CANADA / JUDGMENT

British Columbia v. Apotex Inc.

2020 BCCA 186

COURT
British Columbia Court of Appeal

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2020 BCCA 186 British Columbia v. Apotex Inc. COURT OF APPEAL FOR BRITISH COLUMBIA Citation: British Columbia v. Apotex Inc., 2020 BCCA 186 Date: 20200702 Dockets: CA46807; CA46808 Docket: CA46807 Between: Her Majesty the Queen in Right of the Province of British Columbia Respondent (Plaintiff) And The Jean Coutu Group (PJC) Inc. Appellant (Defendant) And Apotex Inc., Apotex Pharmaceutical Holdings, Inc., Bristol-Myers Squibb Canada, Bristol-Myers Squibb Company, Paladin Labs, Endo Pharmaceuticals Inc., Endo International PLC, Janssen Inc., Johnson & Johnson, Pharmascience Inc., Joddes Limited, Pro Doc Limitée, Mylan Pharmaceuticals ULC, Mylan N.V., Purdue Pharma Inc., Purdue Pharma L.P., The Purdue Frederick Company Inc., 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., 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 Respondents (Defendants)

- and - Docket: CA46808 Between: Her Majesty the Queen in Right of the Province of British Columbia Respondent (Plaintiff) And Pro Doc Limitée Appellant (Defendant) And Apotex Inc., Apotex Pharmaceutical Holdings, Inc., Bristol-Myers Squibb Canada, Bristol-Myers Squibb Company, Paladin Labs, Endo Pharmaceuticals Inc., Endo International PLC, Janssen Inc., Johnson & Johnson, Pharmascience Inc., Joddes Limited, Pro Doc Limitée, Mylan Pharmaceuticals ULC, Mylan N.V., Purdue Pharma Inc., Purdue Pharma L.P., The Purdue Frederick Company Inc., 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., 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 Respondents (Defendants) Before: The Honourable Mr. Justice Grauer (In Chambers) On appeal from: An order of the Supreme Court of British Columbia, dated March 19, 2020 (British Columbia v. Apotex Inc., 2020 BCSC 412, Vancouver Docket S-189395). Counsel for the Appellant The Jean Coutu Group (PJC) Inc. (via teleconference): G. B. Shaw M. Buttery, Q.C. D. Ronde Counsel for the Appellant Pro Doc Limitée (via teleconference): F. Amine K. K. Sherriff Counsel for the Respondent British Columbia (via teleconference): L. Brasil J. A. Dean Place and Date of Hearing: Vancouver, British Columbia June 10, 2020 Place and Date of Judgment: Vancouver, British Columbia July 2, 2020 Summary: The applicants seek leave to appeal a "sequencing order" made by the case management judge in the court below. The applicants, two of many defendants in this proposed class proceeding, both reside in Québec. The applicants sought to have their applications disputing the Supreme Court of British Columbia's ability to assert jurisdiction over them heard before the certification hearing. The judge ordered that these applications be heard in conjunction with the certification hearing. The applicants seek leave to appeal. Held: Leave to appeal is required, as the order falls under the Case Planning provisions (Part 5) of the Supreme Court Civil Rules, and is granted. This is one of those rare case where leave should be granted even though the matter concerns an exercise of discretion in the management of the litigation. This appeal is of significance to the practice and the action. The applicant's allegation that the judge erred in principle in his consideration of the potential prejudice arising from his order has sufficient merit to ground granting leave to appeal, and doing so will not unduly hinder the action's progress. In view of the potential prejudice, it is in the interests of justice that leave to appeal be granted. Reasons for Judgment of the Honourable Mr. Justice Grauer:

1. INTRODUCTION

[1] Before me are two applications for leave to appeal from a "sequencing order" pronounced by the judge appointed to manage this proposed class proceeding. The applicants are two of many defendants, and both reside in the province of Québec.

[2] As Québec parties, the applicants wished to apply for orders striking the claims against them on the ground that the court either did not have territorial competence over them or should decline jurisdiction. They applied before the case management judge for an order that these applications be heard prior to the certification hearing.

