
CANADA / JUDGMENT

Wittman v. Blackbaud, Inc.

2021 BCSC 415

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Supreme Court of British Columbia

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2021 BCSC 415 Wittman v. Blackbaud, Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Wittman v. Blackbaud, Inc.,

2021 BCSC 415

Date: 20210309

Docket: S207965

Registry: Vancouver

Between:

Stefan Wittman

Plaintiff

And

Blackbaud, Inc. and Blackbaud Canada, Inc.

Defendants

Brought under the Class Proceedings Act, R.S.B.C. 1996, c. 50

Before: The Honourable Madam Justice Ahmad

Reasons for Judgment

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Place and Date of Hearing:

Vancouver, B.C.

February 5, 2021

Place and Date of Judgment:

Vancouver, B.C.

March 9, 2021

Introduction

- [1] This matter involves a proposed class proceeding under the Class Proceedings Act, R.S.B.C. 1996, c. 50 [the Act].
- [2] The proposed representative plaintiff, Stephan Wittman, donated money to the BC Cancer Foundation and, in doing so, provided it with some personal information including his age, address, email address and credit card number.
- [3] The defendant Blackbaud, Inc. ("Blackbaud US") is a cloud software company based in South Carolina that, among other things, provides data management and other services for organizations engaged in philanthropic activities. One of its customers is the BC Cancer Foundation.
- [4] Blackbaud Canada, Inc. ("Blackbaud Canada") is a wholly-owned subsidiary of Blackbaud US. Its role is to market Blackbaud US's products and services in Canada. It does not host or manage data collected by Blackbaud US's customers.
- [5] In May 2020, Blackbaud US discovered that an unknown cybercriminal had perpetrated a ransomware attack on it and claimed to have accessed certain information. Blackbaud US believed that information belonging to the BC Cancer Foundation may have been accessed.
- [6] Immediately on discovering the cyberattack, Blackbaud took steps to expel the cybercriminal from its environment and to ensure that the cybercriminal permanently deleted any data it may have accessed. It provided BC Cancer Foundation with information related to the cyberattack.

- [7] In July 2020, the BC Cancer Foundation informed Mr. Wittman that cybercriminals had accessed his personal information as the result of the data breach.
- [8] In the proposed class proceedings, the plaintiff has sought damages and other losses from Blackbaud US and Blackbaud Canada in respect of the data breach.
- [9] On this application, the defendants seek a determination of the sequencing of various applications they intend to bring in the proceeding.

Procedural Background

- [10] The plaintiff filed the action on August 11, 2020 and delivered the certification application materials on the defendants on November 23, 2020, within the timeframe contemplated by the Act.
- [11] Neither defendant has filed a response to civil claim.
- [12] At a judicial management conference held on December 14, 2020, the defendants advised that they intended to bring a number of applications that they hoped to have heard prior to the certification hearing.
- [13] The parties reserved May 6 and 7, 2021 to accommodate possible outcomes of this sequencing hearing. They also reserved September 20 to 23, 2021 for the certification hearing.
- [14] Since then Blackbaud US has filed a jurisdictional response disputing the Court's jurisdiction over it.
- [15] In addition, the defendants have delivered the following unfiled notices of applications:
 - a) an application for an order staying the action pursuant to the International Commercial Arbitration Act, R.S.B.C. 1996, c. 233 [ICAA] (the "Stay Application");
 - b) Blackbaud US's application for an order dismissing or staying the action against Blackbaud US on the basis that this court has no jurisdiction over it, pursuant to Rule 21-8 and the Court Jurisdiction and Proceedings Transfer Act, S.B.C. 2003, c. 28 (the "Jurisdiction Application"); and
 - c) an application for an order granting summary judgment in dismissing the action pursuant to Rule 9-6 (the "Summary Judgment Application").

The Parties' Positions

- [16] On this sequencing application, the defendants seek an order that the Stay Application, the Jurisdiction Application and the Summary Judgment Application be heard and determined at one time before the certification application.

- [17] The plaintiff opposes that sequencing. Although he does not concede that the Stay Application should precede certification as a matter of right, he consents to have that application being heard on May 6, 2021, one of the days set aside for possible pre-certification matters.
- [18] He disputes that either of the Jurisdiction Application or the Summary Judgment Application should be heard prior to certification. He will, however, consent to one, not both, of those applications being heard with the certification hearing.

Issues

- [19] The questions to be determined on this application are:
- a) Is it appropriate that the Stay Application be heard prior to the certification application;
 - b) Should the Jurisdiction Application and the Summary Judgment Application be heard with the Stay Application on May 6, 2021 (i.e., prior to the certification application);
 - c) If not, when should the Jurisdiction Application and the Summary Judgment Application be heard?

