Federal Court Cour fédérale

Date: 20260216

Docket: T-319-24

Toronto, Ontario, February 16, 2026

PRESENT: Associate Judge Trent Horne

PROPOSED CLASS PROCEEDING

BETWEEN:

**ERIC SABBAG, DANNY ROSSNER,
DANIEL BOYER AND CATHERINE ANDERSON**

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

Defendant

ORDER AND REASONS

I. Background

[1] This proposed class proceeding arises out of the design, implementation, and maintenance of the "ArriveCAN" application.

[2] In very general terms, the plaintiffs allege that there were widespread technical failures with the application, including errors that incorrectly ordered travellers to quarantine, even when they were exempt from having to do so having otherwise followed the proper entry protocols.

[3] As I have noted in earlier orders, the proceeding has moved slowly. The statement of claim was issued on February 19, 2024. In January 2025, the defendant's motion to schedule a motion to strike in advance of the certification motion was dismissed (*Sabbag v Canada (Attorney General)*, 2025 FC 148). A scheduling order was issued on April 10, 2025 fixing a timetable leading up to the certification motion and the motion to strike that was jointly proposed by the parties. The parties have complied with the timetable, including service of supporting affidavits in May 2025, and completion of cross-examinations by December 2025.

[4] The plaintiffs have brought a motion for leave to file a supplemental solicitor's affidavit that attaches documents obtained through requests made under the *Access to Information Act*, RSC 1985, c A-1 [ATIA] and other materials. This affidavit was provided to the defendant after the deadline to serve evidence, and before the deadline to complete cross-examinations.

[5] The plaintiffs have not demonstrated that the proposed new evidence will assist the Court, or that it would be in the interests of justice to grant the relief sought. The motion is dismissed.

II. The test in *Atlantic Engraving* Applies

[6] There is no specific Rule in Parts 5.1 or 7 of the *Federal Courts Rules*, SOR/98-106 [Rules] that speaks to introducing further evidence on a motion after cross-examinations have been completed.

[7] The plaintiffs' refer to and rely on Rule 312, and the test articulated in cases such as *Rosenstein v Atlantic Engraving Ltd*, 2002 FCA 503 [*Atlantic Engraving*] at paras 8-9 (that the new evidence will serve the interests of justice; will assist the Court; will not cause substantial or serious prejudice; and was not available prior to the cross-examination of the opponent's affidavits).

[8] Rule 312 does not apply to motions; that Rule is found in Part 5 which is directed to applications. That said, the Court has applied the test in *Atlantic Engraving* in the context of a motion when considering whether leave should be granted to file further evidence (*Offshore Interiors Inc v Worldspan Marine Inc*, 2016 FC 27 at paras 3-4).

III. The Proposed Further Evidence

[9] The plaintiffs' notice of motion attaches as a schedule the affidavit that is proposed to be filed. The affidavit is affirmed by one of the lawyers representing the plaintiffs. It is 12 paragraphs long and attaches eight exhibits. The exhibits are the re-amended statement of claim; "Report 4" of the Auditor General of Canada to the Parliament of Canada; four responses, either in whole or in part, to ATIA requests; a copy of a webpage entitled "What are HTTP status codes?"; and a redacted copy of the class member list to date.

[10] The affidavit states that ATIA requests were made in October 2024, and that there are "a few more requests pending that have not yet been received." The affidavit also states that "I have been informed that further documents concerning the allegations in the Re-Amended Statement of Claim have come to the Plaintiffs' attention since the initial affidavit that I affirmed on

May 1, 2025." The exhibits attached to the affidavit comprise almost 7,500 pages. Particularly in respect of the ATIA responses, the affidavit reproduces the request that preceded the disclosure, but does not explain why some were disclosed in whole and others disclosed in part. The affidavit does not include a narrative as to what is in the exhibits or how or why these documents are relevant to either the pending motion for certification or to strike. This is not a criticism. The purpose of an affidavit is to adduce facts relevant to the dispute without gloss or explanation (*Canada (Attorney General) v Quadrini*, 2010 FCA 47 at para 18).

[11] The plaintiffs' moving motion record does not include an affidavit in support of the motion. There is no evidence on the motion as to why the ATIA requests were served in October 2024, some eight months after the proceeding was commenced.

