# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Ari v. Insurance Corporation of British Columbia,* 2020 BCSC 1087

Date: 20200723
Docket: S123976
Registry: Vancouver

Between:

**Ufuk Ari**

Plaintiff

And

**Insurance Corporation of British Columbia**

Defendant

And

**Candy Elaine Rheaume, Vincent Eric Gia-Hwa Cheung, Thurman Ronley Taffee, Aldorino Moretti, and John Doe and other yet to be identified**

Third-Parties

Before: The Honourable Mr. Justice N. Smith

## Reasons for Judgment

| | |
|---|---|
| Counsel for the Plaintiff: | G. Collette |
| Counsel for the Defendant: | R.R. Hira, Q.C.<br>J.K. Bienvenu<br>R.N.A. Hira<br>R. Hira, Articled Student |
| Counsel for the Third Party Aldorino Moretti: | A. MacKay<br>E. Seckel, Articled Student |
| Place and Date of Hearing: | Vancouver, B.C.<br>June 22, 2020 |
| Place and Date of Judgment: | Vancouver, B.C.<br>July 23, 2020 |

## INTRODUCTION

[1] The Insurance Corporation of British Columbia ("ICBC") is the defendant in this class proceeding, which arises from a breach of privacy (the "Class Action"). A former ICBC employee accessed and sold the personal information of some customers. ICBC is the only defendant in the Class Action, but has issued a third party notice against the former employee and other individuals who received, distributed, and/or used that information (the "third parties"). The allegations in the third party notice are the same as those in a separate action in which ICBC, as plaintiff, names the same people as defendants (the "ICBC Action").

[2] The plaintiff and one of the named third parties now apply for a declaration that the third party notice is a nullity because it was filed out of time and without the leave of the Court required by the *Supreme Court Civil Rules* [*Rules*] in those circumstances. ICBC applies for either retroactive leave to file the third party notice or an order consolidating the ICBC Action with the Class Action. It says evidence from the third parties will be necessary in the Class Action and duplicate proceedings should be avoided.

## THE CLASS ACTION

[3] ICBC is a Crown corporation incorporated under the *Insurance Corporation Act*, R.S.B.C. 1996, c. 228. It operates a universal compulsory plan of vehicle insurance and performs certain additional functions under other motor vehicle legislation.

[4] In those capacities, ICBC acquires and retains personal information about virtually everyone in British Columbia who owns or drives a motor vehicle. That information includes names, addresses, driver's license numbers, vehicle descriptions and identification numbers, license plate numbers, and claims histories. Of particular relevance here, a person with access to ICBC's databases can search a license plate number to find the name and address of the vehicle's owner.

[5] Candy Elaine Rheaume (“Rheaume”) was a claims adjuster employed by ICBC. At various times in 2011, she accessed personal information of 78 customers for no apparent business purposes. The homes of 13 of those customers were later targeted in arson, shooting, and vandalism attacks. Their vehicles had at some point been parked at or near the Justice Institute of British Columbia and the attackers apparently thought they were targeting the homes of police officers.

[6] Rheaume’s employment was terminated for cause on September 1, 2011. In 2017, she was charged with fraudulently obtaining a computer service, contrary to s. 342.1 of the *Criminal Code*, R.S.C. 1985, c. C-46, and pled guilty to that offence.

[7] The class action was filed on June 1, 2012 and Justice Russell certified it as a class action on December 1, 2017. (For purposes of these reasons, it is not necessary to describe the preliminary applications and decisions that preceded the certification hearing.)

[8] Russell J. defined the class as the 78 individuals “whose personal information was accessed for non-business purposes by Ms. Rheaume,” with a subclass of the 13 individuals whose premises received property damage. She certified the following issues as common issues of the class:

> (i) Whether the Employee breached the [Class] Members’ privacy pursuant to the *Privacy Act*, R.S.B.C. 1996, c. 373., when she accessed Class Members’ personal information wilfully and without a claim of right from ICBC data bases.
>
> (ii) Whether the Members are entitled to general damages based on the Employee’s breach of the *Privacy Act*.
>
> (iii) Whether the Members are entitled to pecuniary damages for losses suffered and expenses incurred due to the Employee’s breach of the *Privacy Act.*

(iv) Whether ICBC is vicariously liable for the general damages and pecuniary damages caused by the Employee's breaches of the *Privacy Act*.