Legal Principles

- [20] As is acknowledged in virtually every sequencing decision, as a general starting point, certification should be the first procedural matter determined in a proposed class proceeding: *Watson v. Bank of America Corp.*, 2012 BCSC 146 citing *Kwicksutaineuk/Ah-Kwa-Mish First Nation v. British Columbia (Minister of Agriculture Lands)*, 2009 BCSC 1593 at para. 59.
- [21] However, pursuant to its broad case management powers under the Supreme Court Civil Rules, the court retains the discretion to hear applications before certification if it is just and efficient to do so: *Pantusa v. Parkland Fuel Corporation*, 2020 BCSC 1988 at para. 14 [Pantusa]; *Gill v. Yahoo! Canada Co.*, 2018 BCSC 290 at paras. 14, 16-18.
- [22] Nonetheless, the defendant must show compelling reasons or exceptional circumstances before the court will exercise its discretion to hear applications before certification: *Kett v. Mitsubishi Materials Corporation*, 2019 BCSC 2373 at para. 16 [Kett]; *Forster v. Monsanto Company*, 2020 BCSC 1376 at para. 33.
- [23] The usual discretion is significantly more limited with respect to applications for a stay pursuant to the ICAA. In respect of those applications, Justice Horsman held in *Williams v. Amazon.com, Inc.*, 2019 BCSC 1807 [Amazon] at para. 33 that the "discretion must be exercised in a manner that does not undermine the policy of the Arbitration Act." I take that to mean that in most cases, an application for stay pursuant to the ICAA should be heard in advance of the certification hearing.

- [24] The discretion to be exercised on sequencing applications is highly dependent on the facts of the particular case: *Strohmaier v. British Columbia (Attorney General)*, 2014 BCSC 2078 at para. 13 [Strohmaier].
- [25] In *Cannon v. Funds for Canada Foundation*, 2010 ONSC 146 at para. 15, the court set out a non-exhaustive list of factors for the court to consider when deciding the most fair and efficient sequence of application. Those factors (the "Cannon Factors") are:
- a) whether the application will dispose of the entire proceeding or will substantially narrow the issues to be determined;
 - b) the likelihood of delays and costs associated with the application;
 - c) whether the outcome of the application will promote settlement;
 - d) whether the application could give rise to interlocutory appeals and delays that would affect certification; related to (b)
 - e) the interests of economy and judicial efficiency; and
 - f) generally, whether scheduling the application in advance of certification would promote the "fair and expeditious determination" of the proceeding.
- [26] If the Cannon Factors indicate an equal advantage to hearing certification first or the other applications first, the "tie goes to the plaintiff" and certification will be heard first or concurrently: *Kett* at para. 16.

Analysis

- [27] As noted above, the parties have agreed to proceed with the Stay Application before the certification hearing. For the reasons set out by Justice Horsman in *Amazon*, I agree that it is appropriate that application precede the application for certification.
- [28] The next question is whether the Summary Judgment and the Jurisdiction Applications should also be heard at the same time?
- [29] The plaintiff says that question can be determined, in at least part, by reference to the preconditions of proceeding with the Stay Application and the Summary Judgment Application. He argues those preconditions preclude those applications from being heard at the same time.
- [30] I will start my analysis with a consideration of that preliminary issue.

Preliminary Issue: Can the Summary Judgment Application Be Heard with the Stay Application?

- [31] The defendants rely on section 8(1) of the ICAA for the Stay Application. That section provides:

8 (1) If a party to an arbitration agreement commences legal proceedings in a court against another party to the agreement in respect of a matter agreed to be submitted to arbitration, a party to the legal proceedings may, before submitting the party's first statement on the substance of the dispute, apply to that court to stay the proceedings.

[Emphasis added]

[32] It is unclear from the face of that section whether a party can submit a "statement on the substance of the dispute" after it has filed its application for a stay, but before the application is heard and determined. Without deciding the issue, I anticipate that a cautious defendant would not file a response.

[33] I understand that is the basis on which the defendants in this case have not filed, and do not intend to file, a response to civil claim prior to the Stay Application.

[34] That decision creates a dilemma for the defendants. In order to proceed with the Summary Judgment Application the defendants must file a response to civil claim.

[35] Rule 9-6(2) provides:

(2) In an action, a person who files an originating pleading in which a claim is made against a person may, after the person against whom the claim is made serves a responding pleading on the claiming party, apply under this rule for judgment against the answering party on all or part of the claim.

