IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Douez v. Facebook, Inc.*,
2012 BCSC 2097

Date: 20121214
Docket: S122316
Registry: Vancouver

Between:

Deborah Louise Douez

Plaintiff

And

Facebook, Inc.

Defendant

Before: The Honourable Madam Justice S. Griffin

Oral Reasons for Judgment

In Chambers

Counsel for Plaintiff:	C.A. Rhone G.V. McMullen
Counsel for Defendant:	T.J. Mallett K. Osaka
Place and Date of Trial/Hearing:	Vancouver, B.C. December 14, 2012
Place and Date of Judgment:	Vancouver, B.C. December 14, 2012

[1] **THE COURT:**

Introduction

[2] This is an application by the defendant, Facebook, Inc. ["Facebook"], seeking an order that its application to have this Court decline jurisdiction be heard prior to the plaintiff's application to certify the proceeding as a class proceeding pursuant to the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 ["*CPA*"].

[3] This action is a proposed class action commenced by the plaintiff filing a notice of civil claim on March 29, 2012. The plaintiff sought relief on her own behalf and on behalf of proposed classes described as follows:

> All British Columbia resident persons who are members of Facebook and whose name, portrait or both have been used by Facebook in a sponsored story.

[4] I am the assigned case management judge.

[5] On July 5, 2012, the plaintiff filed and served materials for her certification application.

[6] On July 30, 2012, I heard the parties at a preliminary judicial management conference. Facebook advised that it would be challenging the jurisdiction of this Court. We discussed scheduling matters on a path that would allow this Court to first hear this sequencing application, and then one of two things would happen: either, if the defendant was successful on this sequencing application, we would have the jurisdiction application heard before the hearing of the certification application, or, if the defendant was not successful, we would have the hearing of the jurisdiction application at the same time as the certification application.

[7] The parties worked out a schedule based on this framework, their respective calendars, and the calendar of the Court. I also requested that both parties provide their jurisdiction arguments at the same time as the sequencing application.

Legal Framework of this Sequencing Application

[8] Both parties agree that the general rule in class proceedings is that the certification motion is the first procedural motion.

[9] As held in *Kwicksutaineuk/Ah-Kwa-Mish First Nation v. British Columbia (Agriculture and Lands)*, 2009 BCSC 1593 at para. 59:

> As a general rule, the certification motion ought to be the first procedural matter to be heard and determined in an intended class proceeding... This rule is premised in part on the basis that the brief 90 day period for bringing a certification application in class proceedings legislation is indicative of a legislative intent that certification precede other preliminary motions. This legislative intent underpins section 2(3) of the *CPA*...

[10] Section 12 of the *CPA* provides:

> The court may at any time make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for that purpose, may impose on one or more of the parties the terms it considers appropriate.

[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.

[14] Despite the general rule, both parties agree that s. 12 of the *CPA* gives the case management judge discretion to determine the timing of certification in pre-certification motions, based on the context and unique facts of a case. A number of authorities have discussed the factors that may be considered in the exercise of this discretion.

[15] The defendant relies on the case of *Lieberman et al. v. Business Development Bank of Canada*, 2005 BCSC 389 ["*Lieberman*"]. That action concerned claims by retired employees of the defendant that the defendant had improperly administered an employee pension plan. The allegations included breach of trust including of a specific trust agreement, as well as broader breaches of fiduciary and statutory duties.

[16] The decision of Mr. Justice Davies in *Lieberman* dealt with the question of whether the defendant's *forum non conveniens* application should be heard at the same time as the plaintiff's certification application. He held at paras. 16-17:

> My review of all of the authorities upon which counsel have relied leads me to conclude that the timing of the hearing of jurisdictional issues in proceedings for which certification is sought under the *Class Proceedings Act* is a matter requiring the exercise of discretion determined by the circumstances of each case.
>
> A non-exhaustive list of the factors that will likely have to be considered in exercising that discretion will include: the cost to the parties of participation in *Class Proceedings Act* pre-certification procedures; the strength of a defendant's jurisdictional arguments and the extent to which a preliminary application may dispose of the whole of the proceeding; the potential for delay arising from interlocutory appeals; the complexity of the evidentiary and legal issues that may arise in both the jurisdictional and certification applications; and, the interplay between the issues on both applications.

[17] Similar factors were considered in other cases involving pre-certification motions, as noted by Chief Justice Bauman in *Watson v. Bank of America Corporation*, 2012 BCSC 146 ["*Watson*"], citing an Ontario authority at paras. 22 and 27.

