COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *InvestorCOM Inc. v. L'Anton,*
2025 BCCA 40

Date: 20250127
Dockets: CA50002; CA50005

Docket: CA50002

Between:

InvestorCOM Inc.

Appellant
(Defendant)

And

Martin L'Anton

Respondent
(Plaintiff)

And

Mackenzie Financial Corporation

Respondent
(Defendant)

– and –

Docket: CA50005

Between:

Mackenzie Financial Corporation

Appellant
(Defendant)

And

Martin L'Anton

Respondent
(Plaintiff)

And

InvestorCOM Inc.

Respondent
(Defendant)

Before: The Honourable Justice Griffin
The Honourable Justice Winteringham
The Honourable Justice Riley

On appeal from: An order of the Supreme Court of British Columbia, dated June 13, 2024 (*L'Anton v. Mackenzie Financial Corporation*, 2024 BCSC 1136, Vancouver Docket S238293).

Oral Reasons for Judgment

Counsel for the Appellant (CA50002) / Respondent (CA50005), InvestorCOM Inc.:	A.M. Quayle, K.C. M. Vesely, K.C.
Counsel for the Respondent (CA50002) / Appellant (CA50005), Mackenzie Financial Corporation:	C. Beagan Flood J.A. Hutchinson
Counsel for the Respondent, Martin L'Anton:	T.P. Charney
Place and Date of Hearing:	Vancouver, British Columbia January 27, 2025
Place and Date of Judgment:	Vancouver, British Columbia January 27, 2025

Summary:

The appellants are defending a proposed class action related to a data breach which exposed their customers to a loss of privacy. They appeal the dismissal of their application to strike the within claim as an abuse of process, prior to certification. Held: Appeal dismissed. The chambers judge did not err in refusing to strike the within claim, simply because there is a parallel action in Ontario by other plaintiffs which also seeks certification as a class action. Mere similarity of the claims proposed in the class action does not establish an abuse of process. The chambers judge understood there were legitimate reasons for Mr. L'Anton to choose to sue in BC. There were no facts to suggest that the action was brought or continued for an improper purpose. The question of what jurisdiction might be preferable, when there is a possibility of multiple class actions, would be addressed at the stage of the certification application pursuant to s. 4.1(1)(b) of the Class Proceedings Act, R.S.BC. 1996, c. 50.

[1] **GRIFFIN J.A.**: This is an action which seeks certification as a class action to advance claims arising from a data breach that occurred in February 2023. The data was that of past and current customers of the appellant Mackenzie Financial Corporation ("Mackenzie"), located on the servers of the appellant InvestorCOM Inc. ("InvestorCOM"). The respondent Mr. L'Anton, a former customer of Mackenzie and a resident of BC, received notice from Mackenzie in May 2023 that his personal information, including his social insurance number, had been stolen by hackers. He seeks certification of the claim as a national class action.

[2] There is a parallel claim in Ontario, brought by Alexander Litvin and David McNairn, advancing similar claims and seeking certification as a national class action (the "Ontario Action").

[3] The appellants sought to have the within claim stayed as an abuse of process, each arguing in their respective application that the claim served no legitimate purpose and overlapped with the Ontario Action. These applications were heard together and dismissed by a chambers judge, with reasons indexed as 2024 BCSC 1136.

[4] Mackenzie and InvestorCOM each appeal this decision, submitting that the chambers judge erred in failing to stay the action.

[5] For the reasons that follow, I would dismiss the appeals.

[6] In my view, the appellants' arguments are based on the mere fact of the similarity between the proposed class action claims in the Ontario Action and the proposed class action claims in the within BC action. That is not sufficient to infer that the BC action is an abuse of process.

[7] A claim brought by one plaintiff against defendants for a similar wrong to that alleged by a different plaintiff against the same defendants, is not inherently an abuse of process simply because the claims are similar. There is no duplication of proceedings in such a situation: the plaintiffs are different and advancing their own individual claims. It is only if and when each action becomes certified as a class action covering a broad number of claims for a class of people, that the potential for overlapping and duplicated claims crystallizes.

[8] This is what the judge meant by stating that generally some "unusual or extraordinary facts" are needed to support a preliminary application to stay a proposed class action as an abuse of process, beyond the mere possibility that if the action is later certified as a class action it might duplicate other claims advanced in another yet-to-be certified class action (at para. 16). Contrary to the appellants' submissions, he did not impose an improperly high threshold or rule. He simply fairly observed that the mere fact that there is a possibility of duplication if the action is eventually certified as a class action, without more, is unlikely on its own to establish an abuse of process.

