

CANADA / JUDGMENT

Achtymichuk v. Bayer Inc.

2021 BCCA 147

COURT

British Columbia Court of Appeal

DECIDED

9 April 2021

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2021 BCCA 147 Achtymichuk v. Bayer Inc.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Achtymichuk v. Bayer Inc.,

2021 BCCA 147

Date: 20210409

Dockets: CA47141; CA47142

Between:

CA47141

Lloyd Achtymichuk

Respondent

(Plaintiff)

And

Bayer Inc.

Appellant

(Defendant)

And

Janssen Inc., Janssen Pharmaceuticals, Inc., and

Janssen Research & Development, LLC

Respondents

(Defendants)

-and-

CA47142

Between:

Lloyd Achtymichuk

Respondent

(Plaintiff)

And

Janssen Inc., Janssen Pharmaceuticals, Inc., and

Janssen Research & Development, LLC

Appellants

(Defendants)

And

Bayer Inc.

Respondent

(Defendant)

Before:

The Honourable Mr. Justice Goepel

(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated October 29, 2020
(Achtymichuk v. Bayer Inc., 2020 BCSC 1601, Vancouver Docket S167919).

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Place and Date of Hearing:

Vancouver, British Columbia

March 12 and 16, 2021

Place and Date of Judgment:

Vancouver, British Columbia

April 9, 2021

Summary:

The respondent was the representative plaintiff in a proposed pharmaceutical product liability class action. The appellants were pharmaceutical companies that manufactured and sold various fluoroquinolone antibiotics. The appellants sought to bring precertification applications to strike certain affidavits in support of certification. The chambers judge ordered that the applications to strike would be heard at the same time as the certification application. The appellants seek leave to appeal the sequencing order.

Held: Applications granted. Granting leave to appeal was in the interests of justice. Sequencing orders have become increasingly common in proposed class proceedings, and it was beneficial for the Court of Appeal to provide guidance on the proper procedures in making such orders.

Reasons for Judgment of the Honourable Mr. Justice Goepel:

INTRODUCTION

[1] The appellant in CA47141, Bayer Inc., and the appellants in CA47142, Janssen Inc., Janssen Pharmaceuticals Inc., and Janssen Research & Development LCC, (collectively the "Appellants"), each seek leave to appeal the October 29, 2020, sequencing order that held that certain applications to strike out portions of affidavits in a proposed class proceeding would be heard at the same time as the certification application. The respondent in both appeals, Lloyd Achtymichuk, opposes the applications.

BACKGROUND

- [2] The respondent is the representative plaintiff in a proposed pharmaceutical product liability class action. He alleges the fluoroquinolone antibiotics Ciprofloxacin, Moxifloxacin, and Levofloxacin, used to treat various infections, are dangerous to human health, unsuitable to be marketed and sold to treat infections for which they are not required, and they lacked proper warnings and directions as to the dangers and risks associated with their use. The respondent seeks to bring a claim on behalf of all residents of Canada (excluding Quebec) who purchased, acquired, or ingested these medicines and have allegedly suffered peripheral neuropathy as a result.
- [3] The respondent commenced his claim on August 30, 2016, and has since amended his claim five times, with the most recent iteration (the third amended notice of civil claim), filed on November 29, 2019. The action has been case managed since early 2017. The certification application is now tentatively scheduled to be heard over five days in April 2022.
- [4] On October 16, 2019, the respondent delivered unfiled copies of a notice of application for certification, along with five supporting affidavits. Shortly before a March 2, 2020, judicial management conference ("JMC"), the Appellants advised the respondent's counsel that they intended to bring precertification applications to strike all or a portion of the affidavits sworn by Dr. John Armstrong, which attached an expert report, and by Paul Sanghe, a lawyer at the respondent's counsel's law firm. Dr. Armstrong's affidavit appended some seven volumes of documents totalling over 3,000 pages.
- [5] A central focus of the March JMC was the timing of the Appellants' proposed application to strike the affidavits. The Appellants requested that the case management judge set a date for the hearing of their applications to strike the affidavits or, alternatively, set a date for an application to address the sequencing of the application to strike and the respondent's certification application.
- [6] There was not sufficient time at the March JMC to finalize the issues. On March 6, 2020, the judge sent a memorandum to counsel directing the parties to provide written submissions on the proposed applications. In particular, she directed:
1. The [Appellants] address why the court should hear and decide their application to strike portions of Dr. Cameron's affidavit in advance of them providing their material in response to the certification application and evidence. The [Appellants] should include in their submissions confirmation as to when they gave [respondent's] counsel written notice that they intended to raise this issue at the Judicial Management Conference that took place on March 2, 2020. Please also include counsel's position as to whether there should be a brief oral hearing on these issues. These submissions should be no more than 12 pages.
 2. The [respondent] provide written submissions in response to the same three issues within 10 days of receiving the [Appellants'] submissions. These submissions should be no more than 12 pages.

