IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Sissons v. Canadian Tire Corporation Limited,* 2023 BCSC 1134

Date: 20230704
Docket: S1911663
Registry: Vancouver

Between:

Clifford Frank Sissons

Plaintiff

And

Canadian Tire Corporation Limited, Home Hardware Stores Limited, and Quad City Building Materials Ltd.

Defendants

Before: The Honourable Madam Justice Sharma

Reasons for Judgment

Counsel for the Plaintiff:	J.S. Stanley A. Brine
Counsel for the Defendants:	N. Mantini M. McGreevey W. McNamara
Place and Date of Trial/Hearing:	Vancouver, B.C. May 23, 2023
Place and Date of Judgment:	Vancouver, B.C. July 4, 2023

I. INTRODUCTION

[1] This is an application brought by the defendants to strike the plaintiff's notice requiring trial by jury (dated August 5, 2022) such that the trial would be heard by judge alone. In the alternative, the defendants seek an order deferring the hearing of this application until after all the expert evidence has been exchanged by the parties. Lastly, the defendants ask that if neither order is granted, they have leave to reapply for the same relief under R. 12–6(5) of the *Supreme Court Civil Rules* to strike out the notice after the exchange of expert evidence.

[2] This matter came before me in general chambers. Despite the limited time available when this matter was called, I invited counsel to attempt to finish. I am grateful to them for being largely successful in doing so, but a continuation of the hearing had to be scheduled for another date outside normal court hours.

[3] The plaintiff's action is for personal injury. He claims he contracted Non-Hodgkin's Lymphoma ("NHL") after buying and using an herbicide called Roundup.

[4] The plaintiff filed a notice of civil claim in October 2019. However, that was substantially amended in January 2023. The amendment removed claims of negligence as against the manufacturer of Roundup, Monsanto Canada ULC, which has since been removed as a defendant. What remains is the allegation that the defendants breached s. 18(a) and (d) of the *Sale of Goods Act,* R.S.B.C. 1996, c. 410 [*Act*]. Section 18 deals with implied conditions as to quality or fitness in contracts of sale or lease. The relevant portions of s. 18 state as follows:

> **18** Subject to this and any other Act, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale or lease, except as follows:
>
> > (a) if the buyer or lessee, expressly or by implication, makes known to the seller or lessor the particular purpose for which the goods are required, so as to show that the buyer or lessee relies on the seller's or lessor's skill or judgment, and the goods are of a description that it is in the course of the seller's or lessor's business to supply, whether the seller or lessor is the manufacturer or not, there is an implied condition that the goods are reasonably fit for that purpose; …
> >
> > …

> (d) an implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade;

[5] The plaintiff alleges that he bought the product from the defendants, and because the product caused him to contract NHL, the defendants are liable under s. 18 of the *Act*.

[6] Apart from other defences, the defendants deny liability on the basis that Roundup is neither unsafe nor dangerous. They also plead that the plaintiff's exposure to Roundup did not cause or contribute to his diagnosis of NHL.

II. BACKGROUND

[7] The litigation history of this matter can be summarized as follows:

a) The notice of trial was issued in April 2022. The trial is scheduled to last 29 days, beginning on September 25, 2023, in Vancouver. (The date and time estimate were set before the plaintiff amended his pleadings to remove the claims of product liability and negligence.)

b) On August 5, 2022, the plaintiff filed a notice of trial requiring a jury.

c) On September 7, 2022, the defendants filed a notice to strike the plaintiff's jury notice.

d) A case planning conference was conducted on November 2, 2022. The resulting case planning order required, among other things, that the plaintiff file his application for leave to amend his notice of civil claim by November 30, 2022, and the amended response be filed within 30 days of that filing. The parties were ordered to make best efforts to complete examinations for discovery by January 31, 2023, and to make best efforts to answer outstanding requests for information by February 28, 2023. The defendants were given leave to amend their applications to strike the jury notice following service of the amended notice of civil claim. The master also ordered that the defendants' amended application to strike out "may

be rescheduled to a mutually convenient date but to be before May 2, 2023". The plaintiff says he asked for that stipulation, so he would know the mode of trial with sufficient time to prepare his case and especially instruct the experts.

e) On December 30, 2022, the defendants filed a requisition adjourning the previous hearing date for the application to strike the jury notice—then set for January 10, 2022—to, instead, be heard April 13, 2023.

f) The amended notice of civil claim was filed January 10, 2023. The defendants filed amended responses to the amended civil claim in February 2023.

g) The plaintiff was examined for discovery on January 26 and February 6, 2023.

h) A representative for the defendant Quad City Building Materials Ltd. was examined on March 1, 2023.

[8] The plaintiff also raised a procedural issue: he submits the defendants' application should not proceed because it is contrary to Master Robertson's order because it was being heard after May 2, 2023. Since that order had not been amended, it ought to be treated as binding, precluding the defendants' application being heard.

