IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Tharani v. LifeLabs Inc.,*
2020 BCSC 1670

Date: 20201106
Docket: S1914329
Registry: Vancouver

Between:

Anna Belle Tharani

Plaintiff

And

LifeLabs Inc. and LifeLabs BC Inc.

Defendants

- and -

Docket: S203526
Registry: Vancouver

Between:

Vincent Gogolek

Plaintiff

And

LifeLabs Inc., LifeLabs LP, LifeLabs BC Inc., LifeLabs BC LP, and Excelleris Technologies

Defendants

- and -

Docket: S203198
Registry: Vancouver

Between:

Donna Olson

Plaintiff

And

LifeLabs Inc., LifeLabs LP, LifeLabs BC Inc., LifeLabs BC LP, and Excelleris Technologies Inc.

Defendants

- and -

Docket: S1914311
Registry: Vancouver

Between:

Bridey Morrison Morgan

Plaintiff

And

LifeLabs BC Inc.

Defendant

- and -

Docket: S201411
Registry: Vancouver

Between:

Chuck Wilmink

Plaintiff

And

LifeLabs Inc., LifeLabs LP, LifeLabs Ontarion Inc., LifeLabs BC Inc., LifeLabs BC LP, Excelleris Technologies Inc.

Defendants

Before: The Honourable Madam Justice Iyer

Reasons for Judgment – Motion for Stay

Counsel for Plaintiff, Anna Tharani:	A.C.R. Parsons
Counsel for Plaintiff, Vincent Gogolek:	R. Mogerman J. Thornback
Counsel for Plaintiff, Donna Olson:	B. Olthuis J. Leclerc J. Roos
Counsel for the Defendants:	M. Feder A. Cocks
Place and Date of Hearing:	Vancouver, B.C. September 8, 2020
Place and Date of Judgment:	Vancouver, B.C. November 6, 2020

OVERVIEW

[1] In this application, the proposed representative plaintiff, Anna Belle Tharani, applies to stay three other class actions commenced in this court relating to the same alleged data breach, and to prohibit any other class proceedings relating to the same subject matter from being filed in this court.

[2] All of these proceedings arise from a cyber breach of LifeLabs' data systems that it announced in December 2019. The personal information of some 15 million patients across Canada, including contact information, personal health numbers and passwords, may have been compromised and a subset of 85,000 patients' lab test results were hacked ("Privacy Breach").

[3] Multiple class actions were commenced in Ontario and in BC and a carriage motion was brought in Ontario. On May 6, 2020, Belobaba J. awarded carriage to one of three competing groups of class action law firms (2020 ONSC 2674 ["Belobaba Decision"]). The successful group in Ontario now applies to stay the proceedings commenced in BC by the two rival groups, invoking the doctrines of issue estoppel and abuse of process to argue that this court should not entertain a carriage motion here.

[4] For the reasons that follow, I disagree.

FACTUAL BACKGROUND

[5] The Belobaba Decision describes the claims arising from the Privacy Breach as follows:

> 2 At least thirteen proposed class actions materialized almost immediately -- four in Ontario and nine in British Columbia. In Ontario, the law firms quickly organized themselves into three rival camps, each of them keen to be exclusively appointed class counsel for the Ontario proceeding.
>
> 3 These are the competing groups, their senior class action lawyers and their proposed Ontario proceeding:
>
> (i) Charney Lawyers (Ted Charney) -- *MacBrayne* action;
>
> (ii) The Waddell/Klein/Sotos Group (Marg Waddell and Jean-Marc Leclerc) -- *Feldberg* action;

(iii) The McPhadden/Waldman/Stein Group (Bryan McPhadden) -- *Carter* action.

4 Each of Charney Lawyers ("CL"), the Waddell Group ("WG") and the McPhadden Group ("McG") are also working with one or more B.C. firms.

[6] After trying unsuccessfully to persuade the three groups of law firms to work together, Belobaba J. awarded carriage to the McPhadden Group based on his assessment of the overall approach and the proposed fee arrangements proposed by each group.