- [7] Shortly thereafter, the COVID-19 pandemic resulted in the suspension of regular court operations. In the circumstances, the parties agreed to modify the timeline for exchanging their written submissions. All submissions were exchanged and provided to the court by April 23, 2020.
- [8] In their written submissions, the Appellants set out the nature of their objections to the Armstrong and Sanghe affidavits in detail, focussing on Dr. Armstrong's affidavit. They submitted that, in its current form, the affidavit would likely require them to adduce thousands of pages to respond to evidence they say is inadmissible. The judge summarized their objections to Dr. Armstrong's affidavit as follows:
- 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.
- [9] In the respondent's written submissions, among other things, he acknowledged that if the applications to strike the affidavits were heard at certification and the affidavits were struck out, he would likely seek to adjourn the certification hearing in order to file new expert evidence.
- [10] On July 7, 2020, the parties received a further memorandum from the judge, directing counsel to arrange for a one-hour hearing to address the issues contained in their written submissions. That hearing took place on October 2, 2020.
- [11] During the October hearing, the judge raised for the first time her concerns that she did not have the Armstrong affidavit before her and that the Appellants had not provided their draft applications to strike. Counsel for the Appellants offered to provide the judge with a copy of the Armstrong affidavit and file an application if she thought it was necessary.
- [12] On October 29, 2020, the judge released her reasons dismissing the Appellants' application: 2020 BCSC 1601.
- [13] The judge noted that the Appellants' position was based on two themes, saying:
- [10] The [Appellants'] 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.
- [14] The judge was concerned the affidavits in question were not before her and that the Appellants had failed to put before the court a notice of application. In this regard, she said:

- [9] The [Appellants] 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 [respondent] intends to rely [for] 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 [respondent's] affidavit evidence.
- [15] The judge noted the issue before her was not the validity of the Appellants' objections to the affidavits, but rather whether the objections should be heard and determined prior to the certification application. While the judge emphasized she was not ruling on the merits of the Appellants' objections, she indicated it was necessary to consider the merits to assess the efficiency of deciding the objections ahead of certification.
- [16] The judge relied on *British Columbia v. Apotex Inc.*, 2020 BCSC 412, and the following factors from *Cannon v. Funds for Canada Foundation*, 2010 ONSC 146:
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?
- [17] On the first and fifth factors, the judge found Mr. Achtymichuk would almost certainly file additional expert evidence if the affidavits were struck and, as such, the application would not dispose of the proceeding nor limit the issues. She also found the Appellant's objections went more to weight than admissibility and that it was inappropriate to consider those objections without the benefit of a complete record. She found Bayer's objections "perplexing" given the low threshold at certification, the plaintiff only being required to show some basis in fact for their allegations.
- [18] On the second factor, the judge found increased costs and delays would occur if the proposed application was heard prior to certification.
- [19] The third factor was not spoken to by any party and was neutral.
- [20] The fourth factor was also neutral. The Appellants had committed to not bring an appeal of the unsuccessful application to strike; however, this failed to account for the fact that Mr. Achtymichuk would almost certainly appeal a successful application to strike.

