IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *C.K. v. BetterHelp, Inc.,*
2023 BCSC 1666

Date: 20230922
Docket: S231706
Registry: Vancouver

Between:

C.K.

Plaintiff

And

BetterHelp, Inc.

Defendant

- and -

Docket: S233556
Registry: Vancouver

Between:

A.T.

Plaintiff

And

BetterHelp, Inc.

Defendant

Before: The Honourable Justice Thomas

Reasons for Judgment

Counsel for C.K.:	D.M. Rogers S. Nermtollahi
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Place and Date of Trial/Hearing:	Vancouver, B.C. September 7–8 and 12, 2023
Place and Date of Judgment:	Vancouver, B.C. September 22, 2023

Table of Contents

The Applications

[1] C.K. is an action which contains two proposed representative plaintiffs, C.K. and P.C., represented by YLaw Group and KND Complex Litigation, respectively, acting as co-counsel (the "C.K. Action").

[2] A.T. is an action containing one proposed representative plaintiff, A.T., represented by Siskinds LLP (the "A.T. Action").

[3] Each has brought an application seeking carriage of a proposed national class action proceeding. The defendant in both actions is BetterHelp, Inc. ("BetterHelp").

Underlying Basis for the Actions

[4] The actions were triggered by the publishing of a complaint by the United States Federal Trade Commission ("FTC") on March 2, 2023 (the "Complaint").

[5] The Complaint states that:

a) BetterHelp offers online counseling services, including specialized services for people of the Christian faith, members of the LGBTQ community and teenagers;

b) Millions of people have signed up for the service, which requires them to provide BetterHelp with a variety of personal health information;

c) Recognizing the sensitive nature of this information, BetterHelp repeatedly promised to keep the information private and use it only for non-advertising purposes;

d) BetterHelp capitalized on the personal health information obtained from users by providing it to third-party advertising platforms;

e) BetterHelp also:

    i. failed to employ reasonable measures to safeguard the information;

ii. failed to provide users with proper notice as to the collection, use and disclosure of the information; and

iii. failed to limit contractually how third parties would use the information after BetterHelp provided it to them.

f) It was only in December 2020, well after reporters brought these practices to light and the FTC began its investigation, that BetterHelp "curtailed" its unauthorized use and disclosure of its users' health information.

[6] On July 14, 2023, the FTC announced that it had finalized a consent order with BetterHelp, pursuant to which BetterHelp agreed to:

a) pay a fine;

b) cease its improper practices; and

c) provide notice of the consent order to its users.

[7] The order applied to information obtained from "customers", which was defined as people who had signed up and paid for BetterHelp's services from August 1, 2017 to December 30, 2020, and "covered users", which was defined as people who had created an account to use BetterHelp's services prior to January 1, 2021.

Applicable Law

[8] The ultimate question in deciding a carriage motion is which proposed action will best advance the interests of the class, provide fairness to the defendant and promote the objectives of class proceedings? Those objectives are access to justice, behaviour modification and judicial economy: *Moiseiwitsch v. Canadian National Railway Company*, 2022 BCCA 321 at para. 9 [*Moiseiwitsch BCCA*]; *Ewert v. Canada (Attorney General)*, 2014 BCSC 215 at paras. 14–15.

[9] In answering this question, I have considered the overlapping and non-exhaustive list of 17 factors set out in *Rogers v. Aphria Inc.*, 2019 ONSC 3698 at para. 17 [*Rogers*], which are:

(1) The quality of the proposed representative plaintiffs;
(2) Funding;
(3) Fee and consortium agreements;
(4) The quality of proposed class counsel;
(5) Disqualifying conflicts of interest;
(6) Relative priority of commencement of the action;
(7) Preparation and readiness of the action;
(8) Preparation and performance on carriage motion;
(9) Case theory;
(10) Scope of causes of action;
(11) Selection of defendants;
(12) Correlation of plaintiffs and defendants;
(13) Class definition;
(14) Class period;
(15) Prospect of success (leave and certification);
(16) Prospect of success against the defendants; and
(17) Interrelationship of class actions in more than one jurisdiction.