[9] The Common Issues of the Subclass certified by Russell J. are:

(i) Whether the Attacks were unforeseeable intervening acts such that Ms. Rheaume is not liable for the property damage the Subclass Members suffered as a result of the Attacks.

(ii) If the Attacks were foreseeable, whether the Subclass Members are entitled to damages.

[10] On May 28, 2019, the Court of Appeal allowed the plaintiff's appeal and expanded both the class and subclass. The class definition now reads:

> The 78 individuals who have been identified by ICBC has having their personal information accessed for non-business purposes by Ms. Rheaume and the family members and other residents at the residences of the 78 individuals who have been identified by ICBC has having their personal information accessed for non-business purposes by Ms. Rheaume (the "Class Members").
>
> [Emphasis added.]

The subclass is:

> The Class Members who resided at premises that received property damage caused by the third party attacks.

[11] The Court of Appeal also added as further common issue:

> Whether ICBC's conduct in the circumstances of the Employee's breaches of the Privacy Act justifies an award of punitive damages against ICBC and, if so, what amount of punitive damages is appropriate?

[12] ICBC filed its response to the second further amended notice of civil claim in the class action on July 3, 2018—after Russell J. certified the Class Action but before the appeal was heard. It filed an amended response on April 15, 2020.

[13] No date has been set for trial of the common issues and there apparently have not yet been any examinations for discovery.

## THE ICBC ACTION AND THE THIRD PARTY NOTICE

[14] The ICBC Action was filed on June 30, 2017. The defendants include Rheaume, Aldorino Moretti ("Moretti"), Vincent Eric Gia-Hwa Cheung ("Cheung"), and Thurman Ronley Taffe ("Taffe"). Moretti is alleged to have purchased the customers' personal information from Rheaume, while Cheung and Taffe have been found criminally responsible for their involvement in the attacks on customers' homes. (The style of cause also refers to "John Doe" and two other individuals who counsel for ICBC says it is not proceeding against.)

[15] The ICBC Action was filed five days before Russell J. began hearing the certification application in the Class Action, but nothing in her Reasons for Judgment (indexed at 2017 BCSC 2212) indicates she was told of any related proceedings.

[16] The notice of civil claim states that Rheaume accessed information contained in ICBC's databases for purposes unrelated to her duties and sold the information to Moretti, who in turn provided it to Cheung, Taffe, and others. It alleges breach of contract and breach of fiduciary duty by Rheaume and conspiracy, trespass, and conversion by all defendants.

[17] ICBC was obviously aware of Rheaume's connection to the events at issue when it terminated her employment in 2011, but says it had no knowledge of Cheung or Taffe until the media reported criminal proceedings against them in September 2015. It says it had no knowledge of Moretti until May 8, 2017, when criminal proceedings against Rheaume were concluded and Moretti was referred to in Judge McQuillan's Reasons for Sentence.

[18] ICBC filed the third party notice against Rheaume, Moretti, Cheung, Taffe, and "John Doe and others yet to be identified" on July 3, 2018—the same day it filed its response in the Class Action. The substantive factual allegations and causes of action in the third party notice are identical to those in the ICBC Action.

[19] Moretti and Taffe have filed responses to both the ICBC Action and the third party notice. Cheung has responded only to the third party notice, while Rheaume has responded to neither.

## THE *CLASS PROCEEDINGS ACT*

[20] Before dealing with these applications on the merits, it is necessary to refer to the unique nature of class proceedings. Section 2 of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 [*CPA*], includes the following:

> **2** (1) A resident of British Columbia who is a member of a class of persons may commence a proceeding in the court on behalf of the members of that class.
>
> (2) The member who commences a proceeding under subsection (1) must
>
> (a) make an application to the court for an order
>
> (i) certifying the proceeding as a class proceeding, and
>
> (ii) subject to subsection (4), appointing the member as the representative plaintiff for the class proceeding…

[21] Section 4 of the *CPA* sets out the requirements that must be met before the proceeding can be certified and the matters the court must consider in determining whether a class proceeding is the appropriate procedure for resolution of issues common to all members of the class. Those common issues must be set out in the certification order, along with other matters including the nature of the claims and the relief sought: s. 8. Section 11 states:

> **11** (1) Unless the court otherwise orders under section 12, in a class proceeding,
>
> (a) common issues for a class must be determined together,
>
> (b) common issues for a subclass must be determined together, and
>
> (c) individual issues that require the participation of individual class members must be determined individually in accordance with sections 27 and 28.
>
> (2) The court may give judgment in respect of the common issues and separate judgments in respect of any other issue.

