

NOVA SCOTIA COURT OF APPEAL

Citation: Bellefontaine v. Purdue Frederick Inc., 2010 NSCA 58

Date: 20100707

Docket: CA 320869

Registry: Halifax

Between:

George Bellefontaine, Stephen MacGillivray, L. Annette Stewart,
~~Kevin Lahey~~, Gary Melanson, and George Critchley, and Christopher Fecteau

Appellants

v.

Purdue Frederick Inc., Purdue Pharma Inc., Purdue Pharma L.P.,
Purdue Pharma, Purdue Pharma Company, The Purdue Frederick
Company, Inc., Purdue Pharmaceuticals L.P., P.F. Laboratories Inc.,
and PRA International (collectively, “Purdue”) and
Abbott Laboratories, Limited / Laboratoires Abbott, Limitée,
Abbott Laboratories, and Abbott Laboratories, Inc. (collectively “Abbott”)

Respondents

Judges: Saunders, Oland and Hamilton, JJ.A.

Appeal Heard: June 10, 2010, in Halifax, Nova Scotia

Held: Appeal dismissed with costs in the total amount of \$1,500, plus disbursements as agreed or taxed, payable by the appellants to Purdue Frederick Inc., Purdue Pharma Inc. and Purdue Pharma L.P. per reasons for judgment of Hamilton, J.A.; Saunders and Oland, JJ.A. concurring.

Counsel: Raymond F. Wagner and Michael Dull for the appellants
C. Patricia Mitchell and Scott R. Campbell for the respondents
Purdue Frederick Inc., Purdue Pharma Inc. and Purdue Pharma L.P.
Allan D’Silva for the respondent Abbott (not appearing)

Reasons for judgment:

[1] This appeal involves a proposed class action and raises two issues. The first issue is whether the motions judge, Murphy, J., erred in dismissing the claims, in a proposed class action in Nova Scotia against entities based outside of Nova Scotia, of four named plaintiffs – L. Annette Stewart, Gary Melanson, George Critchley and Christopher Fecteau – the *ex juris* appellants, who had not pleaded a “real and substantial connection” to Nova Scotia. The second issue is whether he erred in deciding this jurisdictional issue before the class certification motion.

[2] The appeal does not deal with whether so-called “national” class actions are available in Nova Scotia or with whether the *ex juris* appellants can be members of a national class as certified in Nova Scotia as opposed to named plaintiffs in the action.

Facts

[3] Six named plaintiffs sued the respondents, alleging they had misrepresented or misadvertised certain properties of OxyContin® tablets. They plead for a variety of relief, including “special damages for medical expenses and other expenses related to the use of [OxyContin® Tablets]”; “damages for the funding of a ‘Medical Monitoring Program’, supervised by the Court, for the purpose of retaining appropriate health and other experts to review and monitor the health of the Plaintiffs ... and to make recommendations about their treatment”; “subrogated claims on behalf of Provincial providers of medical services”; and “remedies available pursuant to s. 14(2)(c) of the **Newfoundland and Labrador Trade Practices Act**, R.S.N.L. 1990 T-7, and s. 4(1) of the **Prince Edward Island Business Practices Act**, R.S.P.E.I. 1988, cap. B-7”.

[4] The statement of claim indicates two of the six named plaintiffs – George Bellefontaine and Stephen MacGillivray – are residents of Nova Scotia. As such they are entitled to sue the respondents in Nova Scotia. Whether they can appropriately represent a ‘national class’ case-managed in Nova Scotia will be decided by the class certification judge.

[5] The remaining four named plaintiffs, the *ex juris* appellants, are not residents of Nova Scotia. The statement of claim indicates they live in

Charlottetown, Prince Edward Island; Moncton, New Brunswick; Northern Arm, Newfoundland and Labrador and Calgary, Alberta respectively. They, along with Messrs. Bellefontaine and MacGillivray, propose to represent and seek certification of a national class of persons, defined as being comprised of (a) “any person in Canada who claims personal injury and/or damage as a result of being prescribed [OxyContin® Tablets]” and (b) “any person who has a derivative claim on account of a family relationship”.

[6] The *ex juris* appellants concede they would not be able to bring their actions in Nova Scotia in an ordinary, non class action with their claims as pleaded. They say their right to bring their action in Nova Scotia arises from their common issue with the two named plaintiffs who are resident in Nova Scotia.