[10] As Justice MacDonald explained in *Wong v. Marriott International Inc.*, 2020 BCSC 55 [*Wong*], courts should assess these factors in a holistic manner:

> [26] The courts discourage a "tick the boxes" approach to carriage motions. The focus should be the broader goal of promoting the best interests of the class members and fairness to the defendants: [*Strohmaier v. K.S.*, 2019 BCCA 388] at para. 41 [*Strohmaier CA*]. When factors are very similar, or have only minor differences, a court may assess them as neutral or not refer to them at all: *Strohmaier CA* at paras. 76–77. The circumstances of each case will determine how much weight should be given to each factor.

Discussion

Uncontentious Factors

[11] Counsel has isolated the contentious issues. Factors (2), (4), (5), (11) and (12) are neutral. I will therefore limit my discussion to the remaining factors.

Factor (17) – Interrelationship of class actions in more than one jurisdiction

[12] Siskinds LLP commenced an action on behalf of another proposed representative plaintiff in Ontario. However, Siskinds LLP has received instructions and undertakes to discontinue that action—regardless of the outcome of this carriage application—resolving any potential multijurisdictional issues.

[13] Therefore, this is a neutral factor.

Factors (9), (10), (15) and (16) – Case theory and scope of causes of action

[14] A carriage application is an inappropriate forum for a searching assessment of the merits of the parties' competing claims.

[15] In *Moiseiwitsch BCCA* at paras. 47–50, our Court of Appeal noted the degree of scrutiny with which courts should assess proposed claims on a carriage application is somewhat unclear. Although courts will not consider the merits of an action, they may appropriately consider the nature and scope of the case theories and causes of action advanced by counsel. An assessment of the efficiency and costs of the competing strategies may occur, to some extent, and could be an important factor, but not necessarily of greater importance than every other factor. The ultimate question is whether the proposed strategy is reasonable and defensible: *Moiseiwitsch BCCA* at paras. 35–36, citing *Mancinelli v. Barrick Gold Corporation*, 2016 ONCA 571; *Wong* at para. 88.

[16] The C.K. Action pleads the following four causes of action: (1) breaches of provincial privacy legislation; (2) the common law tort of intrusion upon seclusion in the provinces that do not have privacy legislation; (3) breaches of provincial consumer protection legislation and (4) breach of the *Competition Act*, R.S.C. 1985, c. C-34.

[17] In addition to the four causes of action pleaded in the C.K. Action (the A.T. Action pleads the common law tort of intrusion upon seclusion in all Provinces), the

A.T. Action also pleads the following three causes of action: (1) breach of confidence; (2) breach of contract and (3) breach of contractual duties of honest performance and good faith.

[18] The factual bases for the actions are substantially the same.

[19] C.K. says the A.T. Action is unnecessarily broad. Specifically, C.K. argues that the additional causes of action pleaded in the A.T. Action are both unviable (in that their application to the facts is uncertain) and unnecessary (in that they would not entitle the putative class to any additional substantive relief that it could not otherwise obtain from the four causes of action pleaded in both actions).

[20] For its part, A.T. says the C.K. Action is too narrow. A.T. argues that the additional causes of action pleaded in its action will help to ensure that all class members have viable claims, given that breach of privacy is a developing area of the law. As a result, A.T. says that C.K.'s restrictive approach may unduly limit the ability of certain class members to receive full compensation.

[21] Both actions advance multiple causes of action that could have individual nuances in different provinces. In my view, both strategies are reasonable and defensible. It would be premature to draw any further conclusions about the relative merits or efficiencies of the proposed causes of action at this stage of the proceedings.

[22] As a result, I find these factors to be neutral.

