

CANADA / JUDGMENT

British Columbia v. Apotex Inc.

2020 BCSC 1335

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 1335 British Columbia v. Apotex Inc. IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: British Columbia v. Apotex Inc., 2020 BCSC 1335 Date: 20200909 Docket: S189395 Registry: Vancouver Between: Her Majesty The Queen in Right of the Province of British Columbia Plaintiff And Apotex Inc., Apotex Pharmaceuticals Holdings, Inc., Bristol-Myers Squibb Canada, Bristol-Myers Squibb Company, Paladin Labs, Endo Pharmaceuticals Inc., Endo International PLC, Jannssen Inc., Johnson & Johnson, Pharmascience Inc., Joddes Limited, Pro Doc Limitee, The Jean Coutu Group (PJC) Inc., Mylan Pharmaceuticals ULC, Mylan N.V., Purdue Pharma Inc., Purdue Pharma L.P., The Purdue Frederick Company, Purdue Frederick Inc., Ranbaxy Pharmaceuticals Canada Inc., Sun Pharmaceutical Industries Ltd., Hikma Labs Inc., Hikma Pharmaceuticals PLC, West-Ward Columbus Inc., Sanis Health Inc., Sandoz Canada Inc., Sandoz International GMBH, Teva Canada Limited, Teva Pharmaceuticals USA, Inc., Teva Pharmaceutical Industries Ltd., Actavis Pharma Company, Valeant Canada LP/Valeant Canada S.E.C., Bausch Health Companies Inc., Gamma Wholesale Drugs Limited, Imperial Distributors Canada Inc., Amerisourcebergen Canada Corporation, Kohl & Frisch Limited, Kohl & Frisch Distribution Inc., McKesson Corporation, McKesson Canada Corporation, Nu-Quest Distribution Inc., Abbott Laboratories Inc., United Pharmacists Manitoba Inc., Procurity Inc., Procurity Pharmacy Services Inc., Shoppers Drug Mart Inc., Loblaw Companies Limited, Unipharm Wholesale Drugs Ltd., and LPG Inventory Solutions Defendants Before: The Honourable Mr. Justice Brundrett Ruling on Costs Counsel for the Plaintiff: Reidar Mogerman, Q.C. Luciana Brasil Paul Miller Counsel for Bristol-Myers Squibb Canada, Bristol-Myers Squibb Company: Rebecca von Rüti David Neave Counsel for Paladin Labs, Endo Pharmaceuticals Inc., and Endo International PLC: Michael Feder, Q.C. Jill Yates Deborah Templer Alexandra Cocks Counsel for Janssen Inc. and Johnson & Johnson: S. Gordon McKee Robin Reinertson Joshua Hutchinson Counsel for Pro Doc Limitee: Kelsey K. Sherriff Fadi Amine F. Paul Morrison Counsel for The Jean Coutu Group (PJC) Inc.: Mary I.A. Buttery, Q.C. Geoffrey Shaw Derek Ronde Counsel for Mylan N.V. and Mylan Pharmaceuticals ULC: Joan Young Scott Maidment Counsel for Purdue Frederick Inc. and Purdue Pharma Inc.: Brad W. Dixon Michelle T. Maniago Cynthia Clarke Barry Glaspell Counsel for The Purdue Frederick Company: Danielle Royal Counsel for Hikma Labs Inc., Hikma Pharmaceuticals PLC, and West-Ward Columbus Inc.: Robert McDonnell Counsel for Loblaw Companies Limited, Sanis Health Inc., and Shoppers Drug Mart Inc.: Deborah Glendinning Adam Hirsh Kevin O'Brien Counsel for LPG Inventory Solutions: Craig P. Dennis, Q.C. Owen James

