

CANADA / JUDGMENT

Achtymichuk v. Bayer

2018 BCSC 1159

COURT

Supreme Court of British Columbia

DECIDED

11 July 2018

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2018 BCSC 1159 Achtymichuk v. Bayer Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Achtymichuk v. Bayer Inc.,

2018 BCSC 1159

Date: 20180711

Docket: S167919

Registry: Vancouver

Between:

Lloyd Achtymichuk

Plaintiff

And

Bayer Inc., Janssen Inc., Janssen Pharmaceuticals, Inc., and Janssen Research & Development, LLC

Defendants

Before: The Honourable Madam Justice Sharma

Reasons for Judgment

Counsel for the Plaintiff:

K. Garcha

B. Sanghe

Counsel for the Defendant Bayer Inc.:

W. McNamara

G. Worden

Counsel for the Defendants Janssen Inc.; Janssen Pharmaceuticals, Inc.; and Janssen Research & Development, LLC:

J. Hutchinson

Place and Date of Trial/Hearing:

Vancouver, B.C.

May 31, 2018

Place and Date of Judgment:

Vancouver, B.C.

July 11, 2018

- [1] The plaintiff in this proposed class action seeks precertification production of documents from the defendant Bayer Inc. The plaintiff settled this application with Janssen Inc., Janssen Pharmaceuticals Inc., and Janssen Research and Development LLC (the "Janssen defendants").
- [2] The claim is for personal injury damages based on allegations surrounding drugs produced by the defendants. The defendant produced Cipro and Avelox (the "Medications") and sold those in Canada since 1996 and 2000 respectively. The primary allegations are that the Medications are dangerous to human health, unsuitable to be marketed and sold to treat infections for which they are not required and that the defendants failed to adequately warn the plaintiff and members of the proposed class about the Medication's adverse effects, specifically the risk of peripheral neuropathy.
- [3] At a judicial management conference on April 12, 2017, I ordered that the plaintiff file and serve an amended notice of claim by July 4, 2017, and that the parties could return on September 12, 2017, to address timing issues of other applications. That amended notice of civil claim was filed, and the parties consented to a further amendment, which was filed August 22, 2017. The latter amendment discontinued claims against various foreign defendants, which eliminated the defendants' desire to bring an application challenging this Court's jurisdiction.
- [4] In this application, the plaintiff asks that the defendant produce the following documents before the certification hearing:
- (a) all product monographs, warning labels and prescribing information for the Medications, including all revisions, from the date of submission to Health Canada to the present;
 - (b) all marketing, promotional and advertising materials regarding the Medications;

- (c) all "Dear Dr.", "Dear Pharmacist" and/or "Dear Healthcare Provider" letters, or similar types of letters to governmental authorities and/or nongovernmental healthcare providers, published and/or issued regarding the Medications;
 - (d) all correspondence, including emails between Bayer and Health Canada regarding adverse drug events of peripheral neuropathy experienced by users of the Medications;
 - (e) all correspondence including emails between Bayer and Health Canada regarding all product monographs, warning label and/or prescribing information changes for the Medications required by adverse drug events relating to peripheral neuropathy, and
 - (f) all adverse drug event reports submitted by the defendant to Health Canada regarding patients experiencing peripheral neuropathy after using the Medications.
- [5] The defendant previously sought to "strike out" portions of the plaintiff's notice of application because of the lack of supporting evidence, but I did not grant that relief: 2018 BCSC 776 [Bayer]. I commented in that decision that the argument raised by the defendant could be addressed in the application for precertification document production (para. 19), which it did.
- [6] The plaintiff acknowledges that the Class Proceedings Act, R.S.B.C. 1996, c. 50 [CPA] does not provide a right to precertification discovery and it is only available in limited circumstances. The plaintiff submits that where production is limited to issues that are relevant to certification, and necessary or material to the certification process, document production before certification may be ordered: *Bryer Law Corp. v. Samsung Electronics Co.*, 2010 BCSC 1661 at paras. 17 and 29. The plaintiff alleges that onus is not high. The plaintiff further submits that if he can demonstrate that the evidentiary record at the certification hearing will be inadequate, then precertification production may be ordered. In addition, the plaintiff asserts that his production request is suitably limited.
- [7] At para. 21 of Bayer, I set out the test for precertification production of documents:
- ... In British Columbia, the case law has consistently held that only in exceptional cases will a document production order be granted pre-certification. Those exceptional cases are where the documents sought are necessary to inform the court about the certification issues, but not from a substantive view, from a procedural view. At the May 31 hearing, the test for whether production of documents will be ordered at the pre-certification stage, and will be whether, procedurally speaking, the production of documents is necessary to inform the court's decision as to whether there is some basis in fact for the claims to proceed as a class action. Counsel for the defendant referred me to *Cantlie v. Canadian Heating Products Inc.*, 2014 BCSC 228, where at paras. 35-44, that test for pre-certification document production is discussed. The test is set out by the court at para. 44, and it is whether the plaintiff can demonstrate the documents requested are "necessary for the certification hearing", and a burden that "will be met only in extraordinary cases". Thus, the test is different than the test applied for the production of documents in an action where the only issue is relevance to an issue in the pleadings.