Analysis

[18] Facebook submits that a consideration of the factors mentioned in *Lieberman* supports granting this motion to hear its jurisdiction application in advance of the certification hearing. In particular, Facebook argues five propositions in its written submissions:

1. Far from creating excess cost to the parties, hearing the jurisdiction application first has the potential to save considerable time and

expense because the jurisdiction issue has the potential to dispose of this litigation in British Columbia.

2. There is no risk of delay or litigation by installment, as the certification schedule has been established. On that schedule, the jurisdiction application will be heard on one day in January 2013, and the certification application will be heard on three days beginning on June 18, 2013. That is, if the certification application goes ahead and is not knocked out by the defendant's success on the jurisdiction application.

3. If successful, Facebook's jurisdiction application has the potential to dispose of the Douez claim, avoiding wasted expense on the part of both parties as well as wasting the Court's resources.

4. Facebook has a strong argument that this Court should decline jurisdiction on the ground of *forum non conveniens*.

5. The jurisdictional issues in the Douez claim are separate from the certification issues, given the clear and unambiguous forum selection clause in Facebook's "Statement of Rights and Responsibilities" between Facebook and its users.

[19] I see the five Facebook arguments as duplicative. Really, Facebook has two prongs to its arguments on this application:

1. Hearing the jurisdiction application first will be more efficient, and it does not create a risk that it will involve litigation by installment; and

2. Facebook's jurisdiction argument is strong and likely to be successful, and the arguments in support of it do not overlap with arguments to be advanced in support of certification.

First Facebook Argument: Judicial Efficiency

[20] Dealing with the first prong to Facebook's arguments and the question of whether or not Facebook's proposal will create a risk of litigation by installment, Facebook relies entirely on the argument that because (a) the parties have exchanged jurisdiction arguments already, and (b) the jurisdiction application can be

heard in January 2013 with a date set for the certification application in June 2013, proceeding with the jurisdiction argument first is efficient.

[21] I do not agree. The fact that the parties at my direction have scheduled dates in advance and exchanged arguments does not make the hearing of the jurisdiction application first more efficient.

[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*.

[26] Facebook's counsel also argued that Facebook would incur considerable cost in preparing evidence for the certification hearing, citing the fact that Facebook had to prepare several affidavits to respond to parallel U.S. class proceedings.

[27] I appreciate that both parties will be put to some expense in preparing for the certification hearing. However, I also note that the parties agree that only three days are needed for the certification application. The jurisdiction application has been estimated to be a one day hearing. There are also judicial resources to be

considered. In my view, the cost of multiple appeals would far exceed the cost of preparing for a single procedural hearing, namely, a combined certification application where jurisdiction arguments can be advanced.

Second Facebook Argument: Merits of Jurisdiction Application

[28] I will now deal with the second prong to Facebook's argument: that its jurisdiction application has strong merit.

[29] In order to appreciate this argument, it is necessary to have some understanding of the expected arguments on the jurisdiction application itself. This is why I asked the parties to provide their submissions on the jurisdiction application. I am glad that I did.

[30] Whereas Facebook has described its jurisdiction application as a challenge to the Court's jurisdiction, its actual argument reveals that this is not an entirely accurate description.

[31] The jurisdiction application is not a challenge to the Court's jurisdiction. This Court's territorial competence is conceded. Rather, Facebook will be asking this Court to exercise its discretion to decline jurisdiction on the grounds that another state, namely California, is a more appropriate forum. This is what used to be known as a *forum non conveniens* application and is brought under s. 11 of the *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28 ["*CJPTA*"]. That section provides:

> 11(1) After considering the interests of the parties to a proceeding and the ends of justice, a court may decline to exercise its territorial competence in the proceeding on the ground that a court of another state is a more appropriate forum in which to hear the proceeding.
>
> (2) A court, in deciding the question of whether it or a court outside British Columbia is the more appropriate forum in which to hear a proceeding, must consider the circumstances relevant to the proceeding, including
>
> (a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum,
>
> (b) the law to be applied to issues in the proceeding,
>
> (c) the desirability of avoiding multiplicity of legal proceedings,
>
> (d) the desirability of avoiding conflicting decisions in different courts,

> (e) the enforcement of an eventual judgment, and
>
> (f) the fair and efficient working of the Canadian legal system as a whole.

[32] Facebook did not mention the legal basis of its jurisdiction arguments in oral submissions, and submitted that the Court did not need to get into them. This seems somewhat contrary to its position that its jurisdiction arguments have such strong merit. How can I know this without at least understanding an outline of each side's position? I do agree, however, that the merits of the jurisdiction arguments cannot be determined today. I will therefore refrain from commenting on them in any detail.

[33] As revealed by its written submissions, Facebook argues that there is a contract between it and its B.C. users which has a forum selection clause in favour of California.

