

CANADA / JUDGMENT

British Columbia v. Purdue Pharma Inc.

2022 BCSC 2343

COURT

Supreme Court of British Columbia

DECIDED

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2022 BCSC 2343 British Columbia v. Purdue Pharma Inc. IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: British Columbia v. Purdue Pharma Inc., 2022 BCSC 2343 Date: 20221215 Docket: S189395 Registry: Vancouver Between: His Majesty the King in Right of the Province of British Columbia Plaintiff And Apotex Inc., Apotex Pharmaceutical Holdings, Inc., Bristol-Myers Squibb Canada, Bristol-Myers Squibb Company, Paladin Labs, Endo Pharmaceuticals Inc., Endo International PLC, Endo Ventures Ltd., Ethypharm Inc., Janssen Inc., Johnson & Johnson, Noramco Inc., Pharmascience Inc., Joddes Limited, Pro Doc Limitee, The Jean Coutu Group (PJC) Inc., Mylan Pharmaceuticals ULC, 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, Roxane Laboratories Inc., Boehringer Ingelheim (Canada) Ltd. / Boehringer Ingelheim (Canada) LTEE, West-Ward Columbus Inc., Sanis Health Inc., Sandoz Canada Inc., Teva Canada Innovation G.P. - S.E.N.C., 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., United Pharmacists Manitoba Inc., Procuracy Inc., Procuracy Pharmacy Services Inc., Shoppers Drug Mart Inc., Unipharm Wholesale Drugs Ltd., and LPG Inventory Solutions Defendants And Lac La Ronge Indian Band and Darryl Gebien Proposed Intervenors Corrected Judgment: The list of appearances was corrected on the front page on January 26, 2023. Before: The Honourable Mr. Justice Brundrett Oral Reasons for Judgment re Applications for Intervention (In Chambers) Counsel for the Plaintiff: R. Mogerman, K.C. J. Winstanley L. Brasil S. McConnell P. Miller V. Lord Counsel for Purdue Pharma Inc. and Purdue Frederick Inc.: C. Clarke B. Glaspell H. Ngan Counsel for Hikma Labs Inc., Hikma Pharmaceuticals PLC, and West-Ward Columbus Inc.: R. McDonell Counsel for Ethypharm Inc.: B. Olthuis Counsel for Janssen Inc. and Johnson & Johnson: S.G. McKee R.L. Reinertson J. Hutchinson Counsel for Teva Canada Limited, Pharmascience Inc., Ranbaxy Pharmaceuticals Canada Inc.: L. Fric C. Lockwood E. MacKinnon Counsel for The Jean Coutu Group (PJC) Inc.: G.B. Shaw D. Ronde J. Cytrynbaum D. DiPardo (watching brief only) Counsel for Mylan Pharmaceuticals ULC: S. Maidment M. Harmer J. Dent Counsel for Purdue Pharma L.P. and The Purdue Frederick Company Inc.: L. Mercer D. Royal Counsel for Sandoz Canada Inc.: T. Posyniak

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Introduction

- [1] I have two applications by non-parties for intervention in a partial settlement approval hearing involving two sets of defendants in this putative class action proceeding.
- [2] Submissions on the settlement approval hearing have been heard today and are scheduled to continue tomorrow, December 16. By agreement of all parties, submissions on the intervention applications were heard during the course of the settlement approval hearing.
- [3] Pursuant to notices of application filed on November 15, 2022, the representative plaintiff, His Majesty the King in Right of British Columbia (the "Province"), is seeking an order certifying, for settlement purposes only, this action as a class action as against Purdue Pharma, Purdue Pharma Inc., and Purdue Frederick Inc. (collectively, "Purdue Canada"), and approving the settlement agreement with Purdue Canada made May 17, 2022 (the "Settlement Agreement").
- [4] The Province is also seeking an order certifying a settlement with Roxane Laboratories Inc., Hikma Labs Inc., Hikma Pharmaceuticals PLC, Boehringer Ingelheim (Canada) Ltd. / Boehringer Ingelheim (Canada) LTEE, and West-Ward Columbus Inc. It is, however, the Purdue Canada Settlement Agreement the proposed intervenors have focussed on.
- [5] There are two proposed intervenors. Both apply for standing and/or an adjournment of the partial settlement approval hearing so that their applications to intervene may be heard. I have heard substantive submissions on their proposed arguments as well as procedural submissions on the basis for the interventions.

