

CANADA / JUDGMENT

Achtymichuk v. Bayer Inc.

2020 BCSC 1601

COURT

Supreme Court of British Columbia

DECIDED

29 October 2020

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2020 BCSC 1601 Achtymichuk v. Bayer Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Achtymichuk v. Bayer Inc.,

2020 BCSC 1601

Date: 20201029

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, appearing via video conference:

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B. Sanghe

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A. Puchta

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

R. Reinertson

G. McKee

K. Russell

Place and Date of Judicial Management Conference:

Vancouver, B.C.

October 2, 2020

Place and Date of Judgment:

Vancouver, B.C.

October 29, 2020

- [1] The defendants want to bring prior to the certification hearing an application to strike two of the plaintiff's affidavits served in support of certification. The plaintiff opposes that request. These issues were addressed at a hearing, convened as a judicial management conference that took place on October 2, 2020.
- [2] Prior to the October 2, 2020 hearing, the parties last appeared in court on March 2, 2020 for a judicial management conference. At that conference, the defendants raised a desire to bring the application to strike the plaintiff's affidavits. At that time, the parties disputed whether amongst them, that issue had been properly raised. Specifically, the plaintiff submits he was not given sufficient notice of the request and was taken by surprise.
- [3] By memo to counsel dated March 6, 2020, I confirmed that there had been inadequate time scheduled before me to deal with the issues the defendants wanted to raise. I directed the parties to provide written submissions, which they did.
- [4] Two intervening events complicated timely progress on this file. First the COVID-19 global pandemic affected this Court's operations reducing to a minimum the matters heard from mid-March until early June, 2020. The court's operations continue to require modifications from the normal practice because of the pandemic.

- [5] Second, the British Columbia Court of Appeal rendered a judgment commenting on the source of this Court's jurisdiction over procedural matters prior to certification (*British Columbia v. Apotex Inc.*, 2020 BCCA 186). In relation to that, by memo to counsel dated July 7, 2020, I requested the parties appear before me for a hearing to address that decision, in relation to and in addition to the outstanding issue of sequencing. That hearing took place on October 2, 2020 and this judgment addresses the issues addressed at that hearing.
- [6] Dealing first with the Court of Appeal's recent decision in *Apotex*, it confirmed at paras. 8 - 11 that precertification, this Court's jurisdiction to make sequencing orders comes from the Supreme Court Civil Rules as opposed to the Class Proceeding Act, R.S.B.C. 1996, c. 50. I had asked the parties to address whether that decision was relevant to the issues the defendants wished to raise in front of me.
- [7] The Janssen defendants argued that it did not bar the defendants' position because orders can be made under part 5 of the Rules (Case Planning) absent an application: Rule 5-3(1) states that the court may make any one of a number of listed orders "whether or not on application of a party". While that is true, it misses a more important point. The lack of an application in this case is not merely a procedural deficiency; without it the defendants' objections are vague and general. That reinforces the plaintiff's original complaint that the defendants raised the prospect of sequencing motion with the court for the first time in March without sufficient nor precise advance notice.
- [8] As noted, the defendants seek a direction to schedule a precertification application to strike two affidavits on which the plaintiff intends to rely at certification. The first is the affidavit of an expert, Dr. Armstrong, sworn October 26, 2019. The second is the affidavit of Paul Sanghe sworn October 1, 2019; Mr. Sanghe is co-counsel for the plaintiff.
- [9] The defendants addressed their submissions and outlined the nature of their intended objections in a general way. Neither affidavit is before me. Nor is the full evidentiary record on which the plaintiff intends to rely the certification. They also failed to put before me a notice of application, whether in draft form or otherwise, relating to the proposed motion to strike the plaintiff's affidavit evidence.
- [10] The defendants' position is based on two themes: (i) that there are serious issues regarding the admissibility of a portion, or all of the affidavits; and (ii) that a ruling on admissibility prior to certification will promote fairness and efficiency by reducing the volume of inadmissible material at the certification hearing.
- [11] I am not in a position, and do not intend, to rule on the validity of the defendants' objections. The issue before me is whether the objections as currently described by the defendants should be heard and determined prior to certification.
- [12] The test to be applied when determining whether an application to exclude evidence prior to certification was recently articulated in *British Columbia v. Apotex*, 2020 BCSC 412 as follows (para. 26):

The Cannon factors were also adopted in *Li*, in which Justice Bowden offered the following general comment as to the exercise of the court's discretion in departing from the general rule:

- [17] While the certification hearing is usually the first step in a class proceeding, the court may exercise its discretion to hear an application before certification where it goes to the merits of the case, narrows or defines the nature and scope of the case for certification or otherwise moves the litigation forward. There is no absolute rule in this regard and each application must be looked at individually in the context of the particular case before the court. (*Consumers' Association et al. v. Coca Cola Bottling Company et al.*, 2005 BCSC 1042).
- [18] The relevant factors that a court may consider when determining whether to proceed with a motion or an application such as this, before a certification hearing, as described in Cannon, are as follows:
1. Will the application dispose of the entire proceeding or substantially narrow the issues to be determined?
 2. What is the likelihood of delays and increased costs associated with the application?
 3. Will the outcome of the motion promote settlement?
 4. Will the outcome of the motion give rise to interlocutory appeals and delays that will affect certification?
 5. The interests of economy and judicial efficiency; and
 6. Generally, will scheduling the application in advance of certification promote the fair and efficient determination of the proceeding?
- [13] Generally, certification is the first application heard in a class action case: *Strohmaier v. British Columbia (Attorney General)*, 2014 BCSC 2078 at paras 17; *Li v. British Columbia*, 2017 BCSC 1616 at para 17; *0116604 B.C. Ltd. v. Alio Gold Inc.*, 2019 BCSC 1829 at paragraph 12. The underlying policy for that general rule is based on the brief, 90-day period for bringing a certification application, which is seen as an indication of the legislative intent that certification should precede other preliminary motions (*Apotex BCSC*, para. 20). Justice Morellato expanded on that rationale in *Gill v. Yahoo! Canada Co.*, 2018 BCSC 290 (paras. 16-24), while confirming that the decision is a discretionary one that will depend heavily on the facts in the particular case. The nature of that discretion as discussed in those cases must be tempered by the Court of Appeal's clarification in *Apotex* of this Court's jurisdiction to grant orders prior to certification.
- [14] The defendants acknowledged that if they were to succeed, the plaintiff would not be precluded from seeking to file additional evidence in support of certification. It is not relevant nor appropriate for me to comment on the likely success of any such application, but the point is that it is unlikely the defendants' application would dispose of the litigation, which is relevant to the first Cannon factor. That weakens the defendants' position.

- [15] With regard to Mr. Sanghe's affidavit, the defendants contend it contains inadmissible or irrelevant opinion evidence. However, they did not argue that responding to that affidavit (or not as they may choose) would burden either the defendants or lead to inefficiency or unfairness in the certification hearing. Thus, I cannot see an advantage to have that matter heard before and separate from certification. Nor did the defendants indicate how hearing the application to strike that affidavit is supported by any of the other Cannon factors.
- [16] The defendants focussed on Dr. Armstrong's affidavit. Their position is that in its current form, that affidavit would likely require them to adduce thousands of pages to respond to evidence that they say is inadmissible. Although stated slightly differently between the defendants, the essence of their objections to Dr. Armstrong's affidavit are threefold:
- a) They allege his independence and impartiality was compromised by the facts he was asked to assume, which they say are misleading or entirely false.
 - b) They say he relies on some 3000 pages of inadmissible expert reports and deposition transcripts and other documents from the U.S. proceedings, which constitute hearsay.
 - c) They say that his report addresses issues beyond the scope of his expertise.
- [17] I emphasize I am not ruling on the merits of the defendants' objections. However, it is necessary to consider the merits to assess the efficiency of deciding the objections ahead of certification.
- [18] As explained below, I do not find the Cannon factors support allowing the application to strike to precede certification.
- [19] The major flaw in the defendants' position is that allowing their application to strike the affidavit prior to certification would require me to essentially rule on objections in the absence of the full evidentiary record, which will be available to me at certification. The record at the certification hearing will consist not only on the impugned affidavits, but presumably the entire record of the plaintiff, as well as evidence adduced on behalf of the defendants and any transcripts from cross-examinations of affiants if they occur.
- [20] That is significant because the first two objections raised by the defendants are in a way ancillary to Dr. Armstrong's opinion in that their focus is not on the content of his opinion.
- [21] The defendants' first objection depends on a conclusion that the assumed facts provided to Dr. Armstrong are misleading. However, no authority was cited to me that holds that if that occurs the expert's independence and impartiality are necessarily compromised.

