COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *J.R. v. 23andMe Holding Co.,*
2025 BCCA 235

Date: 20250618
Docket: CA50715

Between:

J.R.

Appellant
(Plaintiff)

And

23andMe Holding Co., 23andMe, Inc., and
Matthew Kvarda, in his capacity as the foreign representative of
23andMe Holding Co. and 23andMe, Inc.

Respondents
(Petitioners)

Restriction on publication: Anonymity Order of Justice Blok dated October 26, 2023 and issued in Supreme Court Action S-237147 prohibiting publication, broadcast or transmission of information that would identify the Appellant, referred to in these reasons as "J.R.".

Before: The Honourable Mr. Justice Harris
The Honourable Justice Donegan
The Honourable Justice MacNaughton

On appeal from: An order of the Supreme Court of British Columbia, dated May 26, 2025 (*23andMe Holding Co. (Re)*, 2025 BCSC 1067, Vancouver Docket S253696).

Oral Reasons for Judgment

Counsel for the Appellant (via videoconference): S. Nematollahi, E. Karp

Counsel for the Respondents, 23andMe Holding Co. and 23andMe, Inc.: M. Buttery, K.C., L.E. Burgess, S.L. Bjorkquist (via videoconference)

Counsel for the Respondent, Matthew Kvarda, in his capacity as the foreign representative of 23andMe Holding Co. and 23andMe, Inc.:	H.L. Williams A.E. Bowron
Place and Date of Hearing:	Vancouver, British Columbia June 18, 2025
Place and Date of Judgment:	Vancouver, British Columbia June 18, 2025

Summary:

This is an application to quash an appeal on the basis that the order was made under the CCAA and leave to appeal is required. The putative appellant did not seek leave. Held: Appeal quashed. The order was made under the CCAA relying on the jurisdiction conferred by the CCAA. There is no merit to the argument that the order was not pronounced under the CCAA.

[1] **HARRIS J.A.**: This is an application to quash an appeal on the basis that this Court does not have jurisdiction to hear it. The applicants say that the appeal arises from an order made under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 [*CCAA*] and that leave to appeal is required by s. 13 of the *CCAA*. The putative appellant contends that leave to appeal is not required, that there is an appeal as of right, and therefore has not sought leave. This position is grounded in the appellant's argument that the jurisdictional basis of the order under appeal is other than the *CCAA*. The appellant has refused to seek leave or directions as to whether leave is required, despite being advised that leave is required.

[2] At a minimum, the order in issue arises in connection with Chapter 11 bankruptcy proceedings in the United States and an application in BC under the *CCAA* to recognise those bankruptcy proceedings as the main proceeding in the insolvency. That and other ancillary orders were made.

[3] The putative appellant brought applications on their own seeking in substance an order confirming or establishing that, on behalf of a potential class of Canadian customers of 23andMe, the putative appellant was entitled to provide notices of claims in the US Chapter 11 proceedings of class claims, even though the US court issued an order establishing how notice of proof of claims was to be given. That order has a notice deadline of July 14, 2025.

[4] The judge dismissed the appellant's application. The putative appeal is taken from that dismissal.

[5] Considering the impending notice deadline of potential claims in the US court, this appeal has been brought as an urgent appeal in cooperation with the parties. It

is imperative that this Court resolve the issues without delay. Accordingly, these reasons are briefer than they otherwise might have been.

[6] Some context is required. The appellant is a plaintiff in two substantially identical proposed class proceedings. The potential class consists of all Canadian customers of 23andMe whose private information was subject to unauthorized access by a third party on or about October 1, 2023 (the "Cyber Security Incident"). The unauthorized access spawned a number of class and other actions and state breach of privacy investigations in the US and elsewhere.

[7] Subsequently, on November 30, 2023, 23andMe updated its terms of service ("ToS") for US customers.

[8] On December 19, 2023, the appellant obtained, in BC, a limited representation order under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 appointing him as representative for the potential class in the first proposed class action "solely to address any issues arising from the implementation, construction or interpretation of the [November 30 ToS]", and any future terms of service that may replace the November 30 ToS (the "Limited Representation Order"). A representation order is a preliminary step in a class proceeding, but does not amount to a certification of a class proceeding. Neither of the proposed class actions have been certified.

[9] On March 23, 2025, what I will refer to as the debtors (essentially 23andMe) commenced Chapter 11 Proceedings in the United States Bankruptcy Court for the Eastern District of Missouri (the "US Bankruptcy Court"), resulting in an automatic stay of proceedings.

[10] On March 24, 2025, the debtors filed a motion in the US Bankruptcy Court for an order establishing bar dates for filing proofs of claim in the Chapter 11 proceedings, and approving the form and manner of notice. Claims filed beyond the bar date, when set, would not be accepted. Unfortunately, as a result of an

innocently misdirected email, the appellant did not receive notice of the application, although they were intended to be served.

