IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Ari v. Insurance Corporation of British Columbia,* 2024 BCSC 964

Date: 20240603
Docket: S123976
Registry: Vancouver

Between:

Ufuk Ari

Plaintiff

And

Insurance Corporation of British Columbia

Defendant

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

Restriction on publication: An order has been made in this proceeding pursuant to the Court's inherent jurisdiction that prohibits the publication of any information that could identify any of the potential class members, except those who have commenced proceedings in this Court; and the licence plate numbers, driver's licence numbers, vehicle descriptions, vehicle identification numbers, and addresses of any potential class members. This publication ban applies indefinitely unless otherwise ordered. These reasons for judgment comply with this publication ban.

Before: The Honourable Mr. Justice N. Smith

Reasons for Judgment

Counsel for the Plaintiff: G.J. Collette
A.C.R. Parsons

Counsel for the Defendant: J.M. Campbell
D.G. Cowper, K.C.
K. Purcell, Articled Student

Place and Date of Hearing:	Vancouver, B.C. April 24, 2024
Place and Date of Judgment:	Vancouver, B.C. June 3, 2024

[1] This class action arose when an employee of the defendant, Insurance Corporation of British Columbia ("ICBC"), improperly accessed and sold personal information of ICBC customers contained in the corporation's databases.

[2] In reasons for judgment following a summary trial, indexed at 2022 BCSC 1475, I found that the employee's conduct breached the *Privacy Act*, R.S.B.C. 1996, c. 373 [*PA*] and ICBC was vicariously liable. ICBC's appeal from that judgment was dismissed in reasons indexed at 2023 BCCA 331. The issue now is the assessment of class-wide damages.

[3] Between April 2011 and January 2012, houses and vehicles belonging to 13 individuals were targeted in arson and shooting attacks (the "attacks"). Investigation revealed that those 13 were among 79 ICBC customers whose licence plate numbers an ICBC adjuster, Candy Elaine Rheaume, had searched in the corporation's databases without an apparent business purpose. Such a search would reveal, among other things, the name and address of a vehicle's owner.

[4] ICBC admitted in this action that Ms. Rheaume sold some of the information she obtained to Aldorino Moretti for $25 or more per licence plate number, and some of that that information was used by Vincent Eric Gia-Hwa Cheung, Thurman Ronley Taffe and others to carry out the attacks.

[5] ICBC fired Ms. Rheaume and notified 78 customers (one customer had died by then) that their information had been wrongly accessed.

[6] It is not known how many of the 78 customers' information Ms. Rheaume sold. ICBC admitted she sold the information of 45 customers, based solely on what was particularized by the Crown in subsequent criminal proceedings against her. In my earlier reasons, I said:

> [54] Although ICBC has sought to limit its admission to 45 customers, that does not mean that theirs was the only information sold to Mr. Moretti. All ICBC can point to is vague evidence from Ms. Rheaume and Mr. Moretti to the effect that they do not believe the number was as high as 78. There are no records by which any of the other 33 customers can prove that their

> information was sold to Mr. Moretti or by which ICBC can show that it wasn't. …

[7] This action was commenced on June 1, 2012. In the 12 years since then, the Court of Appeal has heard appeals from four different judgments of this Court.

[8] ICBC first applied to strike the notice of civil claim. Justice Russell granted that application only in part, and an appeal and cross appeal were dismissed in reasons indexed at 2015 BCCA 468.

[9] Justice Russell then certified the action as a class proceeding on December 1, 2017. The certification order defined the class as the 78 individuals whose "personal information [was] accessed for non-business purposes by Ms. Rheaume," with a subclass of the 13 individuals whose property was damaged. On appeal from that order, the Court of Appeal, in reasons indexed at 2019 BCCA 183, expanded the class and the subclass to include family members and other residents at the homes of customers whose information had been accessed.

[10] After I succeeded Justice Russell as case management judge, I dismissed an application by ICBC for leave to commence third party proceedings out of time against Ms. Rheaume, Mr. Moretti and others. ICBC had also commenced a separate action against those parties, seeking the same relief for the same alleged wrongs. I found that the third-party notice to be an abuse of process in those circumstances. I also dismissed ICBC's application to have that separate action heard at the same time as the trial of common issues in this action. ICBC's appeal from that order was dismissed in reasons indexed at 2021 BCCA 180.