- [8] At certification, the proposed class representative has the burden to convince the court that there is some basis in fact that the form of the action can appropriately go forward as a class proceeding. It is a purely procedural question. As described by the Supreme Court of Canada in *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1 at para. 71, the legal issues before certification are meant to be in furtherance of the court's screening function.
- [9] In *Cantlie v. Canadian Heating Products Inc.*, 2014 BCSC 228, the court decided at para. 43 that the plaintiffs in that application had blurred the line between the legal test at certification, and the test justifying a precertification order for document production. The plaintiff in this case has done the same thing. As pointed out in *Miller v. Merck Frosst Canada Ltd.*, 2011 BCSC 1759 at paras. 39-40, the "basis of fact" test for certification is more than simply disclosing a cause of action, but it is still restricted to facts -- not evidence. That is an important difference because evidence goes to the merits of the claim whereas an assertion of fact helps the court know whether the proceeding is one that is suitable for certification. In my view, the plaintiff has not appreciated this important difference.
- [10] The defendant points out that in virtually all the cases where precertification production of documents has been ordered, it was granted after the record for the application for certification had been filed. Therefore, the court at least had the plaintiff's view of what the common issues would be. The court could then assess in light of that record, what would be necessary to inform its task at certification.
- [11] In this case, the plaintiff has not yet filed the application for certification. Plaintiff's counsel attempted to brush that off as a mere formality and asserted that the likely common issues are clear on the pleadings. That entirely misses the point. It is not the court's job to infer from the notice of civil claim what common issues will be pled. The burden is on the plaintiff to identify what he says are the common issues. That step is vital. Without it, the court cannot assess whether this is a case that ought to proceed by way of class proceeding.
- [12] That identification is also necessary to put the defendant on notice as to what the alleged common issues will be. That is a significant point because the defendant is obliged by s. 5(5) (b) of the CPA to "swear [the defendant] knows of no fact material to the application that has not been disclosed". Thus, any suggestion that the defendant would deliberately withhold documents relevant to certification must be dismissed without some evidence that the defendant is acting contrary to its statutory obligation.
- [13] It is difficult to conceive how a court could ever be in a position to know whether precertification production of documents could inform the certification hearing in the absence of an application for certification, but I do not have to make that conclusion. I am satisfied that it is inappropriate in this case to do so.

- [14] The plaintiff has not identified potential common issues. Therefore, it is impossible to know whether the requested documents would be necessary in order to inform the court at the certification hearing. There is no "record" for the certification hearing yet, so the plaintiff has no basis whatsoever to argue that the record will be inadequate. I conclude that the plaintiff's application is dismissed on those grounds alone.
- [15] However, even if I am wrong that the application fails for those reasons, I also find that the plaintiff has failed to meet the test for precertification production.
- [16] As a starting point, I disagree with the plaintiff that his document request is limited. It is very broad. The Medications have been marketed since 1996 and 2000. The plaintiff is seeking all marketing, promotional and advertising materials for that time period. He is also seeking what are referred to as "Dear Dr." brochures as well as all correspondence between the defendant and Health Canada dealing with adverse effects. It is unknown how voluminous that material would be, but it is safe to assume that many documents fall into the requested categories.
- [17] The plaintiff submits that production is required "for the limited purpose of framing and satisfying the common issues" requirement under the legislation. Other than making that statement, there was nothing else in the plaintiff's submissions to explain how or why that statement is true. Instead, the plaintiff focusses on his assertion, not supported by evidence, that the production request is not onerous on the defendants.
- [18] In *Charlton v. Abbott Laboratories, Ltd.*, 2013 BCSC 21, this Court stated at para. 44 that in order to meet the threshold that the documents must be necessary, they must be something more than merely helpful or informative. That is because there is a clear separation between the procedural aspects of the class proceeding, which includes the application for certification. Thus, Justice Johnson stated that "wherever the threshold is set, it must be high enough to protect the procedural certification process from becoming bogged down by evidence that goes to the merits" (emphasis added). In my view, the plaintiff has not satisfied me that that would not be the result given the broad range and type of documents he has asked for in this application.
- [19] Both parties refer to *Cantlie* in support of their respective positions. The plaintiff suggests that the statement at para. 47 that the existence of warnings was an issue relevant to procedural questions separate from the issue of the efficacy of warnings, which was relevant to the merits, supports his position before me. He submits that he is only seeking documents regarding the existence of the official product monographs. Therefore, he submits it falls in line with what the court said in *Cantlie*.
- [20] I disagree.