[3] The judge heard those applications together with several others brought by defendants seeking to have their various challenges to the claim, procedural, jurisdictional and constitutional, heard before the certification hearing. In the result, which will be explored in greater detail below, the judge directed that all of these motions, including the applicants', should "proceed in conjunction with the certification hearing": British Columbia v Apotex Inc., 2020 BCSC 412 at para 94.

[4] The applicants maintain that the judge's refusal to consider their threshold applications concerning jurisdiction in advance of the certification exposes them to significant prejudice, was contrary to the interests of justice, and ought to be reviewed by this Court.

[5] I will first look at the nature of the proceeding. I will then turn to the question of whether leave is required before considering the applicable law concerning leave applications.

2. THE PROCEEDING

[6] The plaintiff, British Columbia, commenced this proceeding under the Class Proceedings Act, RSBC 1996, c 50 [CPA], with a notice of civil claim filed August 29, 2018, and amended June 20, 2019.

[7] The judge described the matter this way:

[3] The plaintiff's action is brought on behalf of itself and "all federal, provincial and territorial governments and agencies". It alleges that, during the period from 1996 to the present, it paid healthcare, pharmaceutical, and treatment costs related to the use and abuse of opioids, which the plaintiff refers to as the "opioid epidemic". The plaintiff seeks to recover substantial funds spent on healthcare services associated with opioid-related illnesses, which it says are recoverable "health care benefits" under the Opioid Damages and Health Care Costs Recovery Act, S.B.C. 2018, c. 35 [ORA].

[4] The 48 defendants are all involved in the manufacturing, marketing, distribution or sale of opioid drugs and opioid products in Canada, including British Columbia. The defendants comprise 33 pharmaceutical manufacturers and 15 retailers and distributors of various products. The plaintiff alleges, inter alia, that the defendant manufacturers misrepresented the risks and benefits of opioid products and that the defendant distributors delivered opioid products to pharmacies and hospitals in quantities that they knew or should have known exceeded any legitimate market.

3. LEAVE REQUIREMENTS

[8] The applicants' applications before the case management judge purported to have been brought under section 12 of the CPA, which provides: 12 The court may at any time make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for that purpose, may impose on one or more of the parties the terms it considers appropriate.

[9] In his reasons for judgment, the judge observed that section 12 gives the court the discretion to hear a pre-certification application.

[10] If indeed his orders were pronounced pursuant to section 12 of the CPA, as both the judge and the applicants indicated, then leave to appeal would not be required. An order made under section 12 of the CPA is not one of those prescribed as limited appeal orders by Rule 2.1 of the Court of Appeal Rules. As this Court has often stated, only those orders specifically prescribed in Rule 2.1 are capable of being limited appeal orders, and, subject to the provisions of another statute, only limited appeal orders require leave: see, for instance, Yao v Li, 2012 BCCA 315 at para 27, and Cambie Surgeries Corporation v British Columbia (Attorney General), 2017 BCCA 287 at para 32.

[11] But in this, respectfully, the judge and the parties misconceived the process they were following. Section 12 of the CPA concerns making orders "respecting the conduct of a class proceeding". The CPA defines a "class proceeding" as "a proceeding, including a multi-jurisdictional class proceeding, that is certified as a class proceeding". This matter has yet to be certified as a class proceeding, and consequently is not subject to section 12 of the CPA; it follows that the court's discretion to hear pre-certification applications does not flow from that section.

[12] In MacKinnon v Instaloans Financial Solution Centres (Kelowna) Ltd, 2004 BCCA 472 at para 32, Saunders JA approved the statement of Brenner J, as he then was, in Edmonds v Actton Super-Save Gas Stations Ltd., [1996] BCJ No. 2050 (SC), that until certified, an action commenced as an intended class proceeding is an ordinary proceeding to which the Rules of Court apply--subject to the caveat that before certification, an action commenced under the CPA is, as Saunders JA described it at para 33, "an action with ambition". But it is not a class proceeding.