[7] The three respondents, Purdue Frederick Inc., Purdue Pharma Inc. and Purdue Pharma (collectively called “Purdue Pharma”) are based in Ontario and not ordinarily resident in Nova Scotia. They made a motion before the judge pursuant to **Civil Procedure Rules** 4.07 and 13 to dismiss the claims of the *ex juris* appellants on the basis of the common law principle of jurisdiction *simpliciter*, as codified in the **Court Jurisdiction and Proceedings Transfer Act**, S.N.S. 2003 (2d Sess.) c. 2, as “territorial competence”. They are the only respondents who participated in the motion and in this appeal.

[8] Five respondents, Purdue Pharma L.P., Purdue Pharma Company, The Purdue Frederick Company, Inc., Purdue Pharmaceuticals L.P. and P.F. Laboratories, Inc., are pleaded to be based in the United States of America. They have reserved their right to dispute jurisdiction. The action has been discontinued against the other four named respondents, PRA International, Abbott Laboratories, Limited/Laboratoires Abbott, Limitée, Abbott Laboratories and Abbott Laboratories, Inc.

[9] There is no allegation or evidence that any of the *ex juris* appellants were prescribed OxyContin® Tablets in Nova Scotia, purchased or ingested OxyContin® Tablets in Nova Scotia, or suffered any injury or loss in Nova Scotia. The *ex juris* appellants plead no connection of their respective claims to Nova Scotia and no evidence was adduced to suggest that any of them or their claims has any connection to Nova Scotia.

[10] There are nine proposed class actions in Canada against Purdue Pharma and others regarding OxyContin® tablets in nine different Canadian provinces. The allegations vary significantly among them, but in each the relief being requested includes alleged damages suffered by family members, based on provincial legislation. The relief includes claims asserted by patients under provincial statutes for health care costs. A key aspect of the class certification motion(s) and the substantive determination of their claims will be the medical history of each plaintiff. They assert that they were personally injured by OxyContin® Tablets and specifically allege that they became addicted to the medication after having received a prescription from their respective physicians.

[11] Evidence on these issues will include the plaintiffs' respective health care providers' clinical notes and records, the records and representations of the plaintiffs' respective pharmacists, and the records of their respective provincial workers' compensation boards and private insurers. In short, the individual claims will turn on a review of each plaintiff's provincial medical, employment and insurer records. There are significant provincial aspects of the claims being advanced by way of proposed class actions in each of the nine provinces. Several of them are proposed to be provincial, as opposed to "national", class actions.

Decision Under Review

[12] The judge gave his comprehensive oral decision just over one week following the hearing of the motion. He considered the merits of Purdue Pharma's motion prior to the class certification motion and found that the claims of the *ex juris* appellants should be dismissed for want of territorial jurisdiction on the basis they have no "real and substantial connection" to Nova Scotia.

Standard of Review

[13] The standard of review with respect to the first issue, whether the judge erred in considering the Purdue Pharma's motion in advance of the class certification hearing, is one of palpable and overriding error as it raises an issue of mixed law and fact. The standard of review on the second issue, whether the judge erred in dismissing the *ex juris* appellants claims on the basis they had no territorial jurisdiction, is one of correctness as it hinges on the interpretation and application of jurisdictional legal principles.

[14] In addition to arguing that the judge erred in hearing Purdue Pharma's motion prior to the certification motion and in dismissing the claims of the *ex juris* appellants, the *ex juris* appellants say the judge erred by concluding that (1) national classes are constitutionally impermissible in Nova Scotia and (2) the appellants could never belong to a national class as certified in Nova Scotia. I agree with Purdue Pharma that the judge reached no such conclusions. Reading the judge's decision in its entirety makes this clear. The judge simply dismissed the claims of the appellants on the basis they were named plaintiffs with no "real and substantial connection" to Nova Scotia.

[15] In fact, the judge specifically declined to grant any declaration as to certification of national classes despite Purdue Pharma's request that he do so:

You're going to have to convince me ... that I should make the declaration ... that: The Court can only certify a class or representative proceeding with respect to persons that have a real and substantial connection. ...

...That may or may not be the case in some situations, or for both of those, but I'm just not sure that it's necessary to go there. You know, the Court's reluctant to make sweeping declarations about legislation. I don't think you need that, in this case.