[9] I am not satisfied that acceding to that argument would be in the overall interest of the parties, or in accordance with the administration of justice. Specifically, I have no reason to doubt that despite best efforts, the parties had difficulty being heard on previous dates in general chambers because presiders were not available for a hearing of this length (over one hour). That situation is an unfortunate and all-too-common reality due, in large part, to the over one dozen current judicial vacancies on the Supreme Court of British Columbia.

III. LAW

[10] Rule 12-6(5) outlines the circumstances in which a party served with a jury notice may seek an order that the trial instead proceed by judge alone:

> **Court may refuse jury trial**
>
> (5) Except in cases of defamation, false imprisonment and malicious prosecution, a party on whom a notice under subrule (3) has been served may apply
>
> (a) within 7 days after service for an order that the trial or part of it be heard by the court without a jury on the ground that
>
> (i) the issues require prolonged examination of documents or accounts or a scientific or local investigation that cannot be made conveniently with a jury,
>
> (ii) the issues are of an intricate or complex character, or
>
> (iii) the extra time and cost involved in requiring that the trial be heard by the court with a jury would be disproportionate to the amount involved in the action, or
>
> (b) at any time for an order that the trial be heard by the court without a jury on the ground that the trial relates to a fast track action or to one of the proceedings referred to in subrule (2).

[11] The exclusions listed under R. 12-6(5) must be construed narrowly, and the party applying to set aside the jury notice bears the burden of satisfying the court that one of the grounds listed under R. 12-6(5) has been clearly established: *Han v. Cho*, 2008 BCSC 1192 at paras. 13, 15, 36.

[12] Rule 12-6(2) outlines certain types of proceedings that must be decided by a judge alone. Relevant to this matter is subsection (j) of this rule, which prohibits a jury trial for "a proceeding referred to in R. 2-1(2)", *i.e.*, one that must be started via petition or requisition. Where it is found an action relates to a matter set out in R. 12-6(2), there is no discretion to be exercised and the jury notice must be set aside: *Henni v. Food Network Canada Inc.*, 2022 BCSC 1711 at para. 37. Among the proceedings referred to in R. 2-1(2) are those in which "the sole or principal question at issue is alleged to be one of construction of an enactment, will, deed, oral or written contract or other document": R. 2-1(2)(c).

[13] In the interest of efficiency, the parties agreed to address the issue of appropriateness of a jury trial given the defendants' allegation that the sole issue is the construction of an enactment separately from the complexity issue. Accordingly, I will consider the former issue before turning to the latter.

IV. IS THE CONSTRUCTION OF AN ENACTMENT THE PRINCIPAL QUESTION?

[14] There is no dispute between the parties that the interpretation of a statute is a question of law that cannot be determined by a jury: see *Peters v. Co-operators Life Insurance Company*, 2007 BCSC 1103 at para. 20; see also *Breakaway Futures Ltd. v. Woody Life Village et al*., 2003 BCSC 559 at para. 28.

[15] The defendants argue that the principal question before the court is one of statutory interpretation and that the claim is based on a novel allegation of the interpretation of the contractual warranty for fitness for purpose under s.18 of the *Act*. The defendants submit the plaintiff's claim cannot succeed unless he is correct in this allegedly novel interpretation of the *Act*, “the sole or principal question at issue is alleged to be one of construction of an enactment” such that the jury notice should be struck pursuant to R. 12-6(5)(b): see *Henni* at para. 47.

[16] The plaintiff disagrees, arguing that the case does not involve the interpretation of the legislation, but rather the application of s. 18 to the facts of the case, which he says is a matter separate from the *Act*'s construction. To the extent that there is any issue about the interpretation of s. 18, the plaintiff notes that it is the trial judge's duty to instruct the jury on questions of law whether those question rise from the statute or the common law. The jury is then left to determine whether the facts of the case are sufficient to apply the law to it. In that way, the plaintiff argues, there is nothing unusual about this case that would preclude a jury from deciding it.

[17] The plaintiff also emphasizes that the right to a trial by jury is “a substantive right of great importance” that should be denied only for clear, cogent reasons: *King v. Colonial Homes Limited and Others*, [1956] 2 S.C.R. 528 at 533, 1956 CanLII 13; *MacKinnon v. Ebner*, 1997 CanLII 644 (B.C.S.C.) at para. 28, [1997] B.C.J. No. 364

(Chambers); see also *Gladwell v. Busletta*, 2018 BCSC 1934 at para. 65 (Chambers). Further, as noted in *Bartram v. GlaxoSmithKline Inc*., 2016 BCSC 1409 at para. 7, the effect of R. 12-6(5) "is to create a presumptive right to a civil jury trial". Because the person applying to strike the jury notice bears the onus of clearly demonstrating that a jury could not hear the case, the plaintiff relies on *Sartore v. Beckley*, 2002 BCSC 21 at para. 18, to submit that if a jury could probably hear the case, the application to strike the jury notice must fail.