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Introduction

- [1] The parties have made submissions on the appropriateness of a costs order in relation to a sequencing hearing held to determine the timing of applications in this proposed class proceeding. In reasons reported at *British Columbia v. Apotex Inc.*, 2020 BCSC 412, I ruled that various applications by the defendants ought to proceed in conjunction with the certification hearing. The plaintiff now seeks an order for costs in any event of the cause payable forthwith against the defendants who filed notices of application or application responses on the sequencing issues. The defendants oppose an order for costs. Whether Costs Can be Awarded in Relation to a Sequencing Hearing
- [2] Generally, the court has a wide discretion in awarding costs, but the discretion must be exercised judicially and for reasons connected with the case: *Bauer v. Insurance Corporation of British Columbia* (1989), 38 B.C.L.R. (2d) 232 (S.C.) at 238.
- [3] As specific authority for the order sought, the plaintiff cites Rule 14-1(9) and (12) of the Supreme Court Civil Rules [Rules] which provide as follows:
 - (9) Subject to subrule (12), costs of a proceeding must be awarded to the successful party unless the court otherwise orders.
 - (12) Unless the court hearing an application otherwise orders,
 - (a) if the application is granted, the party who brought the application is entitled to costs of the application if that party is awarded costs at trial or at the hearing of the petition, but the party opposing the application, if any, is not entitled to costs even though that party is awarded costs at trial or at the hearing of the petition, and

- (b) if the application is refused, the party who brought the application is not entitled to costs of the application even though that party is awarded costs at trial or at the hearing of the petition, but the party opposing the application, if any, is entitled to costs if that party is awarded costs at trial or at the hearing of the petition.
- [4] Hence, the Rules generally provide that, if an application is refused, the party opposing the application is entitled to costs if that party is awarded costs at trial or at the hearing of the petition, subject to the discretion of the judge. Strictly speaking, the presumption in Rule 14-1(12) does not apply because if the proceeding is certified as a class action, s. 37 of the Class Proceedings Act, R.S.B.C. 1996, c. 50 [CPA] precludes an award for costs to any party to a class proceeding, at any stage of the application, proceeding, or appeal. This general no-costs rule applying to class actions in British Columbia will mean that no costs will be awarded at the end of the day for post-certification proceedings absent one of the exceptions in s. 37(2) of the CPA applying.
- [5] Still, both subrules 14-1(9) and 14-1(12) allow the court the residual discretion to "order otherwise." Both also exemplify the principle that the successful party should generally be awarded its costs in the cause. The court's discretion to "order otherwise" must be exercised judicially in the context of the case: *Gold v. Gold* (1993), 82 B.C.L.R. (2d) 180 at para. 20.
- [6] Rule 14-1(15)(b) more generally allows a court to make an award of costs related to a particular application, step, or matter in or related to a proceeding:
- (15) The court may award costs
- (a) of a proceeding,
- (b) that relate to some particular application, step or matter in or related to the proceeding, or
- (c) except so far as they relate to some particular application, step or matter in or related to the proceeding and in awarding those costs the court may fix the amount of costs, including the amount of disbursements.
- [7] Rule 14-1(15) thus allows a judge to award costs in respect of a discrete issue in the litigation. As with former Rule 57(15), the discretion under the rule is very broad and must be exercised judicially, not arbitrarily or capriciously: *Lee v. Jarvie*, 2013 BCCA 515 at para. 39-40; *Sutherland v. Canada (Attorney General)*, 2008 BCCA 27 at para. 30.
- [8] The court also has inherent jurisdiction to assess costs, which is subject to being ousted by clear and precise statutory language. Such concurrent jurisdiction is to be exercised sparingly: *Buchan v. Moss Management Inc.*, 2010 BCCA 393 at paras. 12-13, 21-22, 28-30; *Harrington v. Royal Inland Hospital* (1995), 14 B.C.L.R. (3d) 201 at para. 237. However, Rule 14-1(15) of the present Rules has expanded the role of the court such that it is generally no longer necessary to rely on the court's inherent jurisdiction to award costs: *Gichuru v. Smith*, 2014 BCCA 414 at paras. 96, 98.