Factors (13) and (14) – Class definition and class period

[23] The A.T. Action includes a cut-off date for the proposed class of January 1, 2021. This is based on the Complaint, which details BetterHelp's misconduct prior to this date and notes that:

> It was only in December 2020, well after reporters brought these practices to light and the FTC began investigating the practices, that [BetterHelp] curtailed its unauthorized use and disclosure of consumers' health information.

[24] Each party ascribes a different meaning to the usage of the word “curtailed” in this excerpt, and they disagree on how it should be interpreted within the context of the Complaint. Although the Complaint does not identify any misconduct after December 2020, it does note that BetterHelp continued to make representations regarding the uses of the information collected via its intake questionnaire until October 2021.

[25] C.K. argues that A.T.’s proposed cut-off date unreasonably limits the class and could exclude users whose personal information was improperly disclosed or accessed by third parties after December 2020. However, C.K. has not placed any time limit on their proposed class definition, despite the fact that there is currently no evidentiary support for the allegation that BetterHelp continues to engage in misconduct.

[26] A.T. takes the position that there must be “some basis in fact” to give “an air of reality” to a proposed class definition, and that C.K.’s proposed definition is therefore too broad and would fail at the certification stage as currently construed. C.K. concedes that their current proposed class definition is not sustainable and suggests that they will amend it prior to the certification hearing. However, C.K. maintains that it is premature to do so until BetterHelp provides additional information in their affidavits responding to C.K.’s certification materials.

[27] The proposed class definitions represent different strategic decisions made by experienced counsel. I accept that both approaches are reasonable and defensible. However, I do have some concerns about C.K.’s approach in combination with their served certification materials. Those concerns will be addressed under the appropriate factor.

[28] With that qualification, I find class definition and class period to be neutral factors.

Factors (1) and (3) – Quality of representative plaintiff(s) and fee agreements

[29] The quality of the representative plaintiffs is a relatively minor factor in my assessment of this carriage application. They all appear to be suitable representative plaintiffs. They are represented by experienced counsel. I do not find the fact that one of the representative plaintiffs has approximately 35 years of experience in healthcare and education to be a determinative factor in preferring one action over the other.

[30] With respect to the C.K. Action, it appears that C.K. provided sensitive information to BetterHelp in 2021, which was after BetterHelp "curtailed" its misconduct, according to the Complaint. As a result, C.K.'s own claim may face considerably more uncertainty than the claims of other members of the class—namely, those who provided sensitive information to BetterHelp prior to 2021. This raises a real possibility of conflict between C.K.'s own interests and the interests of other segments of the class.

[31] A.T.'s retainer contains the following clause, which addresses these potential conflicts:

> I authorize Siskinds, when acting on my behalf as the representative plaintiff, to take such actions and conduct the class proceedings as it considers appropriate. However, I understand that I retain the right to make all critical decisions regarding the conduct of the class proceedings, but always with a view to the best interests of the Class. If I make a decision regarding the conduct of the class proceedings that Siskinds does not consider being in the best interests of the Class, Siskinds will seek directions from the Supreme Court of British Columbia on this issue.

[32] C.K.'s retainer contains the following clause, which despite counsel's assertions, does not address these potential conflicts:

> In the event that the Client wishes to terminate this agreement, Class Counsel shall continue the prosecution of the Class Action in accordance with the terms of this agreement and the applicable professional obligations in order to preserve and protect the interests of the Class Members, and will seek to replace the Client with another representative plaintiff as necessary.

[33] This clause applies only "[i]n the event that [C.K.] wishes to terminate [the retainer]". It would be of no assistance where C.K. wishes to make a decision that counsel believes is contrary to the interests of the rest of the class (or other disagreement between C.K. and counsel), yet does not wish to terminate the retainer.

[34] In *Wong*, MacDonald J. found the absence of a mechanism in a retainer agreement to address conflicts between co-counsel to be a relevant factor in her carriage analysis: at paras. 53–56. In my view, the absence of a mechanism in C.K.'s retainer agreement to address potential conflicts or disagreements between the representative plaintiff and counsel is similarly relevant.

[35] This is therefore a factor that favours A.T.