[Emphasis added]

[36] The prohibition that the response cannot be filed to proceed with the Stay Application and the requirement that a response must be filed to proceed with the Summary Judgment Application are diametrically opposed.

[37] The defendants acknowledge the dilemma. However, counsel says the dilemma can be remedied if the Court grants leave to allow them to file the response while still allowing it to rely on section 8 of the ICAA. Putting aside the issue of whether the Court has the jurisdiction to do so, or if it is appropriate to do so, the defendants have not taken any steps to obtain such leave.

[38] Until they take whatever steps are necessary to file a response, they are not in a position to proceed with the Summary Judgment Application either with the Stay Application on May 6, 2021, or at all.

[39] Those applications cannot proceed together on that date.

[40] That does not preclude the Jurisdiction Application from being heard at the same time as the Stay Application before certification. The question is: should it? More generally, when should the Jurisdiction and Summary Judgment Applications be heard?

[41] Those questions can be determined by reference to the Cannon Factors.

Application of the Cannon Factors

Will the applications dispose of the entire proceeding or substantially narrow the issues to be determined?

- [42] The defendants argue that the Summary Judgment and Jurisdiction Applications raise discrete issues that, if successful, will summarily dispose of the action or substantially narrow the issues by limiting the claims that have no chance of success. On that basis, they say it is appropriate to hear the applications first.
- [43] If successful, the Jurisdiction Application will be dispositive as against Blackbaud US. However, even if successful against that defendant, it will not dispose of the proceeding against Blackbaud Canada. That matter will still be left to be determined.
- [44] This Cannon Factor is neutral with respect to the Jurisdiction Application
- [45] The issue is even less certain with respect to the Summary Judgment Application. That application may be dispositive of all of the issues against both defendants if the defendants succeed.
- [46] To succeed on a summary judgment application, an applicant must establish there is no triable issue of fact or that the only genuine issue is the amount or a question of law: Rule 9-6(5).
- [47] That is a difficult threshold to meet: *Northwest Organics, Limited Partnership v. Maguire*, 2015 BCSC 1918 at para. 38.
- [48] In *Pantusa*, the court considered the sequencing of a summary judgment application. In light of the "heavy burden" the defendants would bear on a summary judgment application in that case, Justice Milman found that this Cannon Factor favoured the defendants to some degree, but had limited weight: *Pantusa* at paras. 24, 25.
- [49] I am of the same view in this case.
- [50] The plaintiff has advanced his claim on a number of possible causes of action including various breaches of statutory obligations under the Privacy Act, R.S.B.C. 1996, c. 373, the Personal Information Protection Act, S.B.C. 2003, c. 63 and the Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5, negligence and, for those class members in certain provinces, the tort of intrusion upon seclusion.
- [51] On this application, the defendants have outlined the bases on which they say they will succeed in having the claims dismissed on the Summary Judgment Application. Without intending to limit the breadth of their argument, those bases include the absence of any relationship between the plaintiff and the defendants, the inapplicability of the statutory schemes relied on by the plaintiff to the defendants, and the plaintiff's inability to prove any compensable harm.

- [52] I accept that the primary bases for the Summary Judgment Application involve questions of law. However, they are not limited to questions of law.
- [53] The defendants' reference to the harm allegedly suffered (or, as they argue, not suffered) by the plaintiff is, at least in part, a question of fact. Indeed, on this application, they referred me to evidence that they argue prove, as a matter of fact, that the plaintiff did not suffer the harm he has alleged. At the least, the issue of harm or damages is a matter of mixed fact and law.
- [54] To the extent that there are any issues to be determined on the question of harm or damages incurred, it may not be suitable for determination by way of summary judgment.
- [55] That a factual issue may exist distinguishes this case from cases such as *Li v. British Columbia*, 2019 BCSC 1819 [Li] and *Consumers' Association et al. v. Coca-Cola Bottling Company et al.*, 2005 BCSC 1042 [Coca-Cola] in which summary trial applications were heard prior to certification. In *Li*, the sole issue to be decided was the constitutional validity of the subject legislation; in *Coca-Cola*, the issue was limited to statutory interpretation.
- [56] Because the Summary Judgment Application will be dispositive of the issues if it succeeds, this Cannon Factor weighs in favour of the defendants' position. However, given the heavy burden on the defendants to succeed on the Summary Judgment Application, it only tips slightly in favour of the defendants.