I think the decision that I have made is that the claims of the Plaintiffs are dismissed on the basis that there's no real and substantial connection to Nova Scotia, and that addresses the real and substantial connection. I don't think I should be declaring that -- what the scope of the Act is, sort of in the abstract, as requested...

...

I understand the point you're making. I'm not going to give the declaration, and that's not going to surprise you. I don't think it's necessary, in any way, at this stage, in this proceeding, to address the issues that you've raised.

[16] The judge did not reach the conclusions suggested by the appellants. There is no need to say more about these arguments.

Analysis

[17] In deciding that he would deal with Purdue Pharma's motion in advance of the class certification motion, the judge considered the law to the effect that there is a general reluctance against pre-certification motions, but that there will be times when the overriding principles of economy, efficiency and justice will require an interlocutory matter to be heard before certification:

I'll refer first to the **Anderson** case, [**Anderson v. Canada (Attorney General)**, [2008] N.J. No. 302 (S.C.)] . . . paragraphs 18 and 20 of the **Anderson** decision, where the Court said:

"It seems to me that the default position is that the first order of business in any class proceeding is to deal with the certification hearing. The Act implies this. However, the Act is not to be seen as restricting any application that would more readily promote a fair and expeditious result."

And then the Court referred to a number of cases, including the **Baxter** decision, [**Baxter v. Canada (Attorney General)**, [2005] O.J. No. 2165 (S.C.J.)], paragraph 20, which was the next case that I was going to refer to, and **Baxter** is a decision of Justice Winkler in the Ontario Court in 2005, and at paragraph 20 **Anderson** cites **Baxter** where it says:

"It was not the position, however, in **Baxter**, that certain motions or applications that would tend to more efficiently move the certification hearing along, would not be permitted in advance of the certification hearing."

And then paragraph 14 from the **Baxter** decision was cited, and I'm not going to read all of that, except the part that Justice Fowler in **Anderson** highlighted:

"It may be appropriate to make an exception..."

That's an exception to hearing the certification motion first:

"...where the determination of a preliminary motion prior to the certification motion would clearly benefit all parties, or would further the objective of judicial efficiency, such is in relation to a motion for dismissal under Rule 21, or a summary judgment under Rule 20. Such motions may have the positive effect of narrowing the issues, focusing the case, and

moving the litigation forward. An exception may also be warranted where the preliminary motion is time-sensitive or necessary to ensure that the proceeding is conducted fairly."

So notwithstanding that there were different results in **Anderson** and in **Baxter**, in that the actual determination of the noncertification motion was postponed in those cases, the Courts recognized that there might be circumstances where a certification motion could more efficiently come after the other motion, and that's what I've decided we're dealing with here.

...

Suffice it to say that even authorities, which have decided certification should be dealt with first, recognize, in some cases, it may be the reverse. [emphasis added]

[18] He concluded that he had sufficient evidence before him to decide the issue and that there was no indication more evidence was available, or likely to be produced, which would go to the link between the *ex juris* appellants and Nova Scotia, and to the issue whether there was a “real and substantial connection” with this province, than was already before him:

...The pleadings address the status and location of the parties, and, for reasons that I'll explain later, had there been a desire to provide more information in connection with the real and substantial connection, that could have been addressed, and it wasn't raised.

I guess what I'm saying is, there was no request to amend any pleadings, nor was there any affidavit evidence introduced, or any request made to introduce affidavit evidence, with respect to the issue that we're dealing with, the connection of the Plaintiffs' claim with Nova Scotia.

...

And, frankly . . . the evidence -- there's been no indication that there's more evidence available, or likely to be produced, which would go to the tie between the Plaintiffs and Nova Scotia. [emphasis added]

...

And, as I've indicated, I have all the information now that is necessary to address that based on the pleadings and the submissions which I have heard.

...

...candidly, I have no indication that there is any additional evidence which would be available which would be helpful in making a decision.

[19] Having considered the law and determined that he had all the evidence relevant to the issue before him, the judge concluded that he should decide the jurisdiction motion prior to certification because (1) of limitation issues that may arise, (2) with the jurisdiction issue decided, the ultimate certification motion with less affidavit evidence and cross-examination thereon, may be more focussed, simpler and more efficient, (3) no one would be prejudiced by an early determination of the jurisdiction motion, and (4) it would not be more economical judicially to wait to decide the issue.