- [21] On the sixth factor, the judge found that judicial economy and fairness would only be served if the Appellants could succeed on the application to strike, which, without a full record, would require her to prejudge the issues. Accordingly, the sixth factor was not met.
- [22] The judge held that the major flaw in the Appellants' position was that she would be required to rule on the admissibility of the affidavit in the absence of a full evidentiary record. In this regard, she said:
- [19] The major flaw in the [Appellants'] 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 [of] the impugned affidavits, but presumably the entire record of the [respondent], as well as evidence adduced on behalf of the [Appellants] and any transcripts from cross-examinations of affiants if they occur.
- [23] In the result, the judge declined to schedule the applications to strike prior to certification, finding it would not promote the fair and efficient determination of the proceeding.
- [24] The Appellants now each seek leave to appeal the decision.

THE PARTIES' POSITIONS

- [25] The Appellants submit that the issues raised by the proposed appeal are of sufficient significance that leave should be granted. In its submission, the Janssen appellants set out that the judge:
- (a) erred in law by failing to consider or apply the relevant authorities on sequencing an application to strike evidence prior to a certification hearing;
 - (b) erred in law by placing weight on the fact that she did not have the impugned affidavits before her, despite affidavit evidence being prohibited when seeking an order at a case planning conference and/or despite her having declined [Appellants'] counsel's offer to provide the affidavits to her;
 - (c) erred in law by placing weight on the fact that the Appellants had not provided her with a draft notice of application, despite her own directions strictly constraining the materials that could be provided or filed; and
 - (d) erred in law and fact by failing to give any weight to the plaintiff's position that, if the impugned affidavits are struck at the certification hearing, he would seek leave to file new expert evidence and to repeat or reargue the certification hearing with new evidence.

Bayer raised similar points, setting out in its submission as follows:

20. Bayer respectfully submits that [the judge]: (1) erred in law by giving weight to the fact that Bayer did not file a Notice of Application or the impugned Affidavits; (2) erred in fact and law by misapprehending and/or failing to consider Bayer's objections to the Affidavits; (3) erred in law by misapplying the factors relevant to sequencing; and (4) erred in law by concluding that the hearsay nature of Dr. Armstrong's report was insufficient grounds for inadmissibility.
- [26] The Appellants submit their proposed appeal raises issues of importance to the practice. They note sequencing applications have become increasingly common in proposed class proceedings and that this Court has not yet had the opportunity to comment on the scheduling of applications to strike inadmissible evidence relied on for certification prior to the certification hearing. The Appellants submit that it is common practice in a proposed class proceeding that applications to strike all or a portion of an affidavit are heard in advance of certification. In this regard, they refer to *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2008 BCSC 1263; *Huebner v. PR Seniors Housing Management Ltd., D.B.A. Retirement Concepts*, 2020 BCSC 1037; and *Sharp v. Royal Mutual Funds Inc.*, 2019 BCSC 2357. In each of those cases, the judge allowed applications on the admissibility of evidence to take place in advance of the certification hearing. Counsel referred those cases to the judge, but she did not mention them in her reasons.
- [27] The Appellants submit that their application is significant to the action. Unless the affidavits' admissibility is determined in advance of the certification hearing, the Appellants will be required to respond to them despite the affidavits potentially ultimately being deemed inadmissible. They further point out that if the question of admissibility is postponed until the certification hearing and the affidavits are ultimately inadmissible, the respondent has indicated that he will apply for leave to file additional evidence, which will require the certification hearing to be re-argued.
- [28] Regarding the merits, the Appellants submit that the judge erred in principle in not following the cases that have allowed admissibility to be determined in advance of the certification hearing. They also submit that to the extent the trial judge relied on the lack of a formal application or the affidavit of Dr. Armstrong being before her, the process was unfair. In that regard, they note the judge had set the parameters for the application in her March 6 memo and that, in the context of determining sequencing, it was not necessary for either the affidavit or a formal application to strike to be before the court.
- [29] The Appellants further submit that allowing the appeal to go forward will not unduly hinder the action's progress. In that regard, they note the action has already been outstanding for many years, the certification application is not scheduled until April 2022, they will take all necessary steps to expedite the appeal, and they will not appeal the ruling on admissibility in advance of the certification application.