[13] That the Supreme Court Civil Rules apply to this matter was never in doubt. The judge noted that the case had been assigned to him for judicial case management, and that the legal principles applicable to his discretion concerning sequencing included the overarching purpose of the rules as set out in Rule 1-3.

[14] In the circumstances, it seems to me that the procedure the judge was following was in fact governed by Part 5 of the Supreme Court Civil Rules, concerning case planning. By Rule 5-3(1), a case management judge is authorized to make a number of orders whether or not on the application of a party, including (a) setting a timetable for the steps to be taken; and (n) respecting the conduct of any application. These encompass the orders with which we are concerned.

[15] By Rule 2.1 of the Court of Appeal Rules, orders made under Part 5 (Case Planning) of the Supreme Court Civil Rules are limited appeal orders, and therefore can only be appealed with leave. In my view, that applies to the orders that are the subject of the current application. It follows that leave to appeal is required. It would be strange indeed if a case planning order made in an action that was not one "with ambition" required leave, but one made in an action that hoped to be certified as a class proceeding did not.

4. LEAVE PRINCIPLES

[16] The ruling that the applicants seek to appeal was an exercise of the judge's discretion in the management of the litigation before him. The applicable principles were cogently expressed by Fenlon JA in MacRae v Woermke, 2019 BCCA 355 (in 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.

[17] The onus is thus on the applicants, and, as indicated above, the overarching concern, as always, is whether it is in the interests of justice to grant leave: Hanlon v Nanaimo (Regional District), 2007 BCCA 538 at para. 2 (Saunders JA in Chambers).

5. THE PARTIES' POSITIONS 5.1 The applicants

[18] In summary, the applicants submit that it is in the interests of justice to grant leave in this case.

[19] They point first to the issue of territorial competence as a threshold question of law which, they say, as a matter of constitutional imperative, ought to be addressed at the outset because if their position is correct, then the Supreme Court of British Columbia has no jurisdiction over them. If there is no jurisdiction, then there is no class action to be certified against them. This, they maintain, is a point of importance both to this litigation, and to the

practice of class proceedings in general. This was, they say, the first decision to order jurisdiction simpliciter to be heard with the certification application, yet failed to address the issues that flow from that, particularly prejudice. Consequently, this Court's guidance is necessary.

[20] They point second to the issue of prejudice, asserting that, as Québec residents, they stand to be deprived of a substantive defence if they are obliged to proceed to defend a certification application. That defence would be to resist enforcement in Québec of any judgment against them on the basis that the British Columbia court lacked jurisdiction.

[21] The applicants base this submission on Article 3168(6) of the Civil Code of Québec, SQ 1991, c 64 [CCQ] as discussed in Barer v Knight Brothers LLC, 2019 SCC 13. The effect, they contend, is that on an enforcement application in Québec, the British Columbia court will be considered to have had jurisdiction if the applicants are found to have submitted to that jurisdiction. According to Barer, they will be found to have submitted if they have presented substantive arguments that, if accepted, would resolve the dispute or part of it on the merits. This would encompass the certification application hearing. Accordingly, the applicants maintain, they are deprived of their strategic choices.

[22] This was a problem, they contend, that the chambers judge did not discuss in his reasons, yet it was of central importance to their position. He appears to have attempted to address the prejudice by providing, in his order, as follows (para 94):

a) The jurisdictional challenges based upon territorial competence and forum non conveniens will proceed in conjunction with the certification hearing. Any steps the defendants take in compliance with the pre-certification application procedures under the CPA are without prejudice to their submissions on jurisdictional objections including forum non conveniens.

[23] This, the applicants maintain, does not assist. It declares the steps they take to be without prejudice to their submissions, but does not (and cannot) make them without prejudice to enforcement in Québec.

[24] Moreover, the applicants submit, the chambers judge appears to have conflated the issue of jurisdiction simpliciter with the issue of forum non conveniens, directly addressing the latter, but not the former.

