IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *L'Anton v. Mackenzie Financial Corporation,* 2024 BCSC 1136

Date: 20240613
Docket: S-238293
Registry: Vancouver

Between:

Martin L'Anton

Plaintiff

And

Mackenzie Financial Corporation and InvestorCOM Inc.

Defendants

Brought Under the *Class Proceedings Act*, R.S.B.C. 1996, C. 50

Before: The Honourable Mr. Justice Kent

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:	T.P. Charney C. Edwards
Counsel for the Defendant, Mackenzie Financial Corporation:	C. Beagan Flood J.A. Hutchinson
Counsel for the Defendant, InvestorCOM Inc.	A.M. Quayle, K.C. M. Vesely, K.C. D. Alcorn
Place and Date of Trial/Hearing:	Vancouver, B.C. June 13, 2024
Place and Date of Judgment:	Vancouver, B.C. June 13, 2024

[1] **THE COURT:** I have before me three applications in this class action. Each of the two defendants apply for a stay of this action as an abuse of process. The plaintiff applies for certain sequencing directions including a requirement that Responses to the Civil Claim be filed and that a case management and trial judge be assigned to the matter by the court.

[2] I elected to hear the stay application first because I agree that the provisions of the *Class Proceedings Act,* R.S.B.C. 1996, c. 50 dealing with multi-jurisdictional class proceedings cannot and do not oust the jurisdiction of a superior court to stay proceedings as an exercise of its discretion in appropriate circumstances.

[3] The stay applications raise an interesting and vexing question about the propriety of parallel actions in class action proceedings involving different plaintiffs in different provinces. There is case law which says that such parallel proceedings may have the potential for mischief such as the risk of inconsistent decisions, waste of judicial and court resources, duplication of work by counsel, and even the possibility of forum shopping by counsel, among other things. However, the case law also refers to entirely legitimate reasons for parallel and even duplicate actions to be brought in a different province. A proposed class action is not necessarily an abuse of process simply because there is another class action ongoing in another jurisdiction dealing with the same subject matter.

[4] This subject has been addressed by our Court of Appeal in *Fantov v. Canada Bread Company Limited*, 2019 BCCA 447. In that decision Justice Goepel discusses the changes made to the *Class Proceedings Act* following certain recommendations by the Uniform Law Conference respecting conflicts between competing class actions and the need to address the matter by way of legislation.

[5] One of the problems that existed before the legislation was amended was a perceived need by plaintiff's counsel to file parallel proceedings in other provinces simply to obtain standing to make submissions to the court in that other province regarding the “preferability” of having the matter determined by the court of another province. The Act has eliminated any requirement that may have pre-existed the

legislative amendments for what Justice Goepel in *Fantov* labelled as a “stalking horse action” in other provinces for the purposes of obtaining standing.

[6] By way of background, I adopt and repeat paras. 34 through 40 of the *Fantov* decision, along with paragraphs 48 through 52. Justice Goepel in that decision also addressed what he termed as the "two prongs" to stay applications such as the one before me today. I adopt and repeat para. 53 of *Fantov* in that regard. That paragraph holds that a finding of abuse of process is not required in all cases in order for a court to issue a stay, and that other considerations might apply not involving an abuse of process which might justify a stay, such as, for example, to prevent unnecessary and costly duplication of judicial and legal resources.

[7] The question then arises whether the amended legislation has impacted the ability of the court to entertain stay applications as a preliminary matter before any certification hearing. I adopt and repeat here paras. 64 through 66 and 70 through 72 of the *Fantov* decision.

[8] One of the cases to which Justice Goepel refers with approval is *DALI 675 Pension Fund v. SNC Lavalin*, 2019 ONSC 6512, a decision by Justice Belobaba of the Ontario Superior Court, a judge with considerable experience in class action proceedings.

[9] *DALI* noted that parallel proceedings often exist in class action litigation, that such proceedings are subject to "cross-pollination" and frequently end up looking very similar and sometimes essentially identical to each other. It was Justice Belobaba’s view, and I am inclined to agree, that the question regarding abuse of process is to be determined as of the date on which the duplicative action was filed. If there exists legitimate purpose for that duplicative action, then any subsequent amendment to the pleading in the first jurisdiction to adopt the same allegations (as occurred in this case) does not have the result of rendering a formerly legitimate parallel action into an abuse of process. He states, and I agree, that if the original parallel action was not an abuse of process when it was filed, it cannot become so a

few months later once some amendment has been made to the first action in the other jurisdiction.