[20] The appellants have not satisfied me that the judge made a palpable and overriding error in reaching this conclusion. He considered the relevant legal principles and applied them appropriately to the pleadings before him.

[21] On the second issue, the judge addressed the question of whether there was a “real and substantial connection” between the *ex juris* appellants and Nova Scotia, as the parties agreed he should. He did not conclude that a “real and substantial connection” with persons outside Nova Scotia could never be established through a class certification of common issues. Rather, he held that in the absence of *any* link between Nova Scotia and the claims of each *ex juris* appellant other than a common issue with the resident plaintiffs, there is no “real and substantial connection” and thus no jurisdiction *simpliciter* or territorial competence:

...I'm not going to make any conclusion that the fact that a common issue of liability is enough -- of a Defendant's potential liability, is enough to establish a real and substantial connection, but, I'm not going to make that finding in this case.

There may be some cases where -- in a class action situation, where a common issue is enough, but that's not my conclusion in this case in any event, but particularly because there is a reference to legislation and the need to interpret legislation and regulations outside the province.

...

I will just make a comment about the Plaintiffs' position, that the fact that there may be liability on the Defendants is enough to establish a real and substantial connection. I don't agree with that, and I don't want to get into examples, and so on, but, in my view, there has to be some connection between the Plaintiff, a real and substantial connection between the Plaintiff and the jurisdiction. It's not enough to say that a Defendant may be liable to some other Plaintiff in this jurisdiction.

Even if there were cases where it might possibly be that way, the particular circumstances of this case, as I've indicated, where we've got reference to legislation in other jurisdictions, and where the evidence is entirely in other jurisdictions, as far as can be determined, and where there is assistance requested from government agencies in fulfilling remedies outside the province, and so on, that further diminishes any possibility of a real and substantial connection.
[emphasis added]

[22] Prior to reaching this conclusion, the judge carefully reviewed the law and followed appellate authority, including that of the Supreme Court of Canada in **Bisaillon v. Concordia University**, 2006 SCC 19; [2006] 1 S.C.R. 666, at para. 17, when he observed that a proposed class proceeding is a procedural tool, not a jurisdictional enabler:

The class action is nevertheless a procedural vehicle whose use neither modifies nor creates substantive rights. It cannot serve as a basis for legal proceedings if the various claims it covers, taken individually, would not do so. [emphasis added]

[23] He also quoted with approval the Québec Court of Appeal in **Hocking v. Haziza**, 2008 QCCA 800 at para. 150 to the same effect:

What is true of an individual proceeding is no less true of a class action. A class action is merely a procedural vehicle, and the constitutional principle of the territoriality of provincial laws and judicial jurisdictions cannot be ignored or bypassed in this regard.[emphasis added]

[24] He adopted the reasoning in **McNaughton Automotive Ltd. v. Co-operators General Insurance Co.**, [2003] O.J. No. 2914 (S.C.J.), at para. 47:

Although there may be putative class members in these actions who do not have claims in Ontario, it is my view that it is incumbent upon a proposed representative plaintiff in a class proceeding to establish, as a threshold issue, that the court has jurisdiction over his or her claim just as it is necessary for a representative plaintiff to plead an identifiable cause of action against a named defendant in order to sustain that action. [emphasis added]

[25] The statement of claim provides that the *ex juris* appellants did not reside in Nova Scotia and that the respondents did not ordinarily reside here and were based in Ontario. It makes no allegation and the appellants presented no evidence that any of the *ex juris* appellants were prescribed OxyContin® Tablets in Nova Scotia, purchased or ingested OxyContin® Tablets in Nova Scotia, or suffered any injury or loss in Nova Scotia. It appears the evidence exists only and entirely in other jurisdictions. The relief sought is based in part on *ex juris* legislation. In these circumstances, and considering the jurisprudence, including that referred to by the judge, I am satisfied he did not err in concluding there was no “real and substantial connection” between the *ex juris* appellants and Nova Scotia and dismissing their claims.

[26] I would dismiss the appeal with costs in the amount of \$1,500, plus disbursements as agreed or taxed, payable by the appellants to Purdue Pharma.

Hamilton, J.A.

Concurred in:

Saunders, J.A.

Oland, J.A.