The likelihood of delays and costs associated with the applications

- [57] The parties have tentatively set aside four days in September 2021 for the certification hearing. It is unlikely that the hearing of the defendants' applications prior to September will delay that date. The possibility of appeals on those applications is a different matter, which I will address below.
- [58] I will weigh this factor on the basis of cost.
- [59] If the defence applications are heard in advance of the certification hearing and succeed, the parties will have saved the cost of having to prepare for and attend the certification application. On the other hand, if the applications are unsuccessful, the parties will have incurred the time and expense of preparing for and attending those applications, instead of being able to focus their resources on one hearing, being a hearing at which all of the applications, including the certification application, are heard.
- [60] I, of course, am not able to determine the outcome of the Summary Judgment Application. This factor is neutral.

Will the outcome of the applications promote settlement?

- [61] Apart from a dismissal, which would obviate the need for settlement altogether, I am not able to discern any other outcome that will promote or encourage settlement.

[62] This factor is neutral.

Could the applications give rise to interlocutory appeals and delays that would affect certification?

[63] In *Douez v. Facebook*, 2012 BCSC 2097 [Facebook], Justice Griffin (as she then was) expressed concern about the effect of appeals of pre-certification applications on the certification process. She stated:

[11] Both parties agree that the policy underlying the general rule that the certification application should be the first application reflects the Supreme Court of Canada's caution against "litigation by installments," as stated in *Garland v. Consumers' Gas Co.*, 2004 SCC 25 at para. 90.

[12] The *Garland* case was an example of what can happen when separate procedural motions are heard. That case involved two trips to the Supreme Court of Canada and 10 years before it concluded.

[13] As pointed out by the plaintiff, similar problems have been encountered in other cases where pre-certification motions have resulted in multiple appeals and years of litigation before any certification hearing, such as in *Seidel v. Telus Communications Inc.*, 2008 BCSC 933, reversed 2009 BCCA 104, reversed 2011 SCC 15.

[22] It is clear to me that Facebook's argument really is that the jurisdiction argument will be so strong that it is efficient to hear it first because Facebook is going to succeed in that argument. This is rather circular reasoning.

[23] The telling point comes from the answer provided by Facebook's counsel when I asked him what would happen if Facebook lost the jurisdiction application. Was Facebook agreeing that it would not appeal and it would not seek to stay the hearing of the certification application? The answer by Facebook's counsel was a predictable "no".

[24] Likewise, if the plaintiff loses the jurisdiction application, she is likely to appeal.

[25] This means that no matter what the outcome of the jurisdiction application, there will indeed likely be litigation in installments if it is heard first. There will likely be a jurisdiction application, then a stay application, then appeals of each, all before getting to the certification hearing. Indeed, history has shown that some parties will choose to seek leave to appeal on preliminary applications, such as this sequencing application, as in *Lieberman* and as noted in *Watson*.

[64] In *Facebook*, there was one pre-certification application under consideration. In this case, there are three. The possibility of an outcome contemplated by Justice Griffin is increased threefold.

- [65] The defendants acknowledge the concerns raised in Facebook. However, they argue that the concern is less relevant in this case where the parties have agreed to proceed with the Stay Application first. As they can appeal the decision on that matter, they argue that the possibility of an appeal of the decisions on the Jurisdiction or Summary Judgment Applications is of no significance. Furthermore, they argue that if their applications are heard together, any appeals can also proceed together, thereby reducing the possibility of staggered appeals.
- [66] I do not find that argument persuasive.
- [67] Firstly, I have held that the Stay Application cannot proceed with the Summary Trial Application. Any perceived advantage of having all three defence applications heard, and appealed, together is lost.
- [68] Secondly, the argument is premised on the assumption that an appeal of the Stay Application is inevitable. The argument does nothing to alleviate the concern raised in Facebook. In fact, it puts it on all fours with that decision and augments the concern by three.
- [69] Ultimately, proceeding with three applications prior to the certification hearing will increase the possibility of interlocutory appeals and delays that could affect certification.
- [70] Defendants have agreed to take steps to mitigate against the possibility of delay caused by appeals. As one example, in *Halliday v. Shaw Communications Inc.*, 2019 BCSC 2251, the defendants undertook to defer any appeals of the pre-certification applications until after the certification application.
- [71] That was not the case in the Facebook decision. That is not the case here. Without that undertaking, the possible adverse effect of numerous interlocutory appeals is wholly unmitigated.
- [72] This factor weighs heavily in favour of the plaintiff's position on this sequencing application.

Interests of economy and judicial efficiency

- [73] Under this factor, I must consider whether there is any overlap between the issues raised on the proposed applications and the issues to be determined on the certification application. The court should avoid duplication of those applications: *Thomson v. Bryce*, 2016 BCSC 687 at para. 19.
- [74] A central part of the defendants' argument is the overlap and interrelated nature of the issues to be decided. Given that overlap, they argue that economy and judicial efficiency dictate that their applications should be heard together.