[10] The plaintiff justifies and legitimizes his parallel proceeding in British Columbia on the basis that (1) his action named an additional critical defendant, namely, InvestorCOM Inc., an entity that was not even a party to the Ontario proceeding; (2) the Ontario proceeding did not capture the members of the putative class residing in Quebec; and (3) that his pleading precisely identified the statutory causes of action for breach of privacy in the various provinces where such legislation existed and generally crafted common issues which, at least in counsel's view, are superior to those proposed in Ontario, particularly as it relates to the *Personal Information Protection and Electronic Documents Act,* S.C. 2000, c. 5 legislation.

[11] I am inclined to agree that those justifications for the litigation in British Columbia are legitimate and that the action, as pleaded at the time of the filing of the action in British Columbia, was therefore neither completely duplicative of the Ontario action, nor brought for no legitimate purpose. The fact that the plaintiffs in Ontario have subsequently substantially amended their action to include InvestorCOM Inc. as a defendant and to, ironically enough, plead similar additional matters alleged in the B.C. proceeding does not render the formerly legitimate British Columbia action to now be either an entirely duplicative action or one for no legitimate purpose.

[12] That is enough to dispose of the defendants' applications because it is my finding that there has not been an abuse of process in this particular case.

[13] I acknowledge that the court retains jurisdiction to nonetheless stay the proceeding to "prevent unnecessary and costly duplication of judicial and other legal resources" as that phrase appears in para. 53 of the *Fantov* decision, which itself was a quote from an earlier British Columbia Court of Appeal decision in *Ainsworth Lumber Co. v. A.G. of Canada,* 2001 BCCA 105. However, the applications before me were not framed in the alternative to seek a stay on grounds other than abuse of

process. Even had it been so, I likely would have exercised my discretion to deny a stay in any event.

[14] There are legitimate arguments to be made regarding “preferability” of the B.C. action being pursued in British Columbia instead of Ontario. However, I pass no comment on the merits of the preferability issues which fall to be decided at a later date.

[15] I am generally satisfied that the language used in *Fantov* was designed to encourage both the practitioners and the courts to defer to the certification hearing of a multi-jurisdictional class proceeding any issues related to preferability. Indeed, that was the very suggestion made by the Uniform Law Conference when it recommended the changes to class action legislation across the country.

[16] While there still continues to exist an ability to bring a preliminary application for an abuse of process stay should the requisite facts exist, any such application would likely require unusual or extraordinary facts, as was the case in *Tanchak v. British Columbia*, 2024 BCSC 644. In that case the claims of certain members of the class proposed in the British Columbia action were duplicative of an already nationally certified proceeding which had moved forward to a settlement. In that case, there was also an unexplained and very lengthy delay in pursuit of the B.C. action, both before and after the settlement was made. Indeed the settlement required certain amendments to be made to the B.C. proposed action and counsel failed to comply with those requirements, as well as some explicit court directions issued in that regard. In short, the *Tanchak* case was a good example of the sort of unique circumstances that might warrant dismissal of a proceeding or a stay of proceedings on abuse of process grounds.

[17] Those circumstances do not exist here and, for the reasons stated, I prefer to exercise my discretion not to grant the preliminary stay of proceedings requested by the defendants.

[18] Insofar as the plaintiff's cross-application is concerned, it appears the defendants do not oppose the relief sought under items 2 and 3 of Part 1 of the Notice of Cross-Application filed May 30, 2024.

[19] I therefore grant an order that the defendants must deliver their Responses to the Notice of Civil Claim within 60 days.

[20] In accordance with Practice Direction PD-4 of this court, which was updated on January 15, 2024, I will request that the Associate Chief Justice assign this proceeding for judicial management which, if so assigned, will then trigger Practice Direction PD-5 and see the certification application in this proceeding scheduled before the judicial management judge.

[21] Do the parties wish to address costs?

[Submissions regarding costs]

[22] THE COURT: Costs of these applications will be in the cause.

“Kent J.”