[11] As said above, I later found that ICBC was liable for the privacy breach, and ICBC's appeal from that decision was dismissed on the parties' fourth trip to the Court of Appeal.

[12] Section 1 of the *PA* reads:

> **1** (1) It is a tort, actionable without proof of damage, for a person, wilfully and without a claim of right, to violate the privacy of another.

> (2) The nature and degree of privacy to which a person is entitled in a situation or in relation to a matter is that which is reasonable in the circumstances, giving due regard to the lawful interests of others.
>
> (3) In determining whether the act or conduct of a person is a violation of another's privacy, regard must be given to the nature, incidence and occasion of the act or conduct and to any domestic or other relationship between the parties.
>
> (4) Without limiting subsections (1) to (3), privacy may be violated by eavesdropping or surveillance, whether or not accomplished by trespass.

[13] I concluded that the privacy breach was complete when Ms. Rheaume improperly accessed customer information, whether or not she passed the information to a third party. I stress that was a conclusion on establishing liability. It was not intended to define or limit the nature of the damages resulting from the breach. The Court of Appeal endorsed the distinction between the basis of liability and the extent of damages, stating:

> [113] It was open to the judge to consider that Ms. Rheaume's conduct in selling some of the information to third parties for a criminal purpose tainted all of her actions and affected all of the Class Members. Her improper motive in accessing all of the files she accessed without a legitimate business purpose was fairly inferred. As the judge found, "[o]nce she improperly accessed an individual customer's information, the customer was at risk from any use she may have chosen to put it to": at para. 56. This conclusion is supported by the evidence, including ICBC's acknowledgment of all the customers' anxiety and concern when it wrote to them after the breach.

[14] The plaintiff now seeks general non-pecuniary damages for breach of the *PA* in the amount of $25,000 per class member. Any class members who say they suffered individual non-pecuniary damages over and above that amount, or pecuniary damages for losses and expense incurred, would be required to prove those claims in the individual issues phase of this class proceeding.

[15] ICBC says that "baseline" non-pecuniary damages applicable to all class members for the "mere fact their privacy was violated" should be limited to $500 per class member, with any claims to greater pecuniary or non-pecuniary damages to be

raised in the individual issues stage. In making that submission, it relies on the following statement by the Court of Appeal:

> [170] The judge acknowledged that there were some differences between Class Members as well as between Class Members and Subclass Members. The judge made it clear that the assessment of aggregate general damages will be based on the lowest-common denominator circumstances of the class, what I will refer to as a baseline assessment. It will be on a basis "arising from the mere fact that their privacy was violated": at para. 82. The judge acknowledge that this might mean that the aggregate general damages assessment will be "nominal" or "modest".

[16] ICBC says that because the class includes all persons who were living at any of the addresses accessed by Ms. Rheaume, the "lowest common denominator" would be represented by a baby or young child in one of those homes, who would have had no knowledge or understanding of the privacy breach. Any class members who claim to have suffered any fear or distress from knowledge of the breach would be required to prove that in the individual issues phase.

[17] Although I have previously said that the aggregate general damages assessment may be "modest" or "nominal," those terms are not necessarily synonymous with "trivial", and I find that ICBC's position would indeed trivialize the privacy interest that was violated.

[18] Most decisions that have awarded damages under the *PA* did so under very different circumstances, involving the breach of a single person's privacy. For example, in *Heckert v. 5470 Investments Ltd.,* 2008 BCSC 1298, a landlord placed a video camera in the hallway of the building where a tenant's apartment was located. The camera recorded the rental suite's door. Damages for breach of the *PA* were assessed at $3,500, including $500 for chiropractic and acupuncture treatments. The Court described that amount as "nominal."

[19] In *J.M.F. v. Chappell,* [1998] B.C.J. No. 276, 1998 CanLII 14973 (C.A.), a newspaper published the name of the complainant in a criminal case, contrary to a publication ban. A jury awarded $3,000 in general damages and $15,000 in punitive damages for beach of the *PA*, and the Court of Appeal described that award as not

being “so low that it amounts to a wholly erroneous estimation of damages”: para. 38.