- [75] I have decided that the Stay Application will not proceed with the Summary Judgment. I will consider the significance of the overlap between the Summary Judgment and Jurisdiction Applications and between the Stay and Jurisdiction Applications, as well as the possible overlap between those applications and the certification application.
- [76] I agree that there are common issues to be determined on the Jurisdiction and Summary Judgment Applications: both are based on the same facts and both rely on the same affidavits. A central, but not exclusive, part of both applications is the nature of the relationship between the defendants and the plaintiff. Findings on one application will very likely affect the determination of the other.
- [77] On that basis, it is appropriate that the Summary Judgment Application and the Jurisdiction Application be heard together.
- [78] The question is whether the issues raised in those applications also overlap with the issues to be considered and determined on the certification application.
- [79] In my view, they do.
- [80] To succeed at the certification hearing, the court must be satisfied, among other things, that the pleading discloses a cause of action: the Act, s. 4(1)(a).
- [81] The defendants' main argument advanced on the Summary Judgment Application addresses that very issue. They allege that the notice of civil claim does not disclose a cause of action on any of the bases set out in the claim.
- [82] There is a direct overlap between the issues raised in the Summary Judgment Application and one of the issues to be determined at the certification hearing.
- [83] This Cannon Factor strongly favours the plaintiff's position with respect to the Summary Judgment Application.
- [84] I have also considered the possible overlap between the Stay and Jurisdiction Applications and the possibility of having those matters heard together prior to certification. While there is overlap between those applications, in my view, the increased possibility of appeals addressed above weighs against having those applications heard together before the certification application.
- [85] This factor weighs in favour of deferring the Summary Judgment and the Jurisdiction Applications to the certification hearing.

Will scheduling the application in advance of certification promote the "fair and expeditious determination" of the proceeding?

- [86] Referring to the Supreme Court of Canada decisions in *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 and *Canada (Attorney General) v. Lameman*, 2008 SCC 41, the defendants highlight the Court's endorsement of the use of applications to strike and the summary judgment rules as a means of resolving legal disputes promptly where warranted, rather than referring them to a full trial.
- [87] They say denying them the opportunity to have their applications and, in particular, the Summary Judgment Application, heard prior to certification is contrary to the spirit of those decisions.
- [88] However, this factor is not limited to promoting the "fair and expeditious determination" of the proceeding for the defendants. It must apply to the plaintiffs as well. The possibility of an early dismissal of the action must be balanced against the plaintiff's right to have the matter determined on the merits as contemplated by the Act and the Rules.
- [89] In considering this factor, I am mindful of the fact that the plaintiff has taken steps to proceed with this action quickly and in the timeframe contemplated by the Act: *Strohmaier* at para. 23.
- [90] In those circumstances, it would not be fair to allow the defendants three opportunities to have the claim dismissed or otherwise determined before the plaintiff even has a chance to, in effect, start his claim in earnest
- [91] Delaying the Jurisdiction and Summary Judgment Applications until the certification application will not foreclose the opportunity to have the matter determined at an early stage in the proceedings, that is, at the certification hearing, well before trial.

Conclusion on the Cannon Factors

- [92] The strongest argument in favour of hearing the defendants' applications prior to the certification application is the possibility of the early resolution of the claim and the savings to the parties and of the court's resources that would result. However, the argument is speculative as it is dependent on their success on their applications. I am unable to determine the possibility of that success on this sequencing application.
- [93] On the other hand, if any of the defendants' applications are unsuccessful, the possibility of an appeal, while also not certain, appears to be more likely. With three possible pre-certification applications, the likelihood of an appeal, and delay of the certification application, is increased.
- [94] With the exception of the Stay Application, I am not satisfied that any exceptional circumstances exist in this case to justify exercising my discretion to hear all of the defendants' applications before certification.

[95] On balance, having weighed the Cannon Factors, I have concluded that the balance tips in favour of not allowing the Jurisdiction and Summary Judgment Applications precede the certification hearing.

Summary and Disposition

[96] To summarize, subject to further court order or agreement of the parties:

- a) the Stay Application will proceed for hearing on May 6, 2021; and
- b) the Jurisdiction Application and the Summary Judgment Application will be heard concurrently with the certification application on September 20, 21, 22 and 23, 2021.

[97] By setting this schedule, I do not waive any other requirements of the Rules, including the requirement to file a response to civil claim before applying for summary judgment, with respect to any of the applications.

[98] If the parties are not able to agree to a timeline for the exchange of materials for any of the applications, they may contact the Supreme Court Scheduling to set a time to have the matter determined before me.

"Ahmad, J."

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