- [9] Prior to certification, the ordinary rules for the awarding of costs apply: *Smith et al. v. Canada (Attorney General)*, 2006 BCCA 407 at para. 6; *The Consumers' Association of Canada v. Coca-Cola Bottling Company et al.*, 2007 BCCA 356 at para. 12; *Hoisington v. Johnson & Johnson Inc.*, 2020 BCSC 431 at paras. 37-39. Indeed, costs have been awarded in relation to pre-certification applications in proposed class proceedings: *Edmonds v. Acton Super-Save Gas Stations Ltd.*, [1996] B.C.J. No. 2051 (S.C.); *Secure Networx Corp. v. KPMG, LLP*, 2002 BCSC 1001 at paras. 23-27; *Fairhurst v. Anglo American PLC*, 2012 BCSC 45; *Araya v. Nevsun Resources Ltd.*, 2017 BCSC 336.
- [10] Costs have been awarded in Ontario for sequencing motions (*Keatley Surveying Ltd. v. Teranet Inc.*, 2016 ONSC 1139 at para. 15; *Singh v. RBC Insurance Agency Ltd.*, 2020 ONSC 182 at para. 86), as such applications are there referred to. However, I was not directed to any reported case in British Columbia where a costs award has been made in relation to a sequencing ruling in proposed class proceedings.
- [11] Some of the defendants submit that a costs order is barred because the sequencing order here was in the nature of case management. They point out that on an application for leave from my ruling, Mr. Justice Grauer commented that the sequencing hearing was governed by Part 5 of the Rules concerning case planning: *British Columbia v. Apotex Inc.*, 2020 BCCA 186 (in Chambers) at paras. 8-15. They further suggest that there is no provision in the Rules to make a costs award at a case planning conference or judicial management conference absent exceptional circumstances.
- [12] I cannot agree with this position. Rule 14-1 is of general application, and I can discern no prohibition in the Rules against awarding costs in relation to an application simply because it was considered in the context of case planning. Moreover, Rule 5-3(1) contemplates that case planning orders can include determinations of applications, in which case the Rules and powers ancillary to applications are triggered. The fact that applications for sequencing were heard in the course of a scheduled case planning conference does not preclude the application of the Rules or the potential for an order for costs.
- [13] I am therefore satisfied that this Court has the discretion to award costs for a sequencing application. Should the Court Order Costs for the Sequencing Hearing?
- [14] The plaintiff submits that it expended substantial effort and was successful on the sequencing applications. It says that the Rules contemplate that costs will be awarded to the successful party on an application. The plaintiff argues that the sequencing applications raised a discrete issue severable from the remaining claims for which an award of costs payable forthwith can be made: *Martel v. Wallace*, 2008 BCSC 436 at para. 28. The plaintiff further submits that, once the proceeding is certified as a class action, s. 37 of the CPA provides that no costs will be awarded at the conclusion of the action, eliminating any concern about multiple costs assessments, as well as the inability of a party to proceed with the litigation based on having to pay costs.

- [15] The defendants oppose any order for costs. Some note that they shared some limited success on the issue of the timing for the filing of responses to civil claim and on the issue of the certification and other applications being heard without prejudice to forum non conveniens submissions. They point out that the plaintiff did not seek costs in its filed materials or in its submissions at the hearing. The defendants submit that the complexity of the sequencing hearing was partly the product of the plaintiff's decision to join numerous defendants in a single case. They suggest that it remains to be seen whether the plaintiff's opposition to pre-certification applications will actually make the proceeding more efficient. They further point out that costs cannot be awarded for substantive applications heard at the same time as the certification application due to the operation of s. 37 of the CPA.
- [16] Some of the defendants submit that the sequencing hearing was in the nature of case management and that a costs award is not appropriate because the hearing merely addressed the scheduling of future steps in this proceeding. The outcome of the substantive applications by the defendants was not determined, and the defendants were only required to seek a scheduling hearing at all because of the rebuttable presumption in the CPA that the certification will be heard first.
- [17] I generally agree with the submission that costs awards should not discourage the parties from engaging in the case management process. I am the case management justice in this matter. The sequencing of applications is a form of case planning, and the assistance of the parties was required to address the proper scheduling of applications to provide for an orderly progression of the case to certification.
- [18] In many cases, particularly those outside the class context, routine directions as to process and timing traditionally do not attract an order for costs because such decisions are bound up with case management and ought not to be seen as necessarily or primarily adversarial. These reasons should therefore not be read as establishing a general rule encouraging the officious awarding of costs in relation to ordinary case management decisions.
- [19] In proposed class proceedings, a decision as to the proper sequencing of applications can take on heightened importance. The sequencing hearing here raised important procedural issues, the outcome of which were significant to the parties.
- [20] The resolution of the sequencing applications also raised a discrete issue; namely, whether some of the various applications proposed by the defendants should be heard in advance of the plaintiff's application for certification.
- [21] The sub-issues were many, including preliminary consideration of the merits of proposed applications to strike, applications for summary trial, jurisdictional applications, and a constitutional challenge. I also incidentally ruled on the appropriate timing for the defendants' filing of a response to civil claim, an issue which was taken up in the case management process.