[22] By its nature, a class action proceeds in stages. The first stage is certification, when the cause of action and the common issues are defined and, just as important,

limited. After certification, the matter may proceed to a trial of common issues and, depending on the result of that trial, there may be further proceedings to deal with issues that apply to individual class members. When something is said to be relevant to a class action, it is important to identify the stage for which the relevance is asserted.

## VALIDITY OF THE THIRD PARTY NOTICE

[23] The purpose of third party proceedings is to avoid multiple proceedings and inconsistent results: *Lui v. West Granville Manor* (1985), 18 D.L.R. (4th) 391 at para. 40 (B.C.C.A.). Rule 3-5(1) reads:

> **Making a third party claim**
>
> (1) A party against whom relief is sought in an action may, if that party is not a plaintiff in the action, pursue a third party claim against any person if the party alleges that
>
> (a) the party is entitled to contribution or indemnity from the person in relation to any relief that is being sought against the party in the action,
>
> (b) the party is entitled to relief against the person and that relief relates to or is connected with the subject matter of the action, or
>
> (c) a question or issue between the party and the person
>
> (i) is substantially the same as a question or issue that relates to or is connected with
>
> (A) relief claimed in the action, or
>
> (B) the subject matter of the action, and
>
> (ii) should properly be determined in the action.

[24] The time for filing a third party notice is set out in R. 3-5 (4):

> **When leave is required**
>
> (4) A party may file a third party notice
>
> (a) at any time with leave of the court, or
>
> (b) without leave of the court, within 42 days after being served with the notice of civil claim or counterclaim in which the relief referred to in subrule (1) is claimed.

[25] In this case, the third party notice was filed without leave some six years after the expiry of the 42-day period referred to in R. 3-5(4)(b).

[26] A third party notice filed without leave and out of time is a nullity, but the court has discretion to preserve the third party notice by granting leave *nunc pro tunc* ("now for then"): *Hendrix v. Handa Travel Student Trip Ltd.,* 2016 BCSC 620 at paras. 87 and 90. In *Hendrix*, Master Muir found a third party notice was a nullity and declined to grant leave *nunc pro tunc* because some of the third parties had not been served.

[27] ICBC relies on Rules 22-7(2) and (4). Rule 22-7(2) allows the court to set aside a proceeding or a step in a proceeding where there has been a failure to comply with the rules, but R. 22-7(4) requires any objection be brought within a reasonable time, and before the applicant has taken a fresh step.

[28] I do not regard this as an ordinary application under R. 22-7(4). In *Hendrix*, Master Muir found the third party notice to be a nullity, but made an order under R. 22-7(4) "in case that view is wrong…and for greater certainty" after declining to grant leave *nunc pro tunc.*

[29] In this case, both applications were brought as a result of a direction I made at a case planning conference. Prior to that point, ICBC was taking the position that it was up to the plaintiff to apply set aside the third party notice, while the plaintiff argued that the third party notice was a nullity that did not require anyone to do anything.

[30] In passing, I note that an argument based on alleged delay is a difficult one for ICBC to make, having waited six years to file the third party notice. By the time it filed the third party notice, ICBC had been aware of Rheaume's involvement from before litigation began, that of Cheung and Taffe for almost three years, and that of Moretti for more than one year.

[31] I find the failure to comply with R. 3-5(4) clearly renders the third party notice a nullity, absent an order for leave *nunc pro tunc*. I therefore turn to ICBC's application for such an order.

[32] In considering whether leave for the third party notice should be granted *nunc pro tunc,* the court cannot ignore the special considerations that apply to a class action.