[7] Each of the rival groups of Ontario lawyers was or has since become associated with the BC law firms that had commenced class actions in British Columbia. Charney Lawyers (CL) joined with Camp Fiorante Matthews Mogerman who are acting in the *Gogolek* and *Holt* actions. The Waddell Group (WG) joined with Hunter Litigation Chambers, which is acting in the *Olson* action. The McPhadden Group joined with Collette Parsons Corrin LLP, Rosenberg Law, Arsenault Aaron, and later with Boughton Law Corporation, who are acting in the *Tharani* action, the *Morrison* action, the *Doyle* action and the *Wilmink* action. For convenience, I will use the same acronyms used in the Belobaba Decision to describe the groups: CL, WG and McG.

[8] The *Tharani* and *Gogolek* actions propose a national class. The *Holt* action proposes a BC class, and the *Olson* Action proposes a class covering Western Canada (BC, Yukon, NWR, Albert, Saskatchewan and Manitoba). The defendants in the *Tharani* action are LifeLabs Inc. and LifeLabs BC Inc. The *Holt* action names those two defendants as well as LifeLabs LP and LifeLabs BC LP. The Gogolek and *Olson* actions name these four defendants as well as Excelleris Technologies Inc., and Ms. Olson proposes to add another defendant, Excelleris Technologies LP.

[9] The *Carter* action, which was awarded carriage in Ontario, names as defendants LifeLabs Inc., LifeLabs BC Inc., LifeLabs LP and Excelleris Technologies Inc., but does not name LifeLabs BC LP.

[10] The day after the Belobaba Decision, CL requested the assignment of a case management judge in the *Gogolek* action.

[11] I was assigned to case manage the proposed class actions in BC. In June 2020, McG filed the present notice of application in *Tharani* seeking to stay the *Gogolek*, *Holt* and *Olson* actions. At a sequencing case planning conference on June 25, 2020, I directed that McG's stay application be heard before the carriage motion.

[12] On July 14, 2020, the Ontario Divisional Court dismissed CL's and WG's applications for leave to appeal the Belobaba Decision.

ISSUE

[13] The issue in this application is whether permitting the *Gogolek*, *Holt* and *Olson* actions to proceed to a carriage hearing is barred by the doctrine of issue estoppel or would constitute an abuse of process.

ANALYSIS

Stays, Carriage and Certification in Multijurisdictional Class Actions

[14] In class action proceedings, carriage contests occur when more than one class proceeding is brought regarding the same defendant and the same subject-matter. The *Class Proceedings Act* ("CPA") authorises the court to make orders for the "fair and expeditious" determination of class proceedings (s. 12) and to stay proceedings where appropriate (s. 13).

[15] As this court recently stated in *Wong v. Marriott International Inc.*, 2020 BCSC 55 at para. 23, the issue in a carriage motion is:

> … which action is most likely to advance the interests of the class members, provide fairness to the defendants, and promote access to justice, behavior modification, and judicial economy: *Strohmaier CA* at para. 41; *Mancinelli v. Barrick Gold Corporation*, 2016 ONCA 571 at para. 13 [*Mancinelli*].

[16] The cases have established a non-exhaustive list of 17 factors that include assessment of the qualifications of the proposed representative plaintiffs and proposed class counsel, and comparison of the competing case theories and litigation plans. (See *Wong* at para. 24 citing *Rogers v. Aphria Inc.*, 2019 ONSC 3698 at paras. 17-18).

[17] When the court awards carriage to one action, it stays the competing action until certification has been determined. Certification requires the court to determine whether the proposed class proceeding should proceed, applying the factors set out in the CPA. If the court refuses to certify the proposed class proceeding, it may lift the stay on one of the other proceedings.