- [22] Moreover, the sequencing hearing involved extensive written and oral submissions requiring substantial preparation by counsel beyond a typical case management hearing. Notices of application seeking leave to bring various disparate applications in advance of the certification hearing were filed by 16 of the 48 defendants. Numerous additional defendants filed application responses supporting the relief sought by other defendants in the various applications. After a two-day contested hearing, the plaintiff was substantially successful against opposition from over 20 groups of counsel.
- [23] There was no agreement as to the parties to forego costs in relation to the resolution of the sequencing hearing: compare *Austin v. Bell Canada*, 2018 ONSC 4018 at para. 50.
- [24] In these particular circumstances, I am of the view that the plaintiff should be entitled to its costs in relation to the sequencing hearing. Against Whom Should the Costs Award Apply?
- [25] Some of the defendants point out that they did not file any notice of application at the sequencing hearing and merely responded to the applications of other co-defendants. It is suggested that there is no provision in the Rules authorizing the court to order that a party pay for the costs of another party's application. I do not agree. In my view, Rule 14-1 is sufficiently broad to allow an award for costs against a defendant who filed an application response effectively embedding another defendant's application within their response.
- [26] The defendants who filed application responses went beyond merely responding to the applications filed by other defendants. Those application responses advocated for the same relief that other defendants had sought by way of application. In these circumstances, where the responding defendants were fully engaged in the sequencing hearing, it would be unjust for the responding defendants not to be exposed to the same cost consequences as the defendants who chose to advance a similar position by way of a notice of application.
- [27] I would therefore exercise my discretion to award costs against those defendants who filed notices of application as well as those defendants who filed application responses advocating for the same relief. The Appropriate Order
- [28] The sequencing hearing dealt with a serious question to be decided on a discrete issue. The result will not be later revisited at the certification hearing or trial, and if the plaintiff is successful in having the case certified, it is likely that no order for costs will follow. I order that costs be payable to the plaintiff in any event of the cause.
- [29] As to the timing of the costs order, the plaintiff argues that unless costs are payable forthwith there will be no costs order because the no-costs regime under s. 37 will come into play. I am not satisfied that this is correct in light of the authorities referred to above that provide the court with a wide discretion to award costs prior to certification. Section 37 of the CPA merely provides for a no-costs regime once the action is certified. The no-costs rule does not undermine an order for costs made prior to the certification application.

- [30] The putative representative plaintiff is the Province of British Columbia. There is no risk that a meritorious legal argument will be prevented from going forward because the plaintiff lacks the financial resources to proceed. Nor is there a necessity to deter unnecessary or unreasonable conduct in relation to the sequencing hearing. In fact, I agree with the defendants that they attempted to assist this Court in scheduling their proposed applications and in understanding their unique concerns and intentions leading up to the certification application. Overall, I cannot see an appropriate basis for an order of costs payable forthwith.
- [31] In all the circumstances, I would exercise my discretion to award costs to the plaintiff for the sequencing application at Scale B in any event of the cause.
- [32] For greater certainty,
- a) the costs award shall be payable by those defendants who filed notices of application on the sequencing application, and against defendants filing application responses (the "Responding Defendants") advocating for the same relief other defendants had sought by way of applications;
 - b) the Responding Defendants comprise the Paladin Labs, Endo Pharmaceuticals Inc. and Endo International plc, LPG Inventory Solutions; Mylan Pharmaceuticals ULC and Mylan NV; Procurity Inc., Procurity Pharmacy Services Inc. and Unipharm Wholesale Drugs Ltd.; Imperial Distributors Canada Inc.; Hikma Labs Inc., Hikma Pharmaceuticals PLC and West-Ward Columbus Inc.; Abbot Laboratories Inc.;
 - c) costs are not payable forthwith, but rather at the conclusion of the action; and
 - d) no costs order is made against Teva Canada Limited, Ranbaxy Pharmaceuticals Canada Inc., or Pharmascience Inc. "Brundrett J."

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