[33] There is nothing in the *CPA* or the *Rules* to prevent third party proceedings in a class action. For example, in *Stanway v. Wyeth Canada Inc.,* 2011 BCSC 108, Justice Gropper considered an application by the defendant for leave to file third party notices. The application was denied on the basis of the facts and pleadings in that case, but the important point for present purposes is that the application for leave to file third party notices was heard before the certification application. Indeed, the certification application in *Stanway* was specifically adjourned to permit the issue of third party notices to be argued first: para. 8.

[34] The certification process is the most important step in a class proceeding, other than the trial or trials. It determines whether a class proceeding is the preferable procedure, confirms the nature of the claims asserted on behalf of the class, and sets out the common issues.

[35] In my view, the question of whether a class proceeding is to include third party claims should normally be raised at or before certification. The presence of third party claims may be relevant to the question of whether a class proceeding is the preferable procedure and may require the court to identify additional or different common issues.

[36] There may be exceptional circumstances in which the potential basis for a third party claim only becomes apparent after certification, but that is certainly not the case here. By the time of the certification hearing, ICBC was fully aware of the role played by all of the third parties and had filed a separate action against them. That separate action included all of the allegations that were later made part of the third party notice.

[37] The third party notice and ICBC’s response to the civil claim were filed together after certification. ICBC was apparently following a practice that had

developed in which many defendants in class proceedings awaited certification before filing their response. That practice was not provided for in either the *Rules* or the *CPA* and, by the time of the certification application in this case, had been expressly criticized in at least two judgments of this court: *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2015 BCSC 74 at paras. 31–34; *Shaver v. British Columbia*, 2017 BCSC 108 at paras. 77–85.

[38] I find the potential grounds for third party proceedings were clearly known to ICBC before the certification hearing and may have been highly relevant at that hearing. There is no good reason for ICBC's failure seek leave before the certification hearing and I therefore decline to give leave *nunc pro tunc.*

[39] If I am wrong in that, I also agree with counsel for the third party Moretti that the third party notice is an abuse of process and the court should not exercise its discretion in those circumstances. The abuse of process arises from ICBC filing the third party notice while it had an extant action against the same parties, seeking the same relief for the same alleged wrongs.

[40] In *Stanford v. Beazley,* 2019 BCSC 671, the plaintiff filed a Supreme Court action that duplicated claims he and his wife had each commenced separately in the small claims division of the Provincial Court. Justice Horsman said at paras. 39 and 40:

> [39] It is also well established as a matter of common law that the commencement by a plaintiff of more than one action in the same jurisdiction arising from the same dispute is an abuse of court process. As observed by Lord Jessel over a century ago, "It is *prima facie* vexatious to bring two actions where one will do": see *McHenry v. Lewis*, [1883] 22 Ch. D. 397.
>
> [40] This principle has been repeatedly applied by courts in British Columbia and in other jurisdictions in staying or dismissing actions that cover the same dispute as an extant proceeding. See, by way of example, *Lacharity v. University of Victoria Students' Society*, 2012 BCSC 1819; *Paterson v. Jaikumar* (1979), 96 D.L.R. (3d) 674; *Great Pacific Contracting Ltd. v. Harwyn Properties Ltd.* (1981), 29 BCLR 145; *Concord Pacific Kingsway Project Limited Partnership v. Ivanhoe Cambridge II Inc*., 2017 BCSC 282; and *Boehringer Ingelheim (Canada) Ltd. v. Englun*d, 2007 SKCA 62.

[41] ICBC relies on *Singh v. Nicholson*, 2010 BCSC 537, for the proposition that striking a duplicative proceeding is a draconian remedy that should only apply where the proceeding has been instituted to gain an advantage, such as to circumvent the rules or re-litigate an issue that has already been decided.

[42] The facts in *Singh* were similar to *Stanford* in that the action in this court duplicated a small claims action. However, by the time the application to strike the Supreme Court action came on for hearing, the plaintiffs had withdrawn their small claims action and there was no longer any duplication.

[43] *Owners, Strata Plan LMS 343 v. Haseman Canada Corporation*, 2007 BCCA 301, also relied on by ICBC, is also distinguishable. In that case, the plaintiff failed in an application to join additional parties as defendants. The judge hearing that application was told that, one day earlier, the plaintiff had commenced a separate action against the same parties in the event its joinder application was denied.