[12] The plaintiffs' written representations do not refer to any specific part of the proposed further evidence, rather it is generally asserted that the new material is highly relevant. It is submitted, for example, that:

> 24. The supplemental affidavit evidence is highly relevant to the Court's certification analysis and will materially assist the Court in evaluating whether a class proceeding is appropriate. By providing a comprehensive factual record, it allows the Court to consider the systemic, operational, and procedural context underlying the ArriveCAN system.
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> 25. In the context of the current proceedings, the supplemental evidence is of tangible and practical value. By illuminating the operational realities, decision-making processes, and technical challenges associated with the ArriveCAN system, the evidence allows the Court to evaluate the certification criteria on a complete factual record.

[13] The written representations go on to argue that the ATIA records offer tangible evidence relating to internal government awareness of problems with ArriveCAN, deficiencies in the procurement process, technical malfunctions, the number of impacted travellers, poor management of the system, systemic operational failures, and internal communications revealing known risks. The plaintiffs assert that the ATIA evidence directly informs the consideration of the factors set out in Rule 334.16. The plaintiffs' written representations do not refer to any specific page or document within the exhibits or include any footnotes with reference to the exhibits. The documents are only addressed in a high-level, general way.

[14] The defendant opposes the motion. In addition to the objections that there is no evidence or argument directed to the specifics of the new documents and their relevance, and the timing of the request, the defendant also argues that certain documents, particularly many of the pages within one of the ATIA responses, are protected by parliamentary privilege.

[15] In their written representations in reply, the plaintiffs deny that parliamentary privilege applies, but state they have reconsidered their position in respect of certain documents and "have elected to withdraw them in the interests of efficiency and proportionality, without conceding the Defendant's position." A further version of the solicitor's affidavit is attached to the reply argument, which reduces the exhibits to just over 6,000 pages. The plaintiffs' argument offers an explanation as to the timing of the ATIA requests, and pinpoints certain pages of the exhibits in support of an argument that they will be useful to the Court. The reply submissions are longer than the submissions in the moving motion record.

IV. Analysis

[16] Ordinary principles of litigation put the burden of proof on the party making the assertion (*WIC Radio Ltd v Simpson*, 2008 SCC 40 at para 30). The burden is always on the party asserting a proposition or fact that is not self-evident (*Voltage Holdings, LLC v Doe #1*, 2023 FCA 194 at para 40). It is the plaintiffs' burden to establish that the test in *Atlantic Engraving* has been met.

[17] I am not satisfied that the plaintiffs have met the test in *Atlantic Engraving* for either the affidavit as a whole or any of the individual exhibits.

[18] The argument in support of the motion broadly and generally states that the evidence is highly relevant. That is insufficient. It is not up to the Court to review thousands of pages of material and determine if some or all of it will be of assistance in determining the pending motions. A party seeking to introduce further evidence must do more than say it is relevant; relevance must be demonstrated. The fact that both the action and the responses to the ATIA requests relate to the ArriveCAN application is not, on its own, enough. Describing the documents and their contents in a general way is not enough.

[19] I have disregarded the plaintiffs' reply submissions with pinpoint references to the exhibits. There is a basic expectation in litigation that a party will put its best foot forward (see, for example, *Products Unlimited, Inc v Five Seasons Comfort Limited*, 2026 FC 48 at para 36). By saving this argument for reply, the plaintiffs have split their case on the motion, which is unfair to the defendant.

[20] The plaintiffs' initial argument states that all of the evidence is highly relevant, has practical value, and will enable the Court to have a complete and accurate understanding of the issues. This is stated without qualification or reservation. I need not determine if parliamentary privilege applies to any of the documents because the plaintiffs narrowed the scope of the proposed new evidence in light of this argument. This, however, raises the question as to why, if all the evidence was considered to be so important in the first instance, are the plaintiffs now agreeable to removing 1,000 pages of it? This casts a long shadow over the first assertion that all the documents would be of assistance to the Court.

[21] Similarly, I have disregarded the explanation in the plaintiffs' reply argument as to the timing of the ATIA requests. Whether the proposed evidence was or could have been available earlier is part of the *Atlantic Engraving* test that the plaintiffs refer to, yet there is no evidence in this respect in the plaintiffs' moving record. The argument has no evidentiary support. In any event, the plaintiffs have again split their case by offering an explanation in reply that should have been included in the first instance.