[18] As the Court of Appeal explained in *Fantov v. Canada Bread Company, Limited*, 2019 BCCA 447 (para. 51), the amendments to the CPA that now permit filing of multijurisdictional actions in BC (along with similar changes to class proceedings statutes in other jurisdictions) are a legislative response to the strategic use of carriage motions in multijurisdictional class actions:

> 51 The recent amendments to the *CPA* create a mechanism to resolve these issues. They have set up a process and procedure by which a case management judge, in the context of a certification application, can determine whether the proceeding should go forward in whole or in part, or alternatively, be heard in another jurisdiction. By requiring the party that commences a class proceeding to serve a representative plaintiff in any existing or proposed multi-jurisdictional class proceeding commenced elsewhere in Canada and by giving the right to the person so served to make submissions at the certification hearing, the new legislation has done away with the need for stalking horse actions like Fantov to be commenced. Whether and how the proceeding will go forward is decided not in the context of the carriage motion, but rather, at certification pursuant to a set of criteria set out in the legislation.

[19] In *Fantov*, the court of appeal held that stay applications in proposed multijurisdictional class proceedings usually should be decided at the certification hearing, not before it. This is because the legislative criteria for deciding whether it is preferable for all or part of a local action to proceed or the matter should proceed in another jurisdiction requires consideration of the evidence contained in the materials filed at a certification hearing (paras. 64-66). However, Goepel J.A. acknowledged that in some circumstances it will be appropriate to a stay a multijurisdictional class action for abuse of process before the certification stage (at para. 69).

Relationship between Class Counsel and their Clients

[20] While the best interests of the proposed class is the primary consideration in a carriage motion, courts have observed that the enormous legal fees in large class

actions means that the competing law firms have the greatest financial stake (*Fantov* at para. 9).

[21] *Del Giudice v. Thompson*, 2020 ONSC 3623 concerned an unusual claim for costs against class action counsel who represented the successful plaintiff in a carriage motion based on counsel's non-compliance with an order by the case management judge. In awarding costs against counsel and specifying that they not be passed on to the class, Perell J. commented (at paras. 28-29):

> …In a normal action, the lawyer for the client is not personally a litigant. However, in the context of a proposed class action, putative Class Counsel approaches being a co-party with the Class Members in advancing the action. Typically, in terms of risks and rewards, Class Counsel has far more an interest in the class action than an individual class member. This is especially true at a carriage motion. A carriage fight, however, is where Class Counsel is most in it for himself or herself. I have commented more than once that it would be desirable that putative Class Counsel retain a lawyer to argue a carriage motion.
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> 29 In class proceedings, the inherent conflicts of interests of Class Counsel are acceptable and tolerable in furtherance of access to justice and because of the court's oversight of Class Counsel. There is case management. Settlements and Class Counsel's contingency fees must be approved by the Court.

[22] McG submits that "[i]n a carriage dispute the competing putative class counsel are the litigants", and that the participation of the three counsel groups in the Ontario carriage motion bars them from disputing carriage here. In other words, McG seeks to turn judicial expressions of concern about how the practical reality of the high stakes competition between class action law firms may adversely impact the best interests of the proposed class into judicial acceptance that, as a matter of legal principle, the law firms are the litigants.

[23] It is not necessary for me to address the hotly contested evidence presented to me about who appeared before Belobaba J. and what they said. Even accepting McG's account, its argument fails. However great their financial interest may be, class counsel are not parties or privies. Absent proof of purely duplicative actions and no ongoing legitimate purpose (*Fantov* at paras. 71-72), a carriage decision in Ontario does not foreclose a carriage contest here.

Issue Estoppel

[24] Issue estoppel may apply in a subsequent proceeding where in a previous judicial proceeding: (1) the same question was decided; (2) the previous decision was final; and (3) the parties to both proceedings or their privies are the same: *British Columbia (Director of Civil Forfeiture) v. Hyland*, 2010 BCCA 148 at para. 19. The doctrine is discretionary. Even if the criteria are satisfied, the court must decide whether to bar the second proceeding: *Danyluk v. Ainsworth Technologies Inc.,* 2001 SCC 44 at para. 33.

[25] The question before Belobaba J. was, as he put it (at para. 6), "whether CL, WG or McG should be awarded carriage in Ontario." The question before me is who should be awarded carriage in BC. The fact that, like the proposed proceedings in Ontario, all but one of the proposed proceedings in BC are multijurisdictional does not mean that the "same question" is before both courts for the purposes of issue estoppel. That is because while the law governing the comparison may be the same, the comparators are not. There are different proposed representative plaintiffs. The evidence does not show that the other carriage factors are the same. The question on this carriage motion is not the same as that decided in the Belobaba Decision.