[34] The plaintiff has a number of answers to this. Her primary position is that her claim is based on the *Privacy Act*, R.S.B.C. 1996, c. 373, which has conferred exclusive jurisdiction on this Court and that this statutory jurisdiction overrides any forum selection clause. The plaintiff cites a number of cases for the proposition that where a statute confers exclusive jurisdiction on the superior court of a province, that cannot be displaced by a forum selection clause: *GreCon Dimter Inc. v. J.R. Normand Inc.*, 2005 SCC 46; *Zi Corporation v. Steinberg*, 2006 ABQB 92; and by analogy, *Seidel v. Telus Communications Inc.*, 2011 SCC 15.

[35] Secondly, the plaintiff argues that even if the *Privacy Act* did not confer exclusive jurisdiction on this Court, the *forum non conveniens* analysis under the *CJPTA* weighs in the plaintiff's favour. The forum selection clause is only one factor that must be considered by this Court.

[36] The plaintiff outlines a number of other important factors that would be considered on a *forum non conveniens* application, including the comparative convenience and expense for the parties, the law to be applied, the threat of a multiplicity of proceedings and conflicting decisions, the enforcement of an eventual

judgment, and the fair and efficient working of the Canadian legal system as a whole.

[37] Facebook suggests in its written submissions on this hearing that the forum selection clause will be the deciding factor and should persuade this Court that the jurisdiction application should be heard first.

[38] Facebook argues in its written submission that:

> In *Lieberman,* Mr. Justice Davies based his decision to jointly hear the jurisdiction and certification motions on the fact that there was no choice of forum clause, which he observed is "a factor that is often of significance in determining whether a court will decline jurisdiction".

[39] With respect, I consider this to be overstating this factor in the reasons for judgment in *Lieberman.* Mr. Justice Davies' comment about a forum selection clause was not suggesting that in all cases where there is a forum selection clause a *forum non conveniens* application can be heard in advance of a certification application. Indeed, in that case there was arguably a forum selection clause of a nature in the trust agreement at issue, as identified at para. 19(3).

[40] In the context of the reasons for judgment, what the court was saying in *Lieberman* was that only in very clear cases will it be sensible to hear the jurisdiction application first. What the court held at para. 19, item 4 was:

> (4) The legal and evidentiary issues that relate to a determination of whether Quebec is a more convenient forum than British Columbia in which to litigate the issues raised by these proceedings are complex. To that extent, difficult issues concerning what law will govern the determination of various aspects of the plaintiffs' claims will also be of significance to the determination of whether this proceeding should be certified in British Columbia under the *Class Proceedings Act.* While the interplay between those evidentiary and legal issues does not reach the level of "interdependence" between the outcome of issues as in *Money Mart, supra*, I am satisfied that the overlap amongst the issues is such that a bifurcated hearing would not only have the potential to cause injustice but could also result in a multiplicity of proceedings on appeal. *Consumers' Gas, supra*, says that such a result should be avoided if possible.

[41] On this application the plaintiff argues that similar complexity exists on the *forum non conveniens* issue in this case, and there is an overlap between it and the test for certification under the *CPA*.

[42] The plaintiff argues that the jurisdiction application asks the Court to decline to take jurisdiction pursuant to s. 11 of the *CJPTA*, which will require an assessment of the interaction of that Act and the *CPA* and *Privacy Act*. Furthermore, the plaintiff argues that the consideration of the factors enumerated in s. 11 of *CJPTA*, especially factors (a), (c), (d) and (f), have overlap with some of the considerations on the certification application under s. 4(1)(d) and 4(2)(c) to (e) of the *CPA*, which state:

> 4(1) The court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:
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> ...
>
> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
>
> ...
>
> (2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:
>
> ...
>
> (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
>
> (d) whether other means of resolving the claims are less practical or less efficient;
>
> (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

[43] I agree that while the tests are different as between *forum non conveniens* and the preferable procedure test under the *CPA*, I can say as a judge hearing the matter that I appreciate that there may be overlap from a policy perspective and one argument may be informed by evidence and argument relating to the other. It does not make sense to me to separate these issues in this case.

[44] Like Mr. Justice Davies in *Lieberman* at para. 20, I am satisfied that justice will be better served in this case if both applications are heard at the same time "to ensure that all issues are fully canvassed on as full an evidentiary record as the parties deem necessary to the complete analysis of all of the issues."

[45] I also note that in the written submissions of Facebook it relies on a decision of the British Columbia Court of Appeal in *Ezer v. Yorkton Securities Inc.*, 2005 BCCA 22 ["*Ezer*"]. Facebook argues at para. 21 of its written submission:

> An "exclusive jurisdiction" clause akin to Facebook's Forum Selection Clause was upheld and enforced in *Ezer v. Yorkton Securities* in determining that the class certification application should not have been heard before the decision to stay the action. Levine J.A. stated therein:
>
> > The question is whether the jurisdiction in which the action may be brought is determined by the contract between the parties. If the exclusive jurisdiction clause is enforceable, Mr. Ezer cannot bring any action against Yorkton in B.C., including a class proceeding, and there is no action to be certified. The issues of whether a class proceeding is the fair and preferable procedure or there are common issues do not arise.