Factors (7) and (8) – Preparation, readiness and performance of counsel

[36] Both C.K. and A.T. have conducted considerable research and have demonstrated a high level of commitment to their actions. C.K. has retained an expert, and A.T. has retained two experts.

[37] Both counsels articulated the complex issues involved in this case in a clear and articulate manner. Their arguments were complete and well-researched.

[38] With respect to the preparation and readiness of their respective cases, C.K. argues that their action is at a more advanced stage than the A.T. Action because their notice of application for certification was served on the defendant prior to convening a first case planning conference—before receiving a response from BetterHelp and before the A.T. Action was filed.

[39] A.T. says that C.K.'s served notice of application is fatally flawed as it does not meet the minimum standards set out in *British Columbia v. Apotex Inc.*, 2022 BCSC 1383 at paras. 33–43 [*Apotex*]. A.T. correctly points out that C.K.'s served notice of application does not cite any authority that this Court must consider in applying the legal test for certification, nor does it indicate how the affidavit evidence

listed under Part 4 supports the certification criteria in ss. 4(b)–(e) of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50. I further note that C.K.'s notice of application does not cite any specific applicable statutory provisions of the "Provincial Privacy Legislation" or the "Provincial Consumer Legislation" it pleads in its "Legal Basis" section, nor does it cite any legal authority in support of its claim of a violation of the common law tort of intrusion upon seclusion. C.K. did not remedy these deficiencies in their proposed amended notice of civil claim, which formed part of the submissions on this carriage application.

[40] For its part, A.T. has included a draft notice of application for certification that contains none of these deficiencies and represents a near-complete version of an appropriate notice of application.

[41] C.K. says the concerns over their served notice of application go merely to form and are of little import since the parties will exchange a detailed written argument after the evidentiary basis is finalized prior to the certification hearing.

[42] I do not accept C.K.'s position. Many of the omissions in C.K.'s notice of application mirror those of the amended notice of application at issue in *Apotex*, which Justice Fitzpatrick found to be "clearly deficient": at paras. 41–42. In that case, Fitzpatrick J. specifically rejected the argument that exchanging written argument prior to (or during) the certification hearing would render deficiencies in a notice of application insignificant:

> [16] Finally, at para. 54 of [*Dupre v. Patterson*, 2013 BCSC 1561], Adair J. stated that "tendering a written argument at the hearing is neither an alternative to, nor a substitute for, setting out the "Legal Basis" in a notice of application … in accordance with what the *Rules* and the case law require".
>
> […]
>
> [38] Thirdly, the Province contends the defendants have been provided notice of its arguments at the certification hearing. To this end, the Province's counsel observes that the defendants are represented by experienced class action lawyers who are very familiar with the applicable test and settled jurisprudence, and that the Scheduling Agreement contemplates an "exchange of robust submissions upon completion of the evidentiary record".
>
> [39] The competency of defence counsel is not in dispute, but that does not excuse leaving counsel to guess what arguments will be raised against

> their clients. The defendants also never agreed that such written arguments would be adequate notice in place of what was expected to be found in the [amended notice of application]. In any case, this is no substitute given the comments found in *Dupre* at para. 54 and *Boury* at para. 32.
>
> [40] Fourthly, the Province argues that outlining how its extensive evidentiary record provides "some basis in fact" for each of the certification requirements goes beyond the purpose of a notice of application. I disagree.
>
> [Emphasis added.]

[43] C.K.'s position that the concerns are of little import is troubling; their served notice of application is deficient. This problem is aggravated by the fact that C.K. has elected to maintain an unsustainably broad proposed class period which it wishes to maintain until receiving reply affidavits from BetterHelp in response to the notice of application for certification.

[44] In my view, despite the fact that C.K. has already served their notice of application for certification on BetterHelp, the A.T. Action is more advanced in its preparation for certification. The deficiencies in C.K.'s served notice of application for certification, aggravated by their untenable proposed class period, raises the real possibility of a "hiccup" in any schedule for certification, which could negatively impact the timely and efficient resolution of the issues: see *Apotex* at para. 36. Sustaining such a risk would not be in the interests of the putative class, nor would it provide fairness to the defendant or promote the objective of judicial economy.