[18] I do not understand the defendants to disagree with these propositions of law. Rather, the defendants' argument centres on what they say is the plaintiff's novel argument about how the legislation works, which is, in their submission, cogent reason for denying the plaintiff a jury trial pursuant to R. 12-6(5)(b).

[19] The plaintiff further argues that even if he is raising a completely novel interpretation of s. 18 of the *Act* (a point he does not concede), it is premature to strike out the jury notice because there is always the possibility that a trial judge could determine (whether on application or not) that there is no appropriate question to put to the jury during the course of the trial. Even after all evidence has been adduced, the plaintiff points out that the parties will need to make submissions to the trial judge about the charge and questions to be put to the jury. It may be at that point (although, again, this is not conceded) that it becomes apparent that the case is only about interpretation and, therefore, the case should not be submitted to the jury.

[20] Obviously, the approach described by the plaintiff is not ideal, as it may result in the unnecessary expenditure of a great deal of judicial resources to empanel a jury that is never used. It is also appropriate to consider the unnecessary inconvenience to individual jurors resulting from having to potentially attend part or all of a trial only to be dismissed before deciding the matter. That said, these considerations are not determinative.

[21] The more compelling point is that the wording of R. 12-6(2) is mandatory, stating that "[a] trial must be heard without a jury if trial relates to" any of the listed

prescribed circumstances. Thus, if it is found that an action falls within the ambit of R. 12-6(2) (which includes the matters listed in R. 2-1(2)), the court has no discretion, and the jury notice must be set aside: *Henni* at para. 37.

[22] It is also important to focus on the language of R. 2-1(2)(c), which, when read in conjunction with R. 12-6(2), prohibits a jury trial where "the sole or principal question at issue is alleged to be one of construction of an enactment" (emphasis added).

[23] Recently, in *Henni* Justice Hughes stated the test for whether construction of an enactment is alleged to be the sole principal question at issue at para. 36:

> [36] Whether a trial "relates to" a matter pursuant to Rule 12-6(2) means something more than "touches on or is in any way concerned with" one of the excluded matters. An excluded matter must be the main or central focus of the trial: *Han* at para. 37. If the findings of fact will substantially dispose of the issues to be tried, Rule 12-6(2) ought not to be applied. However, if after the facts are found there remains a genuine question as to the significance of those facts when construing a contract, it will be the "principle question in issue" regardless of the relative length or complexity of the fact-finding exercise: *Nelson Marketing International v. Royal & Sun Alliance Insurance*, 2003 BCSC 439 at para. 20 [*Nelson Marketing*].

[24] I agree with the defendants that this case ought to proceed without a jury because the principal question is the construction of an enactment. While there are clearly substantial factual issues that will also have to be determined, I find there remains a genuine question as to their significance in light of the proper construction of s. 18(a) and (d) of the *Act*, whatever that may be. The interpretation of this provision will be determinative regardless of the relative length or complexity of the fact-finding exercise: see *Henni* at para. 36. Thus, the construction of the statute that the plaintiff urges is the principal question to be determined at trial.

[25] That the construction of s. 18 will be the principal question at trial is illustrated by the fact that even if all factual questions are resolved in the plaintiff's favour, success hinges on the court adopting his preferred interpretation of the provision. If the defendants eventually prevail on their interpretation of the legislation, the plaintiff's claim will not succeed; however, if the plaintiff is successful in his

interpretation of the legislation, he may or may not succeed against the defendants on some or all of his claims. That the interpretation of the legislation operates in this binary manner indicates that it the principal question to be tried: see *Henni* at para. 47.

[26] The plaintiff submits a number of cases that he relies on show that courts have easily distinguished the interpretation of a statute from its applicability, but I am not persuaded that these precedents are sufficiently analogous to this situation. For instance, in *Bartram*, there was no dispute about the interpretation of the operative statutory provision; the main issue revolved around the complexity of the scientific issues involved.

[27] I also have doubts about the plaintiff's reliance on *Ter Neuzen v. Korn*, [1995] 3 S.C.R. 674, 1995 CanLII 72, for this purpose. That case involved an appeal to the Supreme Court of Canada from a jury's assessment of damages suffered after the plaintiff contracted HIV from an unsuccessful artificial insemination procedure. Justice Sopinka, writing for the majority, noted that it was somewhat problematic that the trial judge had left it to the jury to decide if the procedure could be characterized as the sale of goods such that the *Act* was applicable, "Only once [the court] has determined that the [*Act*] has any application in the circumstances should the jury be instructed to determine whether the statutory warranty was breached on the facts": para. 70.

[28] There are two problems with the plaintiff's reliance on this case. First, there was no indication that either party had applied to strike the jury notice in order to proceed by judge alone. Based on jurisprudence that I discuss later, it seems likely such an application may have been successful. Second, while the specific comments of the majority seem to imply the trial judge likely could have decided the