[11] On April 30, 2025, the US Bankruptcy Court pronounced an order establishing July 14 as the bar date for filing proofs of claim arising from the Cyber Security Incident and approving the form and manner of notice. The order was provided to the appellant.

[12] On May 6, 2025, Matthew Kvarda was appointed to act as a foreign representative in respect of the Chapter 11 Proceedings and on May 14, 2025, he filed a petition in the British Columbia Supreme Court seeking recognition of the Chapter 11 Proceedings under Part IV of the *CCAA*.

[13] On May 26, 2025, the chambers judge pronounced orders under Part IV of the *CCAA* recognising the Chapter 11 Proceedings as the foreign main proceeding and staying all proceedings against the debtors, including the defendants in the potential class proceedings. He also made an order giving full effect to the US Bankruptcy Court orders throughout Canada.

[14] The appellant, alongside another potential class representative in the second class proceeding, filed an application (heard at the same time as the recognition proceedings) seeking an order allowing J.R. and M.M. to represent "the Putative Class" in any matters concerning 23andMe in the Chapter 11 and the *CCAA* Proceedings. More specifically, the application was framed as seeking a "reinstatement and restatement" of the Limited Representation Order, to include the following terms:

(a) that J.R. and M.M. would represent the Putative Class;

(b) [that] would significantly expand the representative mandate from "solely" addressing issues arising from the November 30 ToS to include "any matter" concerning 23andMe's proceedings within the CCAA Proceedings as well as the Chapter 11 Proceedings;

(c) [that] purported to entitle the Applicants to file a single claim within either the CCAA Proceedings or the Chapter 11 Proceedings in relation to any claim under the First or Second Proposed Class Action;

(d) [that] would require 23andMe to issue a notice to the Putative Class in the form drafted by Plaintiff's Counsel;

(e) [that] would revise the class definition to one that is not a class definition in any filed pleading in the Proposed Class Actions; and

(f) [that] omitted any measure that would ensure the representation order is without prejudice to the rights of any defendants in the Proposed Class Actions at any future certification hearing.

[15] The judge dismissed this application. As noted, he made the orders sought by the debtors in the *CCAA* proceedings. He set out the background to the class proceeding and the Limited Representation Order and its terms. He then observed:

> [17] In the present application of the representative plaintiff, the plaintiff says that it is seeking an order "restating and reinstating the order of Wilkinson J. of December 19, 2023." However, there are considerably more terms set out in the Wilkinson J. order and on my review, they appear more extensive than dealing solely with the terms of service. This can be seen in paragraph 4 of the proposed order which reads:
>
> > The representative plaintiff's and representative counsel's mandate shall specifically and for avoidance of any doubt include any matters concerning 23andMe's proceedings within these proceedings as well as the proceedings brought under Chapter 11 of the US Bankruptcy Code in the US Bankruptcy Court for the Eastern District of Missouri, Eastern Division.
>
> [18] The applicant also seeks in paragraph 5 of the proposed order the right to file a single claim within this proceeding or the US Bankruptcy proceeding on behalf of the Canadian class members in relation to claims arising in the proposed class proceedings and to take such steps as necessary or desirable to address, adjudicate, or otherwise resolve such claim. I also note absent from the proposed order is the without prejudice terms of the representation order.

[16] He went on to analyse the issue:

> [21] The role of this court in circumstances as in the present is different, as it is to determine if recognition has been established and thereafter to provide under s. 52 of the *CCAA* the stated maximum cooperation in this case. There is no substantive parallel *CCAA* proceeding.
>
> [22] While the putative representative plaintiff was not provided notice of the application in the bankruptcy court proceedings, it was provided notice of the order that issued and has been through counsel engaged in communications with counsel for the debtor and foreign representative.
>
> [23] It is apparent from reading the materials that considerable effort went into the negotiation and settlement of the notification terms, the manner of filing claims, either individual and by group, and the bar date in the US proceedings. There are many class actions filed, federal investigations and

> state investigations, foreign investigations, a multitude of arbitration claims, all of which involve counsel in relation to the cyber incident.
>
> [24] In support of this point, claims regarding the cyber incident were provided separate attention and provisions as a result of the involvement of many class action counsel and States' AGs, and while the present putative representative was not involved, there were many entities that had similar issues whose input went into the settlement of the approved terms.
>
> [25] As the bar date will not expire until July 14, 2025, there is ample time for the putative representative plaintiff to seek an appearance before the US Bankruptcy Court to raise its issues.
>
> [26] I also note that all former customers and current customers, including those in Canada, as I have said, were provided notice through various channels identified and pursuant to the terms of the US bar date order.
>
> [27] Also, as I have mentioned, the application for restatement and reinstatement is not a reiteration of the original order. As I see it, there are a number of issues identified by Ms. Buttery for the 23andMe entities in their application response and I refer specifically to paragraphs 33(a) to (e) in her submissions. The proper forum to raise the issues and relief sought by the putative plaintiff is not in the proceeding before me but is the US Bankruptcy Court.