- [30] In his reply, the respondent submits the issues raised by the proposed appeal of the sequencing order are not of sufficient significance to merit leave. He submits the chambers judge correctly applied the relevant legal principles and authorities. In particular, he submits the chambers judge:
1. correctly applied the relevant legal principles and authorities with respect to sequencing applications to strike evidence prior to certification;
 2. correctly held that it would not be efficient or fair to rule on the Appellants' intended objections to the impugned affidavits in the absence of the full evidentiary record that would be available at certification;
 3. correctly held that the Appellants' intended objections to the impugned affidavits were vague and general due to the lack of an application to strike evidence being before the court, in draft form or otherwise, and
 4. correctly held the Appellants' proposed application to strike the impugned affidavits would not dispose of the litigation.
- [31] The respondent emphasized that this is a discretionary order made by a case management judge to which significant deference is owed. He submits that orders made in scheduling applications are considered on a case-by-case basis, taking into account the individual circumstances of each case.

LEAVE PRINCIPLES

- [32] The ruling the applicants seek to appeal was an exercise of the judge's discretion in litigation management. The applicable principles were set out by Justice Fenlon in *MacRae v. Woermke*, 2019 BCCA 355 (Chambers):
- [3] The test to be applied in determining whether leave to appeal should be granted is set out in *Goldman, Sachs & Co. v. Sessions*, 2000 BCCA 326:
1. Is the point on appeal of significance to the practice?
 2. Is the point raised of significance to the action itself?
 3. Is the appeal *prima facie* meritorious or frivolous?
 4. Will the appeal unduly hinder the progress of the action?

The criteria for leave are "all considered under the rubric of the interests of justice": *Vancouver (City) v. Zhang*, 2007 BCCA 280 at para. 10.

- [4] Where, as in the present case, leave is sought to appeal a discretionary order, the third factor requires an assessment of "whether there is an arguable case that the Chambers Judge erred in principle, made an order that is not supported by the evidence, or whether the order appealed will result in an injustice": *Hagwilneghl v. Canadian Forest Products Ltd.*, 2011 BCCA 478 at para. 31. The applicants for leave must establish a reasonable possibility that a

division of the Court of Appeal would grant the appeal on its merits: *Webb v. Canada* (Attorney General), 2019 BCCA 288 at para. 15.

DISCUSSION

- [33] I have determined in the circumstance of this case to grant leave to appeal. I agree with the Appellants that the appeal is of significance to the practice. While the cases cited by the Appellants may arguably be distinguishable, and judges have wide latitude in case management, there may be some benefit to the profession from guidance being provided by this Court as to the proper procedures to be followed on sequencing applications. Sequencing applications have become increasingly common in proposed class proceedings, and this Court has not yet had the opportunity to comment on the scheduling of applications to strike inadmissible evidence in advance of the certification application.
- [34] I also agree that the appeal is important to the action. It will impact the response the Appellants will have to make to the certification application and how the certification application itself will proceed.
- [35] Regarding the merits, I find the Appellants have raised an arguable case that the chambers judge erred in principle or made an order unsupported by the evidence, or that the order will result in an injustice. I find the Appellants have established a reasonable possibility that a division of this Court would grant the appeal on its merits. As I am granting leave, it is not appropriate that I comment further on the merits.
- [36] In my view, an appeal will not unduly hinder the action's progress. The certification hearing is more than a year away, and the Appellants have agreed to expedite the appeal. If the parties are unable to agree to a schedule for the hearing of the appeal, they are at liberty to apply to the registrar for directions.
- [37] It is in the interests of justice to grant leave to appeal.

DISPOSITION

- [38] I grant leave to appeal.

"The Honourable Mr. Justice Goepel"

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