[9] There is also no basis for the appellants' submissions that the chambers judge misunderstood or misapplied the law. He referred to the authority relied upon by the appellants, this Court's decision in *Fantov v. Canada Bread Company, Limited*, 2019 BCCA 447, and applied it correctly.

[10] As recognized in *Fantov*, it is not uncommon for different plaintiffs in different provinces to commence proposed class actions over the same wrong, and the mere existence of the possibility of duplication does not establish an abuse of process.

[11] In *Fantov*, a plaintiff, Ms. Asquith, commenced an action in BC proposing a BC class action, despite the fact a proposed national class action had been commenced in Ontario just over two months earlier and was more advanced. This Court held that the possibility of duplication did not justify staying Ms. Asquith's BC proceeding as an abuse of process. The application for a stay on the grounds that there could be duplication was premature, as the arguments about duplication could be raised at the certification hearing: paras. 69, 73, 74.

[12] However, a placeholder action commenced in BC, described as the "Fantov Action", by the same Ontario law firm advancing the Ontario action, was found by this Court in *Fantov* to be an abuse of process and was stayed because there was no intention of proceeding with that claim, it was merely at that time a procedural tactic by the Ontario law firm: at paras. 7, 10, 72.

[13] The question of how to best manage multiple multi-jurisdiction class actions in Canada was addressed by the Uniform Law Conference, as reviewed in *Fantov*. It made certain recommendations that have been incorporated into British Columbia's *Class Proceedings Act*, R.S.B.C. 1996, c. 50 ["*BCCPA*"].

[14] In short, the structure of the *BCCPA* addresses concerns about the possibility of duplication of overlapping class actions at the time of the application for certification of the proceeding as a class action, not by way of preliminary application.

[15] This makes practical sense because it is only if the action is certified and thereby becomes a class action, that the duplication of claims in overlapping classes will become realized.

[16] Thus, under s. 4.1(1)(b) of the *BCCPA*, at the time of certification, a chambers judge may refuse to certify a class proceeding if the court is of the view it should proceed in another jurisdiction. Prior notice to the plaintiffs in other Canadian multi-jurisdictional class actions involving the same or similar subject matter is required. This allows a judge to consider, at the time of certification, the issues

raised by having multiple overlapping class actions, including whether one action is an unnecessary duplication of another, and whether it is preferable to have some or all of the claims resolved in another proceeding, as explained in *Fantov* at para. 39.

[17] Addressing the question of whether a stay should be granted at the time of certification (as opposed to on a preliminary application) has the benefit of allowing for a full evidentiary record on the preferability issue: *Fantov* at para. 66.

[18] The chambers judge below was mindful of the concern that there could be a duplication of resources if two class actions were certified covering similar claims and similar classes. However, he noted that the question of whether the BC class action was a preferable way of proceeding would be at issue at the certification hearing, and he considered it premature to decide it: para. 15. I see no error in his approach which is consistent with *Fantov* and the structure of the *BCCPA*.

[19] Both appellants say the chambers judge erred in principle in considering the issue of abuse of process as of the date on which the potentially duplicative action was filed, at para. 9 of his Reasons, instead of as of the date of the stay applications. They argue that the judge failed to recognize that an action that does not start out as an abuse of process may become one.

[20] I do not accept the timing dichotomy advanced by the appellants. In my view, the relevant question for a chambers judge is whether the facts alleged by the applicants in the stay application are established and support the conclusion that the proceeding is an abuse of process, having regard to the entire history of the proceeding and considered in the context of the other litigation. The chambers judge properly considered this question.

[21] I also do not accept the appellants' narrow reading of the chambers judge's reasons. The appellants fail to take into account the context of the position advanced by the appellants before him.

[22] The chambers judge addressed the motives of Mr. L'Anton at the time the within action was commenced because the appellants asserted in their notices of

application that the action was filed "months" after the Ontario Action and "for the sole and improper purpose of getting a piece of the 'class-action-action'". The chambers judge did not accept this bald and conclusory assertion that Mr. L'Anton's motives were improper at the time the action was started. He found that the BC action at the time of filing was "neither completely duplicative of the Ontario action, nor brought for no legitimate purpose": para. 11.

[23] I see no error in the chambers judge's assessment that, as of the date this action was commenced, there was no conduct that would support an inference that the action was brought for an improper purpose, or conversely, for no legitimate purpose.