- [6] First, Darryl Gebien filed a notice of application to intervene on December 5, 2022. Mr. Gebien is a plaintiff in a proposed class proceeding in Ontario against manufacturers and distributors of opioids on behalf of all persons in Canada who were prescribed opioids and suffer or suffered from opioid use disorder. He advises that the Ontario proceeding targets the same wrongdoing as this action.
- [7] Mr. Gebien seeks leave to file written submissions and to make oral submissions of up to 20 minutes in length, on the following points: (a) that the Settlement Agreement should not be approved because the security interest it creates threatens to create an illegal preference; and (b) the proceeding, in any event, should not be certified as a class proceeding because certification is unnecessary and therefore cannot be preferable.
- [8] Second, the Lac La Ronge Indian Band ("Lac La Ronge") filed a notice of application to intervene on November 29, 2022. Lac La Ronge is not a party to the Ontario action.
- [9] The Lac La Ronge application is relatively wide-ranging. It seeks as follows in its notice of application: Part 1: Orders sought
1. An order granting Lac La Ronge Indian Band ("Intervenor") leave to:
 - (a) intervene in this proceeding;
 - (b) file evidence and written submissions with respect to the application for certification and partial settlement approval;
 - (c) make oral submissions at the certification and partial settlement approval hearing; and
 - (d) be granted party status for these purposes.
 2. An order that all applications, affidavits, and application records be electronically delivered to the Intervenor.
 3. An order that the certification and partial settlement approval application be adjourned if necessary to effect any of the above and be "paused" until
 - (a) the Plaintiff and Purdue Canada Defendants have made the full disclosure described below, and
 - (b) finality has been achieved with respect to the appeals and bankruptcy process in the United States.
 4. An order that costs not be awarded either for nor against the Intervenor.
- [10] Lac La Ronge submits that it will advance the following positions:
1. There is no identifiable class within the meaning of s. 4(1)(b) of the Class Proceedings Act, R.S.B.C. 1996, c. 50 [CPA].
 2. A class proceeding is neither fair nor preferable within the meaning of s. 4(1)(d) of the CPA.

3. The Settlement Agreement, and particularly the security interest proposed, is unfair and unreasonable to "those affected by it", including (but not limited to) Lac La Ronge, other Canadian Indian bands and municipalities, and class members in the Gebien class proceeding.
- [11] Broadly speaking, the proposed intervenors are persons who have sued, or intend to sue, Purdue Canada in lawsuits separate and apart from the present action. Their claims are being, or may be, advanced in each of Alberta, Saskatchewan, and Ontario. In each case, the claim is a putative class action. Currently, neither intervenor is a creditor of Purdue Canada, despite their submission that they may be in the future.
- [12] As noted, by consensus of the parties, I heard the intervenors' submissions as to standing and their substantive submissions on intervention at the same hearing today. Legal Principles
- [13] I cannot find that a right to intervene in the present proceedings exists on the basis of the notice provisions and other sections of the CPA (s. 2(2), s. 3.1, or s. 12) and the Supreme Court Civil Rules that counsel for the proposed intervenors have cited. Rather, an order allowing intervention is discretionary, and the court must be convinced that the intervention will be of assistance to it. As the Court of Appeal noted in *R. v. Bornyk*, 2014 BCCA 450:
- [7] These are threshold considerations. Interventions will generally not be allowed unless the applicant group has legitimacy, is generally concerned about the issues on the appeal, and can state issues that are suitable for intervention. Beyond these threshold considerations, an order allowing intervention is discretionary and the Court must be convinced that the intervention will be of assistance to it.
- [14] The considerations that apply to intervenor applications are set out in *Carter v. Canada (Attorney General)*, 2012 BCCA 502 at paras. 12-15:
- [12] Generally, intervention will be permitted in two situations. The first is the case in which the applicant has a direct interest in the litigation, in the sense that the result of the appeal will directly affect its legal rights or impose on it some additional legal obligation with a direct prejudicial effect. The fact that the outcome might ultimately adversely impact individual members of a proposed intervenor is not, however, sufficient to constitute the necessary direct interest, since the Court would not, on the appeal, be directly considering their rights or liabilities: *Ahousaht Indian Band v. Canada (Attorney General)*, 2012 BCCA 330 at paras. 4-8, 325 B.C.A.C. 312 (Groberman J.A. in Chambers), *aff'd* on review, 2012 BCCA 404.
- [13] Where an applicant does not have a direct interest, the Court may nevertheless grant intervenor status if the appeal raises public law issues that legitimately engage the applicant's interests, and the applicant brings a different and useful perspective to those issues that will be of assistance in resolving them. The appropriate considerations were summarized by Madam Justice Newbury in *R. v. Watson and Spratt*, 2006 BCCA 234 at para.

