COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *MacKinnon v. Pfizer Canada Inc.,*
2022 BCCA 151

Date: 20220421
Docket: CA47583

Between:

Taylor Janet MacKinnon and Alysa McIntosh

Respondents
(Plaintiffs)

And

Pfizer Canada Inc. and Wyeth Canada

Appellants
(Defendants)

Before: The Honourable Mr. Justice Harris
The Honourable Madam Justice Fenlon
The Honourable Mr. Justice Abrioux

On appeal from: An order of the Supreme Court of British Columbia, dated June 7, 2021 (*MacKinnon v. Pfizer Canada Inc.*, 2021 BCSC 1093, Vancouver Docket S187485).

Oral Reasons for Judgment

Counsel for the Appellants: R. Sutton
(appeared via videoconference April 21, 2022 only)
K. Smiley
E.J.F. Grant

Counsel for the Respondents: E.F.A. Merchant, Q.C.
(appeared via videoconference)
J.M. Rice, Q.C.
H.M. MacDonald
A. Leoni
A. Tibbs
(appeared via videoconference)

Place and Date of Hearing: Vancouver, British Columbia
April 12, 2022

Place and Date of Judgment:	Vancouver, British Columbia April 21, 2022

Summary:

Appeal of a decision certifying a class action on the ground, principally, that no basis in fact had been shown to certify certain common issues. Held: Appeal allowed in part. The certification of the action is upheld, substantially for the reasons of the judge. The appeal is allowed only in respect of the certification of punitive damages, because no basis in fact had been demonstrated in support of certifying that issue.

[1] **HARRIS J.A.**: This is an appeal from a judgment certifying a multi-jurisdictional class action on behalf of all persons resident in Canada who were prescribed and ingested the oral contraceptive Alesse 21 or Alesse 28 between January 1, 2017 and April 30, 2019. The principal, but not exclusive, basis of the claim is alleged manufacturing defects in the contraceptive that reduced its efficacy in preventing pregnancy.

[2] The certification judge was satisfied that each required criterion mandating certification had been satisfied, although the fulfilment of each criterion was contested at the hearing. The reasons for certification are indexed at 2021 BCSC 1093. Those reasons contain a detailed analysis of the issues engaged in the action, an analysis of the causes of action, and details of the evidence material to whether a basis in fact had been established for the criteria for certification, save, of course, for the pleading of the causes of action. It would serve no useful purpose to repeat what is set out carefully and thoroughly in those reasons.

[3] The focus of this appeal is narrower than what was contested on the certification application. The appellant alleges four distinct errors. First, that the judge made a palpable and overriding error in finding that the plaintiffs had established some basis in fact in support of the allegation that Alesse was not as effective as represented. Second, a palpable and overriding error in adducing a basis in fact of a workable methodology capable of proving the claim on a class wide basis. Third, an error in the class definition. And, finally, an error in certifying punitive damages in the absence of any basis in fact supporting that issue.

[4] At the conclusion of the oral hearing, I was of the view that the appellant had failed to establish any reversible error in the order certifying the class action, except

for a potential error in the certification of punitive damages. It was, and it remains, my view that the appeal on the other three alleged errors should be dismissed, substantially for the reasons of the certification judge.

[5] By contrast, I am of the opinion that the appeal of the certification of punitive damages should be allowed. The certification judge, at the time of her judgment, did not have the benefit of the judgment of this Court in *Sharp v. Royal Mutual Funds Inc.*, 2021 BCCA 307. In that case, Justice Voith for Court said this:

> [173] The need for there to be some basis in fact supporting an award of punitive damages before they are certified as a common issue is confirmed in each of *Ari v. Insurance Corporation of British Columbia*, 2019 BCCA 183 at para. 31 (where a basis in fact was found), and *Kirk v. Executive Flight Centre Fuel Services Ltd.*, 2019 BCCA 111 at paras. 140–42 (where no basis in fact was found).
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> …
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> [175] There is no basis in fact in the record, recognizing that this is not a merits-based inquiry, that would warrant an award of punitive damages or that would support considering the issue as a common question.

[6] In the case on appeal, the judge reasoned:

> [146] Finally, the defendants say there is no basis in fact for the claim in punitive damages, in that the Second Amended NOCC consists of a bare allegation of egregious conduct on the part of the plaintiffs without a pleading of material facts to establish that conduct.
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> [147] In the Second Amended NOCC, the plaintiffs allege that the defendants have conducted themselves in a high-handed, wanton, and reckless manner, without regard to public safety. It is alleged that the defendants engaged in deceptive acts in failing to disclose all material facts regarding the risks of using Alesse. It is alleged that the defendants caused the drug to be introduced in the stream of commerce in Canada, knowing that any such defects would cause foreseeable injury to the plaintiff and class members. It is alleged that the defendants failed to implement a timely recall of Alesse once the risks of unintended pregnancy were known to them.
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> [148] Reading the Second Amended NOCC generously, I interpret the claim for punitive damages to be based on the material facts that the defendants knew of the defects in Alesse, and engaged in a pattern of wrongdoing in continuing to sell the product in the Canadian market despite that knowledge. Assuming those facts to be true, they could arguably found a claim for punitive damages: *Rose v. British Columbia Life & Casualty Company*, 2012 BCSC 1296 at paras. 28-31.
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> [149] The plaintiffs' proposed common issues on punitive damages track the bifurcated approach that the defendants suggest would be required "at

> minimum". The first question (issue (j)), asks whether the defendants were guilty of conduct that justifies punishment. The second question (issue (k)), which concerns the quantification of punitive damages, only arises for determination once the aggregate compensatory award is known. The plaintiffs' proposal therefore anticipates that the second question, quantification, will be tried as a common issue after individual damages trials. This bifurcated approach has been endorsed by British Columbia courts: *Stanway v. Wyeth Canada Inc.*, 2011 BCSC 1057 at paras. 58–60, aff'd 2012 BCCA 260, citing *Chalmers v. AMO Canada Company*, 2010 BCCA 560 at para. 31.
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> [150] Accordingly, I conclude that the plaintiffs' proposed common issues relating to punitive damages (issues (j) and (k)), meet the commonality requirement and should be certified as common issues.

[7] As I read the judgment, the judge proceeded to certify the punitive damages issue solely on the basis of the allegations contained in the pleadings. The respondents have not pointed to material beyond the pleadings that establish a basis in fact for the certification of this common issue. This is, I think, an error in principle. It is inconsistent with the reasoning and result in *Sharp*. Accordingly, I would allow the appeal in respect of this issue, and set aside that part of the order certifying punitive damages as a common issue.

[8] Accordingly, I would allow the appeal only to the extent identified above.

[9] **FENLON J.A.**: I agree.

[10] **ABRIOUX J.A.**: I agree.

[11] **HARRIS J.A.**: The appeal is allowed to the extent identified in my reasons.

"The Honourable Mr. Justice Harris"