[26] I accept that the Belobaba Decision was final for the purposes of the issue estoppel analysis.

[27] The fundamental defect in McG's issue estoppel analysis is in its interpretation of "parties" and "privies". McG argues that the financial stakes of class action law firms means that "they are the litigants" rather than the plaintiffs who "remain the members of the putative class regardless of which law firm is awarded carriage." Alternatively, McG submits that the same financial interest means that class counsel are privies of the parties.

[28] Obviously, the law firms are not parties in a formal sense. They are neither plaintiffs nor defendants.

[29] In *J.P. v. British Columbia (Director, of Child, Family and Community Services)*, 2013 BCSC 1403, Walker J. explained the meaning of the term "privy":

> [70] The definition of privies has been the subject of considerable discussion in the authorities. Privies have been described as persons having a community or unity of interest, whether by blood, title, or interest. Privies include parties who control an action or who have a judicial identity. The concept is elastic and the categories of privies are not fixed: D*anyluk* at paras. 59-60; *Lougheed v. Wilson*, 2012 BCSC 169 at para. 67; and *Foreman v. Niven*, 2009 BCSC 1476 at para. 26. For example, privies include persons who are not a party but who control an action; they are bound by the judgment as if they were a party if they have a financial or proprietary interest in the judgment: *Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2)*, [1967] 1 A.C. 853 at 936-937 (H.L.); *Director of Community Operations v. 101150089 Saskatchewan Ltd.*, 2012 SKQB 441 at para. 38; and *Hoffman-LaRoche Ltd. v. Canada (Minister of National Health and Welfare)*, [1997] 2 F.C. 681 (T.D.).
>
> [71] Ultimately, the court has to determine whether there is a "sufficient degree of identification between the two to make it just to hold that the decision to which one was party should be binding in proceedings to which the other is a party": *Gleeson v. J. Wippell & Co. Ltd.*, [1977] 3 All E.R. 54 at 60 (Ch.).
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> [72] In *Giles v. Westminster Savings Credit Union*, 2006 BCSC 1600, aff'd 2010 BCCA 282 ("*Giles (C.A.*)"), Sigurdson J. quoted with approval the following remarks from the author of *The Doctrine of Res Judicata in Canada*, 2d. ed. (Toronto: Butterworths, 2004) at 77:
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> > A privy of a party has been variously defined in issue estoppel cases. Before a person can be a privy of a party, there must be community or privity of interest between them, or a unity of interest between them. They cannot be different in substance. Privity can be one of blood, title, or interest. A person who is privy in interest to a party in an action and has notice of that action is equally bound by the findings in that action. A privy is a person who has a right to participate with a party in the proceeding or who has a participatory interest in its outcome. A person who has no right to participate as a party in a proceeding lacks a due process requirement to make a finding of privity of interest. To determine whether a person has a participatory interest in the outcome of the proceeding is to determine whether the outcome could affect the liability of that person. Privy requires parallel interest in the merits of the proceeding, not simply a financial interest in the result. However, a non-party who enters into a formal agreement with the party in a proceeding for disposing of the proceeds is a privy of that party and bound by the first proceeding.

[30] Counsel – even class counsel – do not control an action; the client does. Counsel are not bound by the judgment as if they were a party. They do not have a parallel interest in the merits of the proceeding. The role of counsel is to serve the client's interests. The financial reality of class action proceedings does not turn

lawyers into co-litigants. The concern that the financial interests of class action counsel may conflict with the best interests of the class is the reason for the extent of judicial oversight of fee arrangements and settlements. Finding class counsel to be privies of the parties would magnify conflict concerns.

[31] I conclude that issue estoppel does not bar a carriage hearing among the competing class actions commenced in BC. If I am incorrect in my analysis, the reasons I have given would lead me to exercise my discretion not to apply issue estoppel in this case.