[45] For these reasons, I find preparation and readiness favour A.T.

Factor (6) – Relative priority of commencement of actions

[46] The C.K. Action was commenced on March 10, 2023; the A.T. Action was commenced 62 days later on May 11, 2023.

[47] In *Moiseiwitsch v. Canadian National Railway Company*, 2022 BCSC 331 at para. 75 [*Moiseiwitsch BCSC*], our Chief Justice determined that a seven-week delay between the commencement of the actions was a neutral factor. There was no discussion about a justification for the delay. The Court of Appeal declined to interfere with this conclusion, noting that "[t]he Chief Justice expressly recognized

both the urgency of the case before him and the objectives of class proceedings" and whether one case was more advanced than the other under factor 7: *Moiseiwitsch BCCA* at paras. 86–88.

[48] In *Morel v. Koninklijke Philips N.V.*, 2023 BCSC 625 at paras. 71–75 [*Morel*], Justice Ker characterized a three-and-a-half-month delay as "more than just a few days", and as a result, she found that the delay weighed "marginally in favour" of the first action. The party that filed the rival action justified the delay "as resulting from extensive research into viable causes of action, potential defendants, the underlying facts of the case, as well as time spent in collecting relevant documents": *Morel* at para. 71. Justice Ker also noted that the quick filing of the first action "may have been done in haste", pointing to two sets of amended notices of civil claims that the first plaintiff had to file.

[49] A.T. says that the relative delay between the filing of the two actions in the present case was the result of their "careful and comprehensive investigation and development" of their action.

[50] I agree the Court should be cautious about creating an incentive for firms to abandon a more deliberative approach to commencing class proceedings. At the same time, there is also merit to proceeding efficiently: *Morel* at para. 75.

[51] There is some evidence supporting the proposition that the C.K. Action may have been filed in haste: the initial representative plaintiff's claim potentially falls outside of the temporal scope of BetterHelp's alleged wrongdoing, necessitating the addition of a second representative plaintiff prior to the carriage hearing; and C.K. will need to seek amendments to their notice of civil claim to fix errors contained in their consumer protection allegations.

[52] The length of the delay in the present case is longer than the seven-week delay in *Moiseiwitsch BCSC*—which the Chief Justice found to be a neutral factor—and shorter than the three-and-a-half-month delay in *Morel*—which Ker J. found to weigh "marginally in favour" of the first action.

[53] In light of these considerations, I find the 62-day delay is a factor that weighs marginally in favour of the C.K. Action.

Holistic Assessment

[54] C.K. argues the "relative priority of commencement of the action creates a rebuttable presumption in favour of the firm who files the claim first" and that A.T. must establish a serious defect with the C.K. Action to obtain carriage.

[55] I reject this assertion. The relative priority of the commencement of the actions is one factor to be considered holistically alongside the remaining *Rogers* factors in making the overriding determination of which proposed action is in the best interests of the putative class while being fair to the defendants and promoting the objectives of class proceedings.

[56] When I consider all of these factors, within the context of the submissions of counsel and the material filed on the hearing of the carriage motions, I am satisfied it is in the best interests of the putative class, while being fair to the defendants and promoting the objectives of class proceedings, to grant carriage of this action to the A.T. Action.

[57] I order the C.K. Action stayed until the certification application in the A.T. Action is decided.

[58] I order the commencement of further class proceedings in the Province of British Columbia against BetterHelp seeking to advance the same claims as those advanced in this action are prohibited without leave of the Court until the certification application is decided.

[59] If certification is not granted in the A.T. Action, or the A.T. Action is discontinued, dismissed or withdrawn, the stay of the C.K. Action and the prohibition against the commencement of further class proceedings in the Province of British Columbia shall both be lifted.

"Thomas J."