[24] In the present case there are simply no hallmarks of abuse of process in the commencement and advancement of the BC claim when one considers the timeline of steps taken to file and advance the claim, and the scope of the claim. The BC action was commenced within the same year as the data breach, as a result of Mr. L'Anton reaching out to counsel. It was commenced soon after the Ontario Action (just over two months), and it advanced both a wider scope of claims and claims against an additional defendant, than did the Ontario Action, which initially was commenced against Mackenzie only. Mr. L'Anton is a different plaintiff represented by different counsel than the plaintiffs in the Ontario Action.

[25] It is now recognized that the approach to data breaches in Canada may vary between provinces—including as between those that have a statutory breach of privacy tort and those that do not—and as between the application of those statutory torts in the courts: see generally *G.D. v. South Coast British Columbia Transportation Authority*, 2024 BCCA 252 at paras. 101–105, 131–141.

[26] As well, the costs regime under class proceedings legislation varies as between provinces. In BC, a plaintiff who brings a certification motion and fails will not be subject to an award of costs, subject to limited exceptions: *BCCPA* s. 37. In Ontario, courts have broader latitude to award costs against the plaintiff if they are unsuccessful: *Class Proceedings Act*, 1992, S.O. 1992, c. 6, s. 31.

[27] Here, given the nature of the tort and the class action legislation in BC, and his residence in BC, there are legitimate reasons for Mr. L'Anton to pursue relief in BC rather than in Ontario, and it cannot be inferred he had improper motives for doing so simply because of the fact that other plaintiffs are pursuing a claim in Ontario.

[28] Further, I do not accept the appellants' suggestion that the chambers judge failed to recognize that an action can become an abuse of process after it was filed. The appellants pointed to no additional conduct by Mr. L'Anton (or omissions) between the date his action was commenced, and the date of the applications for a stay that were brought mere months later, which would support the inference that he was continuing the action for an improper purpose or conversely, that his action had lost its legitimate purpose. The only step of significance taken during that time that the appellants seem to rely on was by the plaintiffs in the Ontario Action, who amended their claim to partially "catch up" to the broader scope of claim being advanced in BC, but that does not lead to a conclusion that the BC action is an abuse of process.

[29] The chambers judge considered all this, and was of the view that subsequent amendments to the pleadings in the Ontario Action could not have the consequence of rendering a formerly legitimate parallel action into an abuse of process: paras. 9–11. He did not fail to consider the state of the BC action as at the time of the stay application; he simply rejected the appellants' arguments that it gave rise to an abuse of process. I see no error in his analysis.

[30] As noted by the chambers judge at para. 16, the facts involving the steps taken in this BC action are very different than in *Tanchak v. British Columbia*, 2024 BCSC 644, where a similar national class action had already been settled, and the impugned duplicative class action had been extensively delayed.

[31] What the appellants are really saying on appeal is that if there are two parallel class actions proceeding to certification, one should be stayed as an abuse of process prior to a certification hearing, because it cannot serve a legitimate purpose

given that the plaintiff in that action could choose to be a class member in the other proposed class action. Further, the effect of their position is that it should be the defendants who get to choose which one should be stayed. I do not accept that argument. In BC, the proper place to consider whether, solely by reason of mere similarity of claims, one proposed class action should be stayed in preference to another one in another Canadian jurisdiction, is at the certification hearing and not in a preliminary application.

[32] It is to be remembered that the doctrine of abuse of process is fundamentally concerned with the integrity of the administration of justice: *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 at para. 51. The appellants simply failed to show that the integrity of the administration of justice is undermined by the bringing or continuing of this proceeding. Again, this is especially so where the *BCCPA* itself provides a process for determining the issue of whether a class action should be certified in one jurisdiction over another, and protocols have been developed nationally to address any concern about duplication of resources, as is reflected in Supreme Court of British Columbia Practice Direction 55 ("PD-55").

[33] While Mr. L'Anton argues on appeal that the appellants' stay applications were also fatally flawed by their failure to follow PD-55, I need not consider that issue as it was not argued below.

[34] I also see no need to consider Mr. L'Anton's fresh evidence application, which is directed to providing more detail about the efforts he has made to advance the proceeding in the trial court.

[35] In conclusion, I see no basis for interference with the judge's refusal to draw inferences that Mr. L'Anton had no legitimate purpose in bringing and continuing the action, and in refusing the stay.

[36] I would therefore dismiss the appeal.

[37] **WINTERINGHAM J.A.**: I agree.

[38] **RILEY J.A.**: I agree.

[39] **GRIFFIN J.A.**: Thank you counsel.

"The Honourable Justice Griffin"