- [22] Aside from that, however, the premise of the objection - that the facts of Dr. Armstrong assumed on instruction from counsel are misleading or false - would appear to require me to decide or form a view as to whether Dr. Armstrong's assumed facts are misleading or false. In order to do that fairly, I would have to consider, or it would be preferable to be able to have the benefit of the full record. That does not support making that decision prior to certification at which time the record will be available.
- [23] In response to the second objection, the plaintiff cites *Mazur v. Lucas*, 2010 BCCA 473. In that case the Court of Appeal noted, after reviewing case law, that "hearsay contained in an expert opinion as relevant to weight rather than admissibility has been commented upon favourably by leading Canadian scholars" (para. 39). At para. 40, the Court of Appeal summarized legal principles confirming that an "expert may rely on hearsay". Neither defendant cited *Mazur*, which is surprising since it is binding on me.
- [24] The defendants' positions on this issue diverge somewhat. Bayer submits categorically that the exhibits are hearsay and therefore inadmissible. That position cannot prevail in light of *Mazur*.
- [25] The Janssen defendants framed the argument a bit differently. Although not citing *Mazur*, the Janssen defendants acknowledged that an expert can rely on hearsay. However, it went on to argue that an expert cannot simply attach documents to her report and thereby make them admissible for their truth.
- [26] I do not know if the plaintiff is purporting to have the exhibits to Dr. Armstrong's affidavit introduced for their truth, nor do I know if Dr. Armstrong relies on them for their truth; the defendants did not put the affidavit before me. Furthermore, it could be that the plaintiff brings other evidence at certification that would establish the truth of some of the exhibits. I note the same considerations apply to the facts that counsel instructed Dr. Armstrong to assume.
- [27] I cannot see how it would be efficient nor fair to rule on the objection in the absence of the full evidentiary record that would be available at certification.
- [28] Bayer also cited *Stanway v. Wyeth Canada Inc.*, 2013 BCSC 2250, which addressed the admissibility of transcripts from a foreign proceeding. However, the facts were sufficiently different to distinguish the case. In *Stanway*, the plaintiff, after certification had been granted, sought to introduce transcripts from US proceedings under Rule 12-5(54), which expressly permits introduction of transcripts in certain circumstances. Justice Gropper dismissed the application, but, notably, allowed the plaintiff to reapply if certain conditions could be satisfied (para. 42). Justice Gropper confirmed that the admission of hearsay is determined on a case by case basis according to the principles of necessity and reliability (para. 36). *Stanway* does not support Bayer's categorical position.

- [29] I do not know if the plaintiff will seek at certification to tender transcripts or any of the other documents apparently cited by Dr. Armstrong in their own right and if so, on what basis. However, it does not promote efficiency to have a process that possibly requires the court to consider the same issue twice: firstly in the proposed application and secondly at certification where the plaintiff may have other evidence that proves the truth of those contents.
- [30] I also note that it is common for experts to be given many facts to assume, including those that form the basis of the plaintiff's claim. The plaintiff's task is to ensure that facts underlying that opinion are adduced at the trial. Indeed, an expert report would be of little use to the court if the expert was not basing his or her opinion on facts identified in the pleadings and ultimately which the plaintiff has the obligation to prove.
- [31] From that perspective, Bayer's position is perplexing, especially because the test at certification is quite low. The plaintiff is not obliged to prove the allegations but merely to show there is some evidence to support them.
- [32] Mazur is an important case on this point. It held it would not be a productive use of court time to entertain submissions on the admissibility of an expert's reliance on material in its own right under the guise of a hearing on the admissibility of their opinion. In my view, whether the objections raised to justify the sequencing motion are framed as Bayer does or as the Janssen defendants do, Mazur suggests that those are arguments that go more to weight rather than admissibility.
- [33] Thus, I conclude allowing pre-certification application to strike portions or all of Dr. Armstrong's affidavit does not meet the first or fifth Cannon factors as cited above at para. 12.
- [34] With regard to the fourth Cannon factor (the likelihood of delays or increased costs) in allowing the pre-certification application to strike to proceed, the defendants submitted they were committed to hold off on any appeal of this ruling pending the outcome or certification. However, they did not account for the possibility that if they succeeded, the plaintiffs would presumably have the option to seek an appeal. In my view, that makes this factor neutral.
- [35] However, I agree with the plaintiff that allowing the defendants' proposed application to proceed will cause delay and increased costs (the second Cannon factor).
- [36] Neither party suggested the third factor (promoting settlement) was material to the issues before me.

[37] Given my comments above about the lack of the entire record, the points about fairness and judicial economy would only be met in the event that the defendants could succeed on their application, which is prejudging the issue. For that, and all the other reasons stated above, the defendants have not met the sixth Cannon factor: I do not find that scheduling an application in advance of certification promotes the fair and efficient determination of this proceeding.

"Sharma J."

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