[20] In *Nesbitt v. Neufeld,* 2010 BCSC 1605, aff’d 2011 BCCA 529, the defendant circulated the plaintiff’s personal correspondence from an old computer. The plaintiff was awarded $40,000, but that was a combined award for breach of the *PA* and defamation.

[21] In *Insurance Corporation of British Columbia v. Somosh,* [1983] B.C.J. No. 2034, 1983 CanLII 673 (S.C.), a private investigator called an individual's place of work and inquired about their employment status, salary, drinking habits and character. Nominal damages of $1,000 were awarded for breach of privacy.

[22] I find that the character of the breach in this case is not meaningfully comparable to what was at issue in those cases. The Court of Appeal described the severity of the breach in this case:

> [107] In my view, the facts of the present case illustrate the value of the statutory tort regime in BC. An examination of the “nature, incidence and occasion(s)” of the ICBC’s employee’s conduct reveals that the privacy breach was serious, consistent with ICBC’s own description of it. She deliberately searched out the private information of Class Members, linking their license plates of their vehicles to their personal residences for an improper purpose of selling that information to persons who she knew had a criminal intention, and did sell some of that information, risking the property and personal safety of the Class Members.

[23] I find that risk existed for all class members, whether they were individually aware of it or not. Many class members have no way of knowing whether their information was disclosed to anyone, to whom it was disclosed or the specific risk that may have created. Even if any such evidence existed, it would be entirely within ICBC’s control. Apart from subclass members, even the customers whose information ICBC admits was sold to Mr. Moretti have no way of knowing if he passed it along to others, as he apparently passed it on to those who committed the attacks.

[24] The Supreme Court of Canada, albeit in a very different context, has recognized that individuals' "clear and pressing interest" in the protection of information about themselves is "of paramount importance in modern society": *Reference re Genetic Non-Discrimination Act*, 2020 SCC 17 at para. 82.

[25] The *PA* makes the breach of privacy tort actionable without proof of damage. The Court of Appeal commented on the purpose of the statutory tort:

> [167] The statutory tort is actionable *per se*, meaning without requiring proof of actual harm. The law presumes some damage will flow from the mere invasion of privacy without proof of actual pecuniary loss: *Pootlass v. Pootlass*, 1999 CanLII 6665 (B.C.S.C.) at para. 62. The statutory tort of breach of privacy serves a public purpose in encouraging persons to respect privacy of others and provides accountability if they do not by way of general damages claims.
>
> [Italicized emphasis in original; underlined emphasis added.]

[26] I find that public purpose and need for accountability is of particular importance at a time when large organizations—public and private—routinely collect and electronically store vast amounts of personal information about everyone they deal with. The people who provide that information often have no meaningful choice about whether to do so. In this case, anyone in British Columbia who wishes to own or drive a motor vehicle must provide information to ICBC.

[27] All of that electronically stored information may be easily accessible to many people within an organization and is vulnerable to improper access and misuse. The court must stress the need for protection of that information and make clear there will be consequences for any failure to do so.

[28] I find the range of damages suggested by ICBC would be inadequate to serve the public purpose of the legislation. The public goal of encouraging respect for and protection of privacy in circumstances such as this requires a level of accountability that is more than a minor cost of doing business.

[29] Further, I find that although the *PA* makes a breach actionable *per se*, accepting ICBC's position on damages would render that provision effectively

meaningless. It would, for practical purposes, require proof of significant harm for any action to be financially worth pursuing. It would also negate much of the benefit of a class proceeding by either requiring a multiplicity of relatively small claims to be advanced in the individual issues phase or discouraging class members from advancing such claims at all.

[30] In my view, the most closely comparable circumstances to those here are found in the Ontario Court of Appeal decision in *Jones v. Tsige*, 2012 ONCA 32, which also involved an employee of a large organization accessing individual records for reasons unrelated to her employment.

[31] In *Jones*, the plaintiff and defendant worked for the same bank but didn't know each other. The defendant had formed a relationship with the plaintiff's former husband and used her workplace computer to access the plaintiff's personal banking records on at least 174 occasions over a four-year period. However, the defendant did not publish or distribute that information to anyone else.

[32] Although Ontario does not have legislation similar to the *PA*, the Court in *Jones* recognized a similar tort at common law and, in assessing damages, referred to awards under the *PA* and similar legislation in other provinces.