- [21] There is a dual significance to the warnings in Cantlie. Whether they were adequate would be an issue analyzed if the merits of the negligence case did proceed. However, the existence (and if they existed, to a limited extent their literal content) of the warnings might have been informative to the court about the commonality of issues to justify a class action. The defendants argued the case was not suitable for a class action because the warnings on the products differed from one company to another.
- [22] In this case, the Medications are highly regulated substances. The existence of warnings is not disputed because they are legally required in some form. The content of those warnings goes only to the merits of the alleged negligence. Thus, Cantlie does not help the plaintiff.
- [23] The plaintiff's material for this application described at length the allegations that he intends to raise should the matter be certified as a class action, repeated from the notice of claim. However, there was no affidavit evidence supporting the allegations. Moreover, the plaintiff's written submissions did not make it clear that the recitation of "facts" in his submissions are merely assertions. The defendant argues that lack of evidentiary support means those allegations cannot be considered at all.
- [24] The plaintiff did not appreciate the significance and implication of the defendant's submission. The court can only make decisions based on admissible evidence put before it (where evidence is required). However, the plaintiff produced a long narrative in the application and his written submissions that went well beyond the evidence he filed. He specifically asked me to rely on those allegations (whether supported by evidence or not) to grant the order for production. Thus, the plaintiff was relying primarily on unsupported allegations in his notice of claim to justify precertification application of documents. That is tantamount to asserting a "right" to precertification production of documents. There is no legal support for that approach.
- [25] Furthermore, the plaintiff relies on exhibits attached to his affidavit which he deposed are true copies of monographs from the "Medications from the Compendium of Pharmaceuticals and Specialties" (CPS). The defendant points out that if the plaintiff was able to obtain those monographs, why would he need an order for more monographs? The defendant also points out that the plaintiff attached Health Canada documents, which were apparently obtained without the assistance of a court order. The defendant submits that obviated the need for the order being sought. I agree with the defendant; the logic of these submissions is sound.
- [26] The plaintiff's affidavit does not explain how the plaintiff obtained those documents, nor whether he believed their content was true, leaving open the question of their authenticity and admissibility. Certainly, the lack of further information about the documents limits what use I can make of them in this application.

- [27] The plaintiff asserts in his written submissions that his request does not involve documents or records that are "scientific or propriety in nature". There is no evidence to back up that statement. In any event, it is not clear to me how that is relevant to the legal issue before me.
- [28] The plaintiff also states that the documents he seeks "appear to be in the public domain". If that is true, then presumably he can obtain them without court order. Again, it is not clear to me how that statement is helpful to his position.
- [29] He further asserts that the production requests are not widespread and would not result in a significant delay or expense to the defendants. As noted above, I do not agree I can make that assumption. In support of his allegation, the plaintiff refers to documents already produced by the defendant in United States litigation. He argues that since the documents have already been produced, it is not onerous for the defendant to produce them again. Given that I have no evidence about the U.S. litigation, or what relevance documents produced in it would have to this action, I cannot gauge how much overlap there would be. More fundamentally, the statement that there is a "large volume" of documents is inherently inconsistent with the plaintiff's submission that production would not be an imposition on the defendants.
- [30] In conclusion, the plaintiff is unable to meet the legal test for precertification production of documents, even if I had concluded that he met the threshold to make the argument. My primary conclusion is that the plaintiff's application fails because he has not filed his application for certification.
- [31] I dismiss the plaintiff's application for precertification production of documents.

"Sharma J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/18/11/2018BCSC1159.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/achtymichuk-v-bayer-2018>

Prepared on 30 October 2026 · Esheria