[44] The plaintiff appealed the denial of the joinder application and, before the appeal was heard, the defendants applied before another judge to stay or dismiss the separate action. The second judge held, and the Court of Appeal agreed, that the appeal from the unsuccessful joinder application did not constitute an extant duplicate action. As I read the decision, there was no duplication at the time because the defendants were not parties to original action unless and until the Court of Appeal ruled otherwise.

[45] While seeking leave to proceed with third party proceedings, ICBC has not discontinued its separate action and has not indicated that it has any intention of doing so. As Horsman J. said in *Stanford* at para. 46, “an election must be made.” In the absence of such an election, the more recently commenced proceeding, being the third party notice, must be considered an abuse of process.

[46] I further note that in *Canadian Imperial Bank of Commerce v. Green*, 2015 SCC 60 at para. 90, Justice Cote set out a non-exhaustive list of factors the court

may consider in determining whether to exercise its discretion to grant an order *nunc pro tunc:*

> (1) the opposing party will not be prejudiced by the order; (2) the order would have been granted had it been sought at the appropriate time, such that the timing of the order is merely an irregularity; (3) the irregularity is not intentional; (4) the order will effectively achieve the relief sought or cure the irregularity; (5) the delay has been caused by an act of the court; and (6) the order would facilitate access to justice; …

[47] For the reasons set out below in relation to the alternative consolidation application, I find it is neither necessary, just, nor convenient for the issues raised by the third party notice to be litigated with the common issues in the class action. Their addition would lengthen the trial to the prejudice of the plaintiff.

[48] Also for the reasons set out below, it cannot necessarily be said that leave would have been granted if the application had been brought at the appropriate time or that the common issues would necessarily have been the same. Further, in view of the facts long known to ICBC, I am not persuaded that the irregularity is unintentional.

## CONSOLIDATION WITH THE ICBC ACTION

[49] Even if it cannot proceed on the third party notice, ICBC is entitled to pursue its separate action against Rheaume, Moretti, and the others. That gives rise to ICBC's alternative application for consolidation under R. 22-5(8):

> **Consolidation**
>
> (8) Proceedings may be consolidated at any time by order of the court or may be ordered to be tried at the same time or on the same day.

[50] Although ICBC's notice of application refers to the Class Action and the ICBC Action being consolidated, it is really an application for the alternative order that they be tried at the same time.

[51] A true consolidation produces a single proceeding with a consolidated statement of claim and statement of defence. That is appropriate where the parties are the same and the issues are common such that disposition of one of the actions

will necessarily dispose of the issues in the other: *Discovery Enterprises v. Ebco Industries et al.,* 2001 BCSC 235 at para. 23. Consolidation is not possible in this case because ICBC would be both a plaintiff and a defendant in a consolidated action.

[52] An order for two actions to be heard together is discretionary: *Shah v. Bakken,* (1996) 20 B.C.L.R. (3d) 393 at para. 12 (S.C.).

[53] There are two questions that must be considered. The first is whether the two proceedings involve common claims, disputes, and relationships. That determination is made on a review of the pleadings. The second is whether the two proceedings are so interwoven as to make separate trials at different times before different judges undesirable and fraught with problems and expense: *Raymond James Investment Counsel Ltd. v. Clyne*, 2018 BCSC 720 at para. 36, citing *Hui v. Hoa* 2012 BCSC 1045.

[54] ICBC argues that the two actions should be tried together because the evidence of Rheaume, Moretti, Cheung, and Taffe must be before the court on the Class Action and the court may make findings of fact against them that will prejudice them in defending the ICBC claim.

[55] ICBC says an essential element of the first common issue is that the data was accessed "without a claim of right" and the plaintiff will have to call evidence from Rheaume to show that she accessed and used the information outside her employment context. It says that in order establish that the private information that left ICBC was connected to the property damage, the plaintiff will also need to prove that the information was delivered to Moretti and then passed to Taffe and Cheung.

[56] That submission is not consistent with ICBC’s own pleadings in the Class Action, which do not put any of those facts in issue.