[33] The Court said damages for breach of privacy in cases where the plaintiff suffered no pecuniary loss are intended "to vindicate rights or symbolize recognition of their infringement" (at para. 75) and should be "modest but sufficient to mark the wrong that has been done" (at para. 87). The Court set a conventional range of such damages at "up to $20,000," and on the facts of the case, awarded damages at the mid-point of the range, or $10,000:

> [90] In determining damages, there are a number of factors to consider. Favouring a higher award is the fact that Tsige's actions were deliberate and repeated and arose from a complex web of domestic arrangements likely to provoke strong feelings and animosity. Jones was understandably very upset by the intrusion into her private financial affairs. On the other hand, Jones suffered no public embarrassment or harm to her health, welfare, social, business or financial position and Tsige has apologized for her conduct and made genuine attempts to make amends. On balance, I would place this

> case at the mid-point of the range I have identified and award damages in the amount of $10,000. …

[34] The breach of privacy in this case was more serious than the one in *Jones*. It was motivated by personal financial gain and resulted in distribution of information to third parties, including criminals. Its impact was not limited to a single individual, and the full extent of the distribution of information and the risks it created at the time will never be known. I find those factors outweigh the mitigating factor that some class members may have been unaware of what occurred.

[35] In the circumstances of this case, based on the severity of the breach, I find an award of $15,000 per class member falls within the category of a modest or nominal award, and I assess damages in that amount.

[36] The plaintiff also seeks approval of class counsel fees of 35% of the aggregate class wide damages inclusive of disbursements, taxes and interest. The plaintiff, Mr. Ari, retained counsel in March 2012 and entered into a contingency fee agreement. Although the agreement has apparently been misplaced, I accept counsel's statement that it provided for a fee of 35% of the damages recovered plus taxes, disbursements and interest. Because the total amount now being sought is inclusive of disbursements, taxes and interest, it is less than set out in the agreement.

[37] The factors to consider in assessing the reasonableness of class counsel fees were referred to in *McKay v. Air Canada,* 2015 BCSC 1874 at para. 16. Those are:

(a) the time expended by counsel;

(b) the legal complexity of the matters to be dealt with;

(c) the degree of responsibility assumed by counsel;

(d) the monetary value of the matters in issue;

(e) the importance of the matter to the client;

(f) the degree of skill and competence demonstrated by counsel;

(g) the results achieved;

(h) the ability of the client to pay;

(i) the client's expectations as to the amount of the fee;

(j) the risk undertaken by counsel; and

(k) the position of any objectors.

[38] *McKay* was a decision approving settlement of a class action. The factors listed weigh even more heavily in favour of counsel in this case because, unlike many class actions where counsel fees have been considered, the matter was not settled after certification. This litigation was hard-fought for 12 years, including four separate appeals. Counsel not only assumed the risk that the action would not be certified, but they then assumed the risk that no liability would be found. Liability was established only after a summary trial and the dismissal of ICBC's appeal. Counsel also assumed the risk of class wide damages being assessed at an amount that would not adequately compensate for the work done or the risk assumed.

[39] There are no objectors, and ICBC takes no position on the matter of fees. I have no difficulty finding the fee sought to be entirely appropriate.

[40] The plaintiff also seeks a $10,000 honorarium to the representative plaintiff, Mr. Ari, to be paid as a disbursement.

[41] Although compensation to the representative plaintiff is not automatic, modest compensation is appropriate where the representative plaintiff has provided necessary and active assistance leading to success on behalf of all class members. The court must ensure that the amount of any separate payment to the representative plaintiff is not disproportionate to the benefit derived by the class

members, the effort of the representative plaintiff and the risks assumed by the representative plaintiff: *Cardoso v. Canada Dry Mott's Inc.,* 2020 BCSC 1569 at para. 49.

[42] Mr. Ari became the representative plaintiff at a time shortly after homes and property of class members had been attacked. Like counsel, he has lived with this matter for 12 years. In light of those circumstances and the result achieved, I find the $10,000 honorarium to be appropriate, particularly as it is to be paid as a disbursement from counsel's all-inclusive fee and will not affect the net recovery of individual class members.

[43] The parties have agreed on the form of a notice of determination of common issues and a litigation plan, including the procedure for distribution of class-wide damages and the procedure for claiming further individual damages. Those documents are approved.

"N. Smith J."