[17] J.R. contends that the order was made only *in the context* of the *CCAA* proceedings and not *under* it. J.R. relies on for support paras. 20, 21 and 27 of the judge's reasons. J.R. says the judge noted that the proceedings were not substantive *CCAA* proceedings, the court's role is different to the US court's role and that the proper forum for the relief sought by the representative plaintiffs was the US court. J.R. says that the judge did not exercise a discretion relying on *CCAA* principles in reaching his conclusions—that is one of the appellants' primary basis for arguing that leave is not required. J.R. says given that the judge concluded that the relief could not be sought in these *CCAA* proceedings, the decision and the order denying the relief also could not have been made under the *CCAA*. J.R. goes on to argue that the orders were not necessarily incidental to the *CCAA* proceedings, and therefore, not being made under the *CCAA* and an appeal lies as of right.

[18] In my view, these submissions are without merit. It is evident from the reasons just cited that the judge considered he was exercising a jurisdiction conferred on him by the *CCAA* in recognising and giving effect to the US order,

including staying proceedings and giving effect to the orders for bar dates for filing proofs of claim and approving the form and manner of notice. These are, in my view, orders made in the exercise of a jurisdiction conferred by and under the *CCAA*. Further, the dismissal of the appellant's application was a necessary corollary to the recognition order. In making the one order, and dismissing the application, in my view, the judge exercised a discretion under the *CCAA* and appropriately considered the principles governing his discretion under that *Act*. In doing so, he disposed of an argument that the order applied for was simply a reinstatement and restatement of an existing order.

[19] The judge's comment that there is no substantive *CCAA* proceeding only indicates that the court is not embarking on a proceeding in which it is adjudicating the substantive rights and remedies of parties within the insolvency. Rather, it is determining whether to recognise insolvency proceedings in another jurisdiction as the main proceeding and then making necessary incidental and ancillary orders to cooperate to the maximum extent appropriate to facilitate those proceedings in accordance with the principles of comity. This involves the exercise of jurisdiction under the *CCAA* no less than undertaking the management of the insolvency proceedings in BC. I have no doubt the judge exercised jurisdiction under the *CCAA*. Moreover, it is a complete *non sequitur* to suggest that the order that the relief should be sought in the US means that the order could not have been made under the *CCAA*. The order that the proper forum is the US is the result of exercising jurisdiction conferred by the *CCAA* to recognise a main proceeding, and then applying the principles of comity as required by the *CCAA* to refer discrete issues such as notice and proof of claims to that proceeding.

[20] It is incontrovertible that an order made under the *CCAA* requires leave. As a statutory court we have jurisdiction to hear an appeal, in these circumstances, only if leave is sought and granted, assuming the order is pronounced under the *CCAA*.

[21] The law is clear that various criteria guide a court in determining whether an order is pronounced under the *CCAA*. For example, Justice Tysoe has stated a court

should ask whether the order was "necessarily incidental to the proceedings under the *CCAA*" or "incidental to any order made under the *CCAA*": *Redfern Resources Ltd. (Re)*, 2011 BCCA 333 (Chambers) at paras. 9–10. Other courts have indicated that it matters whether the issue affects the restructuring of the insolvency or if *CCAA* considerations inform an exercise of discretion.

[22] It is clear to me that the appellant's application sought orders engaging these principles. This is so even ignoring the fact the notice of application expressly identified and relied on the *CCAA*, among other legal bases. There is, in my opinion, no merit in the argument that although the orders were made in the context of *CCAA* proceedings, they were not made under it. This case is different from *GEC (Richmond) GP Inc. v. Romspen Investment Corporation*, 2025 BCCA 9. That case dealt with independent actions, to which ordinary civil procedural rules were expressly preserved by order, the outcome of which did not turn on any *CCAA* factors. That is not so here. As I see it, the application was brought within the *CCAA* proceeding, expressly relied in part on the *CCAA* proceeding, and its resolution and the order made necessarily turned on *CCAA* considerations and the jurisdiction conferred on the judge under the *CCAA*. Moreover, the order applied for, if made, would have directly engaged the *CCAA* proceedings and the recognition of the effect of the US proceedings.

[23] Similarly, I do not think that alleging error in the interpretation of the Limited Representation Order alters the jurisdictional basis of the dismissal of the application. In my view, the effect of that order, however interpreted, was spent because it was overtaken by the insolvency proceedings, the consequential stays, and the recognition orders. I find no merit in a suggestion that an order reinstating the earlier order could be made under any jurisdiction other than the *CCAA*.

[24] For these reasons, the order under appeal, in my view, is made under the *CCAA*. Leave to appeal is required. It has not been sought. Accordingly, the Court lacks the jurisdiction to hear the appeal and I would, therefore, quash the appeal.

[25] **DONEGAN J.A.**: I agree.

[26] **MACNAUGHTON J.A.**: I agree.

[27] **HARRIS J.A.**: The appeal is quashed.

"The Honourable Mr. Justice Harris"