3, 70 W.C.B. (2d) 995 (Chambers): ... where the applicant does not have a "direct" interest in the litigation, the court must consider the nature of the issue before the court (particularly whether it is a 'public' law issue); whether the case has a dimension that legitimately engages the interests of the would-be intervenor; the representativeness of the applicant of a particular point of view or "perspective" that may be of assistance to the court; and whether that viewpoint will assist the court in the resolution of the issues or whether, as noted in *Ward v. Clark*, the proposed intervenor is likely to "take the litigation away from those directly affected by it". (Para. 6.)

- [14] Factors weighing against granting intervenor status include the possibility that an intervenor will expand the scope of the proceeding by raising new or immaterial issues, or create an undue burden or injustice for the parties to the appeal by, for example, forcing them to respond to repetitive arguments: *Friedmann* at para. 19; *Faculty Association of the University of British Columbia v. University of British Columbia*, 2008 BCCA 376 at para. 15, 263 B.C.A.C. 3 (Chambers). Rule 36(5)(b) affirms this as it provides an intervenor may only make submissions that pertain to the facts and issues set out in the factums of the parties unless a court orders otherwise.
- [15] Finally, an intervenor is to make principled submissions on points pertinent to the appeal. It is not to argue for a particular result or support the position of one party or the other: *Friedmann* at para. 28. See also *J.P. v. British Columbia (Children and Family Development)*, 2016 BCCA 124 at paras. 3-6; *R. v. Watson and Spratt*, 2006 BCCA 234 at para. 3; and *Wilson v. Depuy International Ltd.*, 2018 BCSC 854.
- [15] In *Wilson* at para. 4, Justice Branch held that beyond the traditional intervention test, he had the discretion to allow such an intervention under the case management powers provided by s. 12 of the CPA. However, the Court of Appeal has since clarified that this section applies after the proceeding is certified as a class proceeding: *British Columbia v. Apotex Inc.*, 2020 BCCA 186 at para. 11 (Grauer J.A. in Chambers); *British Columbia v. The Jean Coutu Group (PJC) Inc.*, 2021 BCCA 219 at paras. 38-40. As this action has not yet been certified as a class proceeding, I would consider the appropriateness of intervention under the traditional intervention test in *Carter*. Discussion
- [16] On the first branch of the test in *Carter*, I assess that neither proposed intervenor has a direct interest in the litigation.
- [17] Neither proposed intervenor is a government body as defined under the Opioid Damages and Health Care Costs Recovery Act, S.B.C. 2018, c. 35 [ORA] who has incurred health care costs as a result of the so-called opioid crisis. The applicants are not class members, or a representative of one, or potential parties to this action.

- [18] Lac La Ronge argues that the security interests granted to the plaintiff and class members over Purdue Canada is unfair and unreasonable to those affected by it, including Lac La Ronge, other Canadian Indian bands and municipalities, and class members in the Gebien class proceeding. It submits it is directly and adversely affected by the terms of the proposed Settlement Agreement.
- [19] Mr. Gebien is a plaintiff in an Ontario proposed class proceeding that includes Purdue Canada as a defendant. However, there is no overlap in the two actions that would bring the multi-jurisdictional provisions of the CPA into play so as to necessitate his involvement here. I cannot find, as in *Wilson*, for instance, that the proposed settlement would have a direct effect on the Ontario proceeding. The scope of the BC proceeding is much more narrowly defined than the Ontario proceeding.
- [20] Mr. Gebien argues that the Purdue Canada Settlement Agreement, if approved, "threatens to deprive the applicant, and the class that the applicant proposes to represent in the Ontario Proceeding, from accessing compensation for harms suffered." He also refers to there being a risk that those in the proposed class in the Ontario proceeding who were prescribed opioids manufactured by Purdue Canada will be adversely impacted by the term of the Settlement Agreement granting the plaintiff a security interest.
- [21] As noted, the plaintiff class in the BC action is limited to government entities, all of whom allegedly provided public health insurance benefits as a result of various defined opioid-related wrongs allegedly committed by the defendants. This is not a proposed settlement that would include compensation for all persons as individuals who do not opt out of the proceedings.
- [22] I am advised that the Ontario proceeding seeks compensation for those most directly harmed; that is, individuals who were prescribed and became addicted to opioids. The plaintiff class in BC does not similarly include individuals who may have been harmed by opioid use. Rather, the defined class here is limited to specific governmental entities who paid health care benefits caused or contributed to by an opioid-related wrong as defined in the ORA.
- [23] As Mr. Gebien acknowledges in his application, while both the BC and Ontario proceedings concern similar alleged wrongs, and many of the defendants in this proceeding are also defendants in the Ontario proceeding, the classes are very much distinct and this present proceeding is more focussed.
- [24] The Lac La Ronge proposed intervenor suggests it has a direct interest in the proposed settlements with the Purdue Canada defendants in that the settlement "purports to create a security interest over the assets of the Purdue Canada Defendants who are common to its national class action in another province." This theme also appears in the Gebien application, which references there being reason to believe Purdue Canada is or will soon become insolvent.