[22] The re-amended statement of claim (Exhibit A) is already in the Court file. An affidavit on a motion only needs to set out facts that do not appear in the Court file (subrule 353(2)(c)).

[23] It is not clear when the Auditor's report (Exhibit B) was first published. On page 60, under the heading "Date of the report," it is stated "we obtained sufficient and appropriate audit evidence on which to base our conclusion on 27 May 2025, in Ottawa, Canada." It is not clear whether the report was first published and available to the plaintiffs at that time or later. It is not

apparent the plaintiffs acted with alacrity and put the defendant on notice of an intention to seek leave to introduce this document at the first opportunity. In any event, the plaintiffs have not demonstrated how this document contains information that is relevant to the certification motion or the motion to strike.

[24] Similarly, the plaintiffs have not met their onus to demonstrate that any of the ATIA responses (Exhibits C-F) will assist the Court. I need not determine whether parliamentary privilege applies in whole or in part to the documents in Exhibit C. There is no evidence on the motion speaking to the timeliness of the ATIA requests, and why these pending requests were not raised when a pre-hearing schedule was fixed. It would be prejudicial to the defendant, contrary to the guiding principles in Rule 3, and not in the interests of justice, to permit the plaintiffs to introduce thousands of pages of documents at this stage of the proceeding without demonstrating or explaining in any detail how they would be of assistance. I agree with the defendant that adding thousands of pages into the record, with no clear link to the issues to be decided, is more likely to burden the Court than to assist it.

[25] As for Exhibit G, there is a statement in the proposed affidavit that this is a copy of a Umbraco webpage entitled “What are HTTP status codes?” There is no explanation in that affidavit as to what or who Umbraco is, or how these codes are relevant to the proceeding. There is no affidavit on the motion explaining why this webpage could not have been part of the evidence in the first instance, or if these codes appear in either the existing evidentiary record or only in the proposed new evidence. This document is not addressed in the plaintiffs’ argument in the moving motion record. It is not the role of the Court to read the document and determine how

or why it may be relevant. Again, I have disregarded the explanation directed to these codes in the reply submissions because it constitutes case splitting.

[26] Finally, Exhibit H is a redacted document showing the current class member list. I have no explanation as to whether such a list was part of the evidence that was served in May 2025, or if this document is materially different than one that may be in evidence. There is no argument directed to this document in the moving motion record.

[27] I am not satisfied that the plaintiffs would be prejudiced if the motion is dismissed. The plaintiffs have not demonstrated that the proposed new evidence is directly relevant to the pending motions.

[28] The plaintiffs submit that the need to permit the filing of supplemental affidavits is especially pronounced in the context of a proposed class action because class proceedings, by their very nature, are substantially more complex than individual actions, and that the evidentiary record frequently evolves over time. It is argued that class actions demand procedural flexibility to accommodate the iterative development of emerging evidence.

[29] Class proceedings are procedurally different than individual actions, however there are common basic rules and expectations. When a schedule is set for a certification hearing, parties cannot expect that new evidence will be permitted at any stage as a matter of routine. The test in *Atlantic Engraving* is not relaxed or eliminated in the context of class proceedings. Specifically in this case, there is a fixed timetable to get the motions ready for a hearing. When the plaintiffs

consented to a deadline for service of their evidence, they knew that the ATIA requests were pending. Neither the timetable nor the discussions leading to it contemplated the disclosure of evidence on a rolling basis.

[30] The plaintiffs' motion is therefore dismissed.

[31] The defendant does not request costs, and none are awarded.

ORDER in T-319-24

THIS COURT ORDERS that:

1. The plaintiffs' motion is dismissed.

"Trent Horne"
Associate Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-319-24
STYLE OF CAUSE:	ERIC SABBAG ET AL v AGC

MATTER CONSIDERED IN WRITING, PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*, WITHOUT THE PERSONAL APPEARANCE OF THE PARTIES

ORDER AND REASONS:	HORNE A.J.
DATED:	FEBRUARY 16, 2026

WRITTEN REPRESENTATIONS BY:

Me Andrea Grass	FOR THE PLAINTIFFS
Me Marième Sirois-Vaillancourt Me Sarom Bahk Me Béatrice Courchesne-Mackie	FOR THE DEFENDANT

SOLICITORS OF RECORD:

ACTIS LAW GROUP INC. Barristers and Solicitors Montréal, Quebec	FOR THE PLAINTIFFS
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