Abuse of Process

[32] In *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79*, 2003 SCC 63 at para 38, the Supreme Court of Canada explained the policy underlying the doctrine of abuse of process

> It is true that the doctrine of abuse of process has been extended beyond the strict parameters of *res judicata* while borrowing much of its rationales and some of its constraints. It is said to be more of an adjunct doctrine, defined in reaction to the settled rules of issue estoppel and cause of action estoppel, than an independent one (Lange, *supra*, at p. 344). The policy grounds supporting abuse of process by relitigation are the same as the essential policy grounds supporting issue estoppel (Lange, *supra*, at pp. 347-48):
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> > The two policy grounds, namely, that there be an end to litigation and that no one should be twice vexed by the same cause, have been cited as policies in the application [page104] of abuse of process by relitigation. Other policy grounds have also been cited, namely, to preserve the courts' and the litigants' resources, to uphold the integrity of the legal system in order to avoid inconsistent results, and to protect the principle of finality so crucial to the proper administration of justice.

[33] McG's abuse of process argument is that to permit class counsel who have lost a carriage motion in one jurisdiction (Ontario) to seek carriage of a class action claim for which the same class action counsel group is acting in BC permits forum shopping. As stated in its reply submissions:

> CL and WG attempt to use the sections of the Class Proceedings Act R.S.B.C. 1996, c. 50 (the "CPA") that guide the court when determining whether to yield to another jurisdiction in the case of overlapping multi-jurisdictional proceedings as statutory cover for an attempt to have another "bite at the cherry". They do so disregarding an order of the Ontario Superior

> Court of Justice after availing themselves of that Court's jurisdiction in a carriage dispute.

[34] However, the mere fact that parallel class actions have been commenced does not make them duplicative. It is common for class proceedings, including those proposing multijurisdictional classes, to be commenced in more than one jurisdiction: *DALI 675 Pension Fund v. SNC Lavalin*, 2019 ONSC 6512, para. 12; cited in *Forster v. Monsanto Company*, 2020 BCSC 1376 at para. 44. One reason is that there is no proceeding until a court orders certification. As noted in *Hafichuk-Walkin v BCE*, 2016 MBCA 32, another reason is our federal system.

[35] McG's suggestion that CL and WG are "disregarding" the Belobaba Decision by seeking carriage here overlooks basic principles of Canadian federalism. Belobaba J. did not and could not make an order precluding the prosecution of class proceedings in this province.

[36] Stays of class action proceedings have been granted on abuse of process grounds where the same lawyers or same plaintiffs file virtually identical class actions in multiple jurisdictions or the evidence shows that any difference in identity is formal rather than real: *SNC Lavalin* paras. 18-19. That is a high standard. Given the opportunity to assess and compare competing proposed class actions in a carriage motion and at the certification stage, both of which involve more fulsome evidentiary records than on an earlier stay application, courts should be cautious about allowing a stay application to be used as a pre-emptive strike.

[37] Here, the *Carter* action awarded carriage in Ontario does not name LifeLabs BC LP as a defendant. One of the BC class actions proposes a BC class, not a national class. WG proposes two regional class actions, as it did in Ontario. I have reviewed the Notices of Civil Claim in the impugned BC actions and compared them to the claim in *Carter*. Although they overlap substantially, they are not identical.

[38] There is no evidence that Ontario class counsel selected the proposed representative plaintiffs in BC or that the BC firms now working with the Ontario groups are mere "beards". Rather, it appears to me that cooperation among counsel

has reduced the number of competitors. The fact that all of the proposed class actions were filed within a short period does not demonstrate no legitimate purpose; it reflects the reality of class action litigation in the Canadian federal system.

[39] Although I appreciate that the multiple carriage motions are inefficient, this must be balanced against the interests of putative BC class members to have their best interests considered by a BC court. The fact that the *Carter* action was awarded carriage in Ontario is a factor to be considered in a carriage motion and at certification. It is not a basis for staying the impugned BC actions.

[40] The stay application is dismissed, without prejudice to Ms. Tharani's ability to raise these arguments at carriage motion and/or at certification.

"Iyer J."