- [25] I note that Lac La Ronge has not yet advanced a formal claim against Purdue Canada. While Mr. Gebien is suing Purdue Canada in Ontario, I find it difficult to understand how a settlement in this proceeding would in any way lead to a tenable argument of inappropriate priority or preference of one creditor over another.
- [26] As counsel note, Purdue Canada is presently a going concern. It is not a debtor in any insolvency proceeding, whether in Canada or the United States. The only nexus Purdue Canada has to any insolvency proceeding is that they have been caught up as "related parties" for the purposes of a stay proceeding against US Chapter 11 Debtors, which stay was granted by the Superior Court of Justice in Toronto administering the recognition proceedings of the US Chapter 11: Purdue Pharma L.P., Re., 2019 ONSC 7042.
- [27] Speculation about Purdue Canada's possible future insolvency does not change the fact that the proposed intervenors have no substantive right to participate in what is essentially the administration of a settlement contract, to which the intervenors were not a party, that is proposed for approval by the courts: see *Parsons v. The Canadian Red Cross Society*, 2016 ONSC 2661 at paras. 14, 19.
- [28] I cannot find, on the whole, that the BC proceedings legitimately engage the direct interests of the applicants.
- [29] On the second branch of the Carter test, in addition to considering whether the applicants' interests are engaged, I would consider whether either applicant brings a different and useful perspective to those issues that will be of assistance in resolving them.
- [30] Mr. Gebien, as noted, made submissions on two issues. The first is whether the Purdue Canada Settlement Agreement "threatens" to create an "illegal preference". As noted, Mr. Gebien is not an existing creditor, and I do not agree with the submission that the Purdue Canada Settlement Agreement may create a preference (illegal or otherwise) that directly engages his interests or that of the other intervenor or provides a useful context in which to hear the intervenors' submissions.
- [31] The second is whether the class proceedings represent a preferable procedure. However, the applicant, again, is not directly affected by this issue and its submissions on this point do not represent a public interest argument. Rather, it is an argument more appropriately made by the parties within the context of this proceeding.
- [32] As noted above, Lac La Ronge proposes to address whether there is an identifiable class, whether a class proceeding is a fair and thus preferable procedure, and whether the settlement is fair, reasonable, and in the best interests of those affected by it.
- [33] Again, this action involves governmental bodies who have incurred health care costs as a result of alleged "opioid-related wrongs". It does not involve constitutional litigation where a broader range of interests are at stake.

- [34] Broadly, the test to be considered by the court on the settlement approval application is that which was originally set out in *Dabbs v. Sun Life Assurance Co. of Canada*, 40 O.R. (3d) 429, 1998 CanLII 14855 at 15 (S.C.); namely, whether the settlement is fair, reasonable, and in the best interests of those affected by it.
- [35] The duty of the court in the settlement approval process is to act as a supervisor. Its primary purpose is to protect the interests of absent class members who are parties to the proceeding itself: see *Bodnar v. The Cash Store Inc.*, 2011 BCCA 384 at para. 20, citing *Fantl v. Transamerica Life Canada*, 2009 ONCA 377 at para. 39. My function is therefore limited to assessing the settlement proposal that has been presented.
- [36] The proposed interventions are not narrow in scope. It appears, from their oral and written submissions, that both proposed intervenors are likely to expand the scope of the partial settlement hearing beyond what is presently contemplated.
- [37] I am concerned that the proposed intervenors would delay a determination of the issues and take the settlement proceedings off into side issues, a factor which weighs against granting intervenor status: see *Ward v. Clarke*, 2001 BCCA 264 at para. 6.
- [38] I am not convinced that either proposed intervenor has offered a unique and different perspective on these issues that will assist the Court at the settlement approval hearing.
- [39] The oral submissions of Lac La Ronge on the possible bases for intervention were wandering and unfocussed. I find that its participation would not assist the Court on the issues I have to address. The submissions of counsel for Mr. Gebien were more focussed, but again I cannot find that his participation will be of assistance to the Court.
- [40] The plaintiff class and the settling defendants are all ably represented by experienced counsel. The other non-settling defendants are present and are represented by counsel. The Court is not in need of any further assistance from the proposed intervenors on the issues presently before it.
- [41] In my view, the applicants do not bring a different and useful perspective to the issues and the settlement approval applications that will be of assistance in resolving them. Rather, the proposed intervenors are likely to take the litigation away from those directly affected by it.

Conclusion

- [42] In all the circumstances, I would not exercise my discretion to provide the intervenors standing to make submissions at this hearing.
- [43] I dismiss the applications by the two proposed intervenors. "Brundrett J."

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