[57] The key factual allegation in the plaintiff’s second further amended notice of civil claim is found at para. 9:

> 9. In or about 2010 and 2011 at least 65 individuals had their personal information, wilfully and without claim of right, accessed by the Employee without a legitimate or authorized purpose, many of whom had their premises, vehicles and other personal possessions made targets of shootings, arson and other property damage. The Employee used the unlawfully obtained personal information herself, or disclosed the personal information to unauthorized third parties, who used that personal information to identify, locate and target those individuals and/or their families and other residents of their premises.

[58] In its initial response, ICBC not only admitted that allegation, but provided further particulars. After identifying Rheaume as an ICBC employee with access to database at all material times, the response contained the following paragraphs.

> 19. Between February 1, 2011 and September 1, 2011, Rheaume improperly accessed personal information of 78 individuals contained in the Databases without apparent business purposes (the "Illegal Access").
>
> …
>
> 21. Rheaume subsequently disclosed the personal information obtained through the Illegal Access to Moretti for a fee of $25 or more per licence plate (the "Illegal Disclosure").
>
> 22. The personal information provided to Moretti by Rheaume was used by Cheung, Taffe and others to engage in arsons, shootings and other illegal or improper activity (the "Attacks"), which resulted in loss and damage to property owned by 13 of the 78 individuals whose personal information was disclosed. (the "Targeted Subclass")

[59] In its amended response, ICBC has amended para. 19 to specifically adopt the phrase "without a claim of right," while reducing the number of people to whom its says that applies. The paragraph now reads:

> 19. Between February 1, 2011 and September 1, 2011, Rheaume accessed, without a claim of right, personal information of 45 persons contained in the Databases (the "Illegal Access").

[60] The amended response then says Rheaume accessed information of 23 persons "for which the purpose and claim of right of Rheaume's access is unknown to ICBC" and 11 for which a claim of right has been identified or, in at least one case, where the claim has been extinguished by the individual's death.

[61] The paragraphs relating the involvement of Moretti, Cheung, and Taffe remain substantially unchanged.

[62] ICBC therefore admits that Rheaume accessed personal information of class members without a claim of right, that she passed that information to Moretti, and that the information was used by Cheung and Taffe to attack the homes of the subclass members. The plaintiff does not have to prove facts that the defendant admits in its pleadings.

[63] The effect of the recent amendments to ICBC's response is to simply assert that the class is smaller than what was assumed at the time of certification. It may be arguable that the change constitutes the withdrawal of an admission, for which consent or leave of the court was required under R. 7-7(5)(c), but I do not need to consider that question here.

[64] The trial of common issues will determine whether Rheaume's conduct, which ICBC has admitted for the purpose of the class action, constituted a breach of class members' privacy pursuant to the *Privacy Act*, R.S.B.C. 1996, c. 373, whether ICBC is vicariously liable for the conduct, and whether class members are entitled to damages. It will also determine whether the attacks suffered by members of the subclass were foreseeable to a person in Rheaume's position.

[65] The assertion that there are some individuals who can no longer be properly considered members of the class is not relevant to any of those common issues and is a matter to be addressed after the common issues are decided.

[66] ICBC appears to hope or assume that, in a combined trial, the defendants in the ICBC Action will put in issue facts it has admitted in the Class Action. In my view, that is not an appropriate use of R. 22-5 (8). In any event, it is not clear how much issue there could be about those facts. Rheaume has not responded to the ICBC Action and both ICBC and the plaintiff in the Class Action now have access to what appears to be extensive evidence obtained in the criminal proceedings against Rheaume, Cheung, and Taffe.

[67] The application to have the ICBC Action tried at the same time as the trial of common issues in the Class Action must be dismissed. If, following that trial, there

are to be any subsequent trials of individual issues, it may then become appropriate to consider such an application.

## CONCLUSION

[68] The third party notice filed by ICBC out of time and without leave is a nullity and ICBC's application for leave to file it *nunc pro tunc* is dismissed.

[69] Although it may not be strictly necessary in view of the fact that the document is a nullity, I order that the third party notice be set aside.

[70] The defendant's application to have action S176231 heard at the same time as this Class Action is dismissed, but the defendant has leave to renew the application, if necessary, after a trial judgment on common issues and before a trial or other procedures to determine individual issues.

"N. Smith, J"