[25] The applicants maintain that they are ready to go with their appeal, and will move with celerity. Accordingly, they say, the appeal will not unduly hinder the proceedings. 5.2 The respondent

[26] The respondent points first to context, observing that this is a national claim, not limited to acts and harm occurring in British Columbia.

[27] On the question of the timing of the hearing of an application concerning jurisdiction, the respondent notes that there will undoubtedly be cases where such applications should be heard first, and others where they should not. There is no "one-size-fits-all", and the question

is one properly to be determined by the case management judge on a case-by-case basis. The exercise of discretion in this regard is governed by the "Cannon factors", a non-exhaustive list set out in Cannon v Funds for Canada Foundation, 2010 ONSC 146, adopted in British Columbia in Watson v Bank of America Corporation, 2012 BCSC 146, and Li v British Columbia, 2017 BCSC 1616. These were the factors applied by the judge in this case.

[28] As to prejudice, the respondent submits that, on the record, this is a non-issue. If the court concludes that it has jurisdiction, then the defendants can simply ignore that finding, and not participate. The plaintiff will bear the burden of enforcement and establishing jurisdiction. The argument that the applicants will lose their defence against enforcement in Québec because they participated in a certification hearing after being ordered to do so is not sustainable, and the respondent would not take any contrary position.

[29] Moreover, the respondent asserts, there is no evidence upon which the claim of prejudice could be based. Instead, the applicants rely on the judgment of the Supreme Court of Canada interpreting legislation in the Barer case. What is missing is any proper evidence in the form of expert opinion as to the effect of the Québec legislation.

[30] In any event, the respondent contends, the Barer case is of no assistance. It does not interpret the CCQ in the context of certification where a Québec defendant has been ordered to participate. Rather, it speaks at para 69 of submission to the jurisdiction "when the defendant presents substantive arguments which, if accepted, would resolve the dispute -- or part of the dispute -- on its merits." But, the respondent maintains, there is nothing about a certification hearing that deals with the merits.

[31] Rather, in the respondent's submission, the determination at a certification hearing of the common issues to be certified may provide a basis for establishing a real and substantial connection between the jurisdiction and the applicants, citing Harrington v Dow Corning Corp, 2000 BCCA 605 and Chalmers v AMO Canada Company, 2010 BCCA 560 at para 40.

[32] In the circumstances, the respondent contends, the interests of justice do not favour granting leave to appeal. This Court will ultimately have the opportunity to consider these questions in the context of the full record of the certification hearing and decision, and the test for interfering with an exercise of discretion in the management of litigation has not been met.

6. DISCUSSION

[33] In my view, this is one of those rare cases where leave to appeal should be granted notwithstanding that the matter concerns an exercise by the judge of his discretion in the management of the litigation before him.

[34] As I see it, the point of the appeal is of significance both to the practice, in terms of providing additional guidance for the exercise of discretion in "sequencing orders" for proposed class proceedings, and to this action in particular, given its proposed national scope. I note in this regard that the respondent's contention, based on the cases of

Harrington and Chalmers, that the process of certification itself may give rise, through common issues, to a real and substantial connection, is questionable. Those cases dealt with the potential for common issues to provide a real and substantial connection between British Columbia and non-resident plaintiffs (class members), not defendants.

[35] No basis has been presented upon which it could be contended that the appeal will unduly hinder the progress of this action.

[36] On the question of merits, the applicants may indeed face an uphill battle, but I consider that they have raised an arguable case that the chambers judge erred in principle in his approach to the question of prejudice in relation to jurisdiction simpliciter. As leave is to be granted, I do not propose to say more about the merits.

[37] The overarching consideration, in my view, is the interests of justice. I find that the applicants have established an arguable case that they will suffer sufficient prejudice to give rise to an injustice if leave is denied.

7. DISPOSITION

[38] Leave to appeal is granted to both applicants. Costs will be in the cause of the appeal. "The Honourable Mr. Justice Grauer"

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