[46] As pointed out in the plaintiff's argument, the quote relied on by Facebook above omitted the first sentence of the paragraph quoted from *Ezer*, which stated, "There is no such statutory conflict in this case." Here, of course, the facts are different than in *Ezer* because the plaintiff does say there is a statutory conflict between the forum selection clause and the *Privacy Act*.

[47] Here, the fact that the plaintiff relies on the court's jurisdiction as conferred by statute and the fact that the issue before me will be one of *forum non conveniens* rather than jurisdiction *simpliciter* distinguishes it from some other cases where the jurisdiction issue was argued in advance of the certification hearing, such as *Ezer* or *Marren v. Echo Bay Mines Ltd.*, 2002 BCSC 1168, rev'd 2003 BCCA 298.

[48] The plaintiff also argues that hearing a jurisdiction application first in this case would be contrary to the costs protection granted by the *CPA*. I find it unnecessary to determine that issue today.

Conclusion

[49] In conclusion, the key argument on this sequencing application by the defendant is that a determination of whether or not the Court should decline jurisdiction may dispose of the entire proceeding before this Court and avoid inefficiency and cost. I disagree. I see a much greater potential for inefficiencies

and wasted costs if the jurisdiction argument is heard separately, prior to the certification application.

[50] It appears to me that each side has complex arguments to make on the *forum non conveniens* issue. I cannot weigh Facebook's argument as so overwhelmingly superior and clear that it should be heard first.

[51] It is not appropriate for me to say too much given these issues will come back before me, but I simply want to make it clear that as a judge hearing the matters I would find it more helpful to have them heard together. Therefore, I am going to order that the jurisdiction application be heard at the same time as the certification application.

[52] Any questions? No. All right. In terms of adjourning the date on January 13, I will simply make that order now too. The date of January 13 set aside for hearing the jurisdiction application is adjourned.

[53] MR. MALLETT: One point. It relates to scheduling of certification, since we are backloading jurisdiction into certification. We allocated three days for certification. I think it would behoove us to try to perhaps put some time parameters around the jurisdiction argument and the balance of the certification argument. I'm wondering if rather than discuss that here today counsel discuss it and try to, again, be as efficient as we can in putting this show before Your Ladyship.

[54] THE COURT: I had presumed that when you set aside the time for certification you did not know what the outcome was and so you considered it might be the whole ball of wax. I will leave it up to both sides to discuss whether they feel they have enough time in the three days. I would presume there is, but –

[55] MR. MALLETT: And I'm not at this point in time saying it isn't.

[56] THE COURT: Right.

[57] MR. MALLETT: I'm simply saying we should turn our minds to that and, at a minimum, the allocation of the time within those three days to the two proceedings that will be before the court.

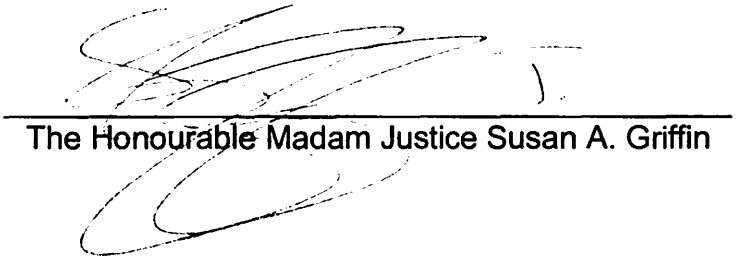
[58] THE COURT: Subject to submissions to the contrary, it would make sense to me to have the jurisdiction application be dealt with as part of a response to the certification application. So in other words, the plaintiff will go first with its certification application, then the defendant will go second with its jurisdiction application and response to certification, and then the plaintiff replies. That to me makes the most sense and will address the plaintiff's point that sees some overlap between the issues. It does not mean that the jurisdiction argument is only a defence. I appreciate that you are also saying it should preclude the certification, but it strikes me as logical that it proceed that way.

[59] MR. MALLETT: Then I'm glad I stood up and we had this discussion.

[60] THE COURT: Right. And if you see something different, then I suggest the two of you discuss it, and certainly you can seek another management conference in front of me to discuss how to best organize that and the allocation of time.

[61] MR. MALLETT: Thank you.

[62] THE COURT: Thank you very much.



The Honourable Madam Justice Susan A. Griffin