to recover from the defendants any portion of the loss claimed which the court might attribute to the fault of the third parties (see paras 1 and 8). The Defendant submits that the dismissal of the claim for contribution and indemnity, which was upheld on appeal in *Taylor*, was based on this agreement because, as the defendants were

saved harmless from any damages caused or contributed to by the fault of a concurrent tortfeasor, the basis for any right to contribution or indemnity was eliminated.

[35] In response, the Plaintiff submits that the existence of an agreement between the plaintiffs and third parties in *BC Ferries*, in comparison to the pleading amendment made by the Plaintiff in the case at hand, is not a basis distinguish the case at hand from the reasoning in *BC Ferries* and the other jurisprudence. The Plaintiff argues that, regardless of the particular mechanism employed, if a plaintiff is not claiming from the defendant more than the defendant's apportioned share of liability, the defendant can have no claim for contribution and indemnity.

[36] Subject to one qualification, which I will explain momentarily, I agree with the Plaintiff's submission that the distinction raised by the Defendant between *BC Ferries* and the case at hand is not material to the analysis required in this motion. In *BC Ferries*, at paragraph 14, where the Court of Appeal refers to the defendants being saved harmless from any damages caused by another tortfeasor, it expressly describes this point as having been made by the judge below. In paragraph 13, the Court of Appeal recites portions of that judge's decision, including the following:

> …
>
> It is not the contract, itself which deprives the defendant of claiming against the third party, obviously the defendant is not a party to that contract but the fact that the plaintiff only seeks from the defendant that part of its loss which the defendant caused.

[37] Consistent with the Plaintiff's submission, I read the result in *BC Ferries* as flowing from the limited scope of the plaintiffs' claim against the defendants in that case, as opposed to the

fact that the plaintiffs had agreed with the third parties to limit the scope of their claim in that manner. I also note that, in *Taylor* (the other authority upon which *Gottfriedson* relied), the plaintiff's limitation of its claim against the defendant, so as to claim only the damages apportioned to the defendant in accordance with its relative degree of fault, was captured in an amendment to its pleading, not in an agreement with the relevant third parties.

[38] I would, however, qualify this analysis by noting what I do consider to be one potentially relevant distinction between the litigation dynamics in the present case and those found in *BC Ferries* or other cases (such as *Ontario New Home Warranty Program v Chevron Chemical Co*, [1999] OJ No 2245, 46 OR (3d) 130, referenced by the Defendant) where Pierringer-type settlement agreements are employed. As I read those cases, the plaintiffs made some form of commitment, extending beyond the particular proceeding in issue, not to claim from the defendants any more than their apportioned share of liability. In the case at hand, while the Plaintiff's claim in this Federal Court action is limited in that manner, I do not understand the Plaintiff to have committed not to assert a claim in a provincial superior court, pursuing the Defendant and/or Murphy Battista for any share of liability the Court may apportion to Murphy Battista.

[39] In my view, this distinction does not affect the analysis under s 50.1 of the Act. Indeed, as I read *Taylor*, the same litigation dynamics existed in that case is in the case at hand, as the plaintiff in *Taylor* limited the claim against the defendant through the pleading in that proceeding, without any indication apparent in the decision that the plaintiff had committed not to pursue other claims outside the scope of the proceeding. Moreover, in the case at hand, the

Defendant's proposed third party claim, both as reflected in its draft pleading accompanying its motion materials, and as is the nature of a claim for contribution and indemnity, does not extend beyond the scope of the claim asserted by the Plaintiff against the Defendant in this particular proceeding. Subject to my consideration below of the Defendant's remaining arguments under s 50.1, the proposed third party claim appears to have no possibility of success.

[40] However, the possibility that the Defendant could face a claim in a provincial superior court, either asserted by the Plaintiff directly or asserted by Murphy Battista against the Defendant as a third party, is potentially relevant to the Defendant's motion for a discretionary stay under s 50(1) of the Act. I will consider that point later in these Reasons.

[41] Finally, before leaving the analysis under s 50.1, I note the Defendant's argument that the Plaintiff's pleading amendments are ambiguous and therefore do not support a conclusion that there is no possibility that the Defendant will be found liable to pay for loss attributable to Murphy Battista. In support of this argument, the Defendant notes the reference in *Taylor* (at paras 9-10) to an earlier stage in that proceeding in which the judge below (Cullity J.) had dismissed a motion to strike the third party claim on the basis that an amendment to the plaintiff's pleading was ambiguous. *Taylor* describes that amendment as an effort by the plaintiff to prevent the defendant from asserting a third party claim by limiting the plaintiff's claim to the "several liability" of the defendant.

[42] As the Plaintiff notes, the decision by Cullity J. in the earlier motion is not available. Our understanding of reasoning in that motion is therefore limited to the description by the Court of

Appeal in *Taylor*, which states that, in the view of Cullity J., the plaintiff still seemed to be claiming that the defendant was liable for all the damages she had suffered, such that the defendant still had the right to seek contribution. Following some guidance from Cullity J., the plaintiff amended the pleading to expressly plead that her claim was limited to the damages that would be apportioned to the defendant in accordance with the relative degree of fault attributable to the defendant's negligence. Based on the amended pleading, Cullity J. then found that the defendant's third party claim was untenable, and the Court of Appeal agreed (at paras 11-12).

[43] I do not read *Taylor* as necessarily endorsing the conclusion by Cullity J. on the earlier motion that the amendment of the plaintiff's pleading to limit her claim to the "several liability" of the defendant was ambiguous and ineffective. The decision contains no analysis in support of that conclusion. Nor has the Defendant in the case at hand provided any such analysis. Indeed, in *Gottfriedson*, Justice Harrington employs the language of several liability in describing the plaintiff's pleading as limited to "… only seek redress against Canada severally…".

[44] I have no doubt that the intention of the Plaintiff in the case at hand could have been pleaded more elaborately, so as to expressly state, as did the plaintiff in *Taylor*, that her claim against the Defendant seeks only those damages that are attributable to the Defendant's proportionate degree of fault. However, I find no basis to conclude that the Plaintiff's more economical language, in restricting the relief sought in paragraphs 1(c) and (d) of her pleading to damages "… for the defendant's several liability …", is ambiguous or otherwise ineffective in achieving her intention. Moreover, the Plaintiff is clearly on the record in this motion in explaining that her intention is to seek only damages that are apportioned to the Defendant.

[45] That said, while the following point was not raised by the Defendant, I expressed concern at the hearing of the motion that paragraph 1(e) of the pleading, which asserts a claim for categories of special damages, is not limited by a similar reference to the Defendant's several liability. The Plaintiff's counsel responded that the categories of special damages claimed are by their nature attributable solely to the Defendant, such that no express limitation to the Defendant's several liability was required. In the alternative, the Plaintiff submitted that, if the Court remained concerned about this point, it was available to dismiss the motion under s 50.1, subject to a clarifying amendment to the pleading.

[46] I remain concerned about this point. I am not convinced that the claim asserted in paragraph 1(e) of the Plaintiff's pleading, and in particular the reference to costs incurred in preventing identity theft—including costs incurred for the purpose of credit monitoring and other out-of-pocket expenses—is not a claim that could potentially involve damages contributed to by both the Data Breaches and the Ransomware Attack. I understand the Plaintiff to be amenable to an amendment to clarify that the claim for special damages seeks only damages for the Defendant's several liability, described by the Plaintiff's counsel at the hearing as a matter of "belt and suspenders", as this is consistent with the Plaintiff's intention.

[47] I also note that, in *BC Ferries*, the Court of Appeal dismissed the appeal from the order striking out the third party claims, subject to the plaintiffs amending their pleadings to eliminate any doubt as to the limits of their claim and any uncertainty as to the obligation of the trial judge to determine what fault, if any, for the plaintiffs' loss was attributable to parties other than the defendants. In the case at hand, an amendment to the Plaintiff's claim for special damages,

comparable to those amendments already made to claim only several liability, will similarly serve those purposes. My Order below will reflect that point.

[48] Based on the above analysis, I conclude that the Defendant's proposed third party claim has no possibility of success and that this motion for a stay under s 50.1 of the Act must fail.

(3) Effect of Proposed Narrowing of Class

[49] Consistent with the Plaintiff's arguments at the hearing of this motion, the above s 50.1 analysis, related to the effect of the Plaintiff limiting her claims to the Defendant's several liability, is independent of the Plaintiff's proposed amendment to narrow the class definition to exclude persons who contacted Murphy Battista prior to June 24, 2021. Having concluded, based on that above analysis, that the s 50.1 motion must fail, I need not address in any detail the parties' respective arguments on the effect that narrowing the class definition would have on the proposed third party claim.

[50] However, I do wish to comment on the concern I raised at the hearing about the possibility of basing my decision on this motion on the Plaintiff's arguments surrounding the narrow class definition, when the class definition (if any) will not be determined until the certification motion. I note the Plaintiff's counsel's response that, while there may be reluctance to impose upon the Plaintiff a class that she has not agreed to represent in this proceeding, ultimately it falls to the Court to determine the class definition at the certification motion. I also accept the Defendant's counsel's explanation that he does not have the necessary instructions to

advise the Court, at the present juncture, as to what position the Defendant may be taking at the certification hearing on the class definition as presently proposed by the Plaintiff.

[51] All of this is to say that the outcome of the certification hearing, including the class definition, is presently speculative. The Plaintiff's counsel submits that the Court can only "play it where it lies", as there is currently no other proposed class definition on which to base the outcome of the stay motion. However, counsel also emphasizes that the Plaintiff's argument arising from the limitation of her claim to the Defendant's several liability is not dependent on the narrow class definition. Had the proposed narrow definition been the only basis for the Plaintiff to resist the Defendant's stay motion, the presently speculative nature of the eventual class definition may have been a significant hurdle for the Plaintiff to overcome in opposing this motion. However, as noted above, the s 50.1 motion must fail solely on the basis of the several liability argument. That outcome is not dependent on the specific class definition that may ultimately be proposed by the Plaintiff or determined by the Court on the certification motion.

B. *Whether this action should be stayed pursuant to s 50(1) of the Act*

(1) General Principles

[52] Section 50(1) of the Act provides as follows:

Stay of proceedings authorized	**Suspension d'instance**
50 (1) The Federal Court of Appeal or the Federal Court may, in its discretion, stay	**50 (1)** La Cour d'appel fédérale et la Cour fédérale ont le pouvoir discrétionnaire de

proceedings in any cause or matter	suspendre les procédures dans toute affaire :
(a) on the ground that the claim is being proceeded with in another court or jurisdiction; or	**a)** au motif que la demande est en instance devant un autre tribunal;
(b) where for any other reason it is in the interest of justice that the proceedings be stayed.	**b)** lorsque, pour quelque autre raison, l'intérêt de la justice l'exige.

[53] While the parties cite various authorities that have interpreted s 50(1) of the Act, they both rely on the recent decision in *Richards v Canada*, 2021 FC 231. There, Justice Norris succinctly explained that, under s 50(1), whether to stay a proceeding is a discretionary determination, and a stay should be granted only in the clearest of cases, with the Court being guided by whether in all circumstances the interests of justice support such a result (at para 9).

[54] Justice Norris also explained the distinction between ss 50(1)(a) and 50(1)(b). Section 50(1)(a) deals with a specific circumstance when it may not be in the interests of justice to allow a proceeding to continue—namely, when the claim is being pursued in another jurisdiction. Such a situation may be contrary to the interests of justice, for instance, because it may be unduly burdensome to a defendant to have to defend more than one action seeking the same relief, because of a risk of inconsistent factual or legal findings, or because of risk of double compensation for the claimant (at para 10).

[55] By comparison, s 50(1)(b) reflects the fact that the existence of parallel proceedings in different courts or jurisdictions is not the only circumstance in which it may not be in the

interests of justice to allow a proceeding to continue. For example, the temporary suspension of a proceeding pending some other event can be in the interests of justice because, in the long run, it will promote the best, most expeditious, and least expensive determination of the proceeding (at para 11).

(2) Applying these Principles

[56] Invoking first s 50(1)(a), the Defendant argues that this provision applies, because the Plaintiff has made clear that, if the Defendant prevails in this stay motion, an action will be filed in the British Columbia Supreme Court [the BC Court], asserting claims that are the same as or similar to those asserted in the present Federal Court action.

[57] The Defendant relies on two paragraphs in the Plaintiff's affidavit filed in her motion record. First, she explains that her counsel had drafted a Notice of Civil Claim to be filed in the BC Court [the BC Pleading], alleging that the Defendant's conduct in bringing the stay and conflict motions in the Federal Court constitutes an abuse of process. She also states that the BC Pleading has not been filed. Second, the Plaintiff states that, if she is forced to recommence her claim in a provincial court, evidence that has been obtained in the Federal Court proceeding (in the Defendant's affidavits and during the cross-examination of the Defendant's affiants) would be lost.

[58] The Defendant's motion record includes an affidavit sworn by Patricia Bradley, a paralegal with the Department of Justice, which attaches a copy of the draft BC Pleading. Ms. Bradley deposes that on October 11, 2021, their office was informed of Murphy Battista's

intention to bring a new class action in the BC Court and was provided with the draft BC Pleading. She does not provide any further context surrounding the receipt of this document. However, in one of the affidavits sworn by Murphy Battista's managing partner, Ms. Kordic, filed in the Plaintiff's motion record, she takes the position that the draft BC Pleading is not properly before the Court in this motion, because it was sent to the Defendant as part of a "without prejudice" settlement overture.

[59] At the hearing, neither party devoted any particular attention to the question whether the BC Pleading was properly before the Court. In particular, the Plaintiff's counsel advanced no arguments resisting the Court relying on this document. Regardless, a review of the BC Pleading reveals that it does not assist the Defendant's argument. It does not appear to be a pleading parallel to that filed in the Federal Court, intended to initiate a class action arising from the Data Breaches. Consistent with the Plaintiff's explanation in her affidavit, the BC Pleading reads as a proposed class action advancing allegations of abuse of process related to the Defendant's handling of the Federal Court action. The Defendant submits that two proceedings need not be exactly parallel in order for s 50(1)(a) to apply (see *Oujé-Bougoumou Cree Nation v Canada*, [1999] FCJ No 1827, 176 FTR 307 at para 12). However, the claims reflected in the draft BC Pleading are sufficiently different from those in the Federal Court action that this principle does not assist the Defendant.

[60] I accept the Defendant's assertion that the Plaintiff's affidavit also refers to recommencing her claim in a provincial court. However, as the Plaintiff submits, this is simply a reference to an intention to purse a claim in a provincial superior court if the Defendant's stay

motion is successful and she is therefore forced into another venue because the Federal Court is not available to her. I accept the Plaintiff's argument that this is not the sort of situation contemplated by s 50(1)(a).

[61] At the hearing, the parties disagreed on whether s 50(1)(a) applies only in a situation where the claim is presently being proceeded with in another court or jurisdiction. The Plaintiff submits that there is no jurisprudential support for invoking s 50(1)(a) in the absence of an existing competing proceeding. In support of their respective positions on this disagreement, both parties focused on the principles applicable to s 50(1) as identified in *Canada (Attorney General) v Cold Lake First Nations*, 2015 FC 1197 [*Cold Lake*] at para 14, including whether there is a risk of "imminent adjudication" in two different forums. I am inclined to the view that the language employed in *Cold Lake* supports the Plaintiff's position, as it would be rare for there to be a risk of imminent adjudication of a dispute in a forum where a proceeding has not yet been commenced. However, I need not arrive at a definitive conclusion this point, as little turns on it in the absence of any evidence that the Plaintiff has any intention to purse parallel proceedings in two different courts.

[62] That said, as I identified earlier in these Reasons, the Plaintiff has made no commitment not to assert in the future a claim against the Defendant in another court, seeking more than its apportioned share of any damages for which the Defendant may have joint liability with Murphy Battista. It remains at least theoretically possible that the Plaintiff (on her own behalf and as a class representative) could commence such an action against the Defendant in a provincial superior court. It is also possible that an action could be commenced against Murphy Battista in a

provincial superior court and that Murphy Battista could attempt to join the Defendant as a third party, seeking contribution and indemnity.

[63] Given those possibilities, I will consider the Defendant's arguments that the interests of justice warrant a discretionary stay under s 50(1)(b) of the Act. The Defendant advances the following four principal arguments:

A. There are overlapping facts underlying claims related to the Data Breaches and claims related to the Ransomware Attack, the exploration of which will require documentary and oral discovery of Murphy Battista;

B. To achieve judicial economy, these claims should be heard only once and at the same time;

C. Uniting these claims in one court would avoid the potential for inconsistent findings of fact and liability and would avoid the possibility of the Defendant paying more than its fair share of damages; and

D. It would be prejudicial to the Defendant to require it to litigate in two courts. The Defendant submits that this Court's findings on the certification motion may negatively affect its ability to seek contribution and indemnity from Murphy Battista. Conversely, it argues that the Plaintiff and the class would suffer no prejudice if this matter were moved to a provincial superior court, as a class of larger scope, including those affected by the Ransomware Attack, could then purse their entire claim, including against Murphy Battista.

[64] The Plaintiff submits that s 50(1)(b) cannot apply, as the Defendant's arguments all relate to the possibility of duplicative proceedings. The Plaintiff argues that s 50(1)(a) addresses duplicative proceedings and that s 50(1)(b) therefore applies only to circumstances other than duplicative proceedings. I have difficulty with the logic of the Plaintiff's submission. Accepting for argument's sake the Plaintiff's position that s 50(1)(a) applies only when there is an existing duplicative proceeding, it cannot be the case that the Court is deprived of jurisdiction to grant a stay in circumstances where there is a possibility of future proceedings with some degree of duplication or overlap, if the interests of justice warrant that result.

[65] However, I accept the Plaintiff's submission that, if analyzing the interests of justice under either s 50(1)(a) or 50(1)(b), the principles set out in *Cold Lake* usefully guide that analysis. At paragraph 14 of *Cold Lake*, Justice Barnes lists these principles as follows, while noting that the Court should also give some consideration to the balance of convenience between the parties:

A. Would the continuation of the action cause prejudice or injustice (not merely inconvenience or extra expense) to the defendant?

B. Would the stay work an injustice to the plaintiff?

C. The onus is on the party which seeks a stay to establish that these two conditions are met;

D. The grant or refusal of the stay is within the discretionary power of the judge;

E. The power to grant a stay may only be exercised sparingly and in the clearest of cases;

F. Are the facts alleged, the legal issues involved, and the relief sought similar in both actions?

G. What are the possibilities of inconsistent findings in both Courts?

H. Until there is a risk of imminent adjudication in the two different forums, the Court should be very reluctant to interfere with any litigant's right of access to another jurisdiction;

I. Priority ought not necessarily to be given to the first proceeding over the second one or, vice versa.

[66] Viewed through the lens of these principles to the extent applicable, I find that the interests of justice do not favour granting a discretionary stay.

[67] I find little support in the Defendant’s arguments for a conclusion that continuation of the Federal Court action would cause prejudice or injustice (not merely inconvenience or extra expense) to the Defendant. I have already concluded that the Rules afford the Defendant the procedural tools necessary to obtain evidence from Murphy Battista. Theoretically, the existence of proceedings in both this Court and a provincial superior court, with related issues, could result in inconsistent findings, arising from the certification motion or otherwise. However, this possibility appears to me to be extremely speculative and remote, particularly given that the

possibility of a proceeding being commenced at all in another court is itself a matter of speculation.

[68] Balanced against those considerations, a stay would work an injustice to the Plaintiff, as the parties have expended considerable efforts to prepare for the certification motion in this action, which is presently scheduled to be heard next month. The product of these efforts could be lost, or at least require further efforts to realize, if this proceeding were moved to another court. Therefore, it is also far from clear that considerations of judicial economy would favour such a result. Taking into account the fact that the onus in this motion is on the Defendant, and the guidance that the power to grant a stay may only be exercised sparingly and in the clearest of cases, I exercise my discretion against granting a stay under s 50(1) of the Act.

V. **Conclusion and Costs**

[69] Based on the above analysis, the Defendant's motion is dismissed.

[70] At the hearing of this motion, the parties jointly proposed that the issue of costs arising from this motion (and potentially the withdrawn motion to remove Murphy Battista as counsel due to an alleged conflict of interest) be deferred to be determined based on written submissions following the decision on the merits of the motion. I agree with this approach, and my Order will reflect deadlines, as discussed at the hearing, for steps leading to the determination of costs.

ORDER IN T-982-20

THIS COURT ORDERS that:

1. Subject to the Plaintiff amending her pleading to limit her claim to special damages to damages for the Defendant's several liability, the Defendant's motion is dismissed.

2. The Court's determination of costs arising from this motion (and potentially the withdrawn motion to remove Murphy Battista as counsel due to an alleged conflict of interest) shall take place in writing upon completion of the following steps:

    a. The parties shall attempt to reach agreement on the determination of costs and shall provide joint submissions to the Court by January 14, 2022, advising as to such agreement or that agreement has not been achieved;

    b. If such agreement has not been achieved:

        i. The Plaintiff shall serve and file by January 21, 2022, written submissions as to its position on costs, limited to three pages plus any supporting material; and

        ii. The Defendant shall serve and file by January 28, 2022, written submissions as to its position on costs, limited to three pages plus any supporting material.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-982-20
STYLE OF CAUSE:	ANNE CAMPEAU v HER MAJESTY THE QUEEN
PLACE OF HEARING:	HEARD BY VIDEOCONFERENCE VIA VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	DECEMBER 14, 2021
ORDER AND REASONS:	SOUTHCOTT J.
DATED:	DECEMBER 20, 2021

APPEARANCES:

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Stephen Kurelek	FOR THE DEFENDANT

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Attorney General of Canada Ottawa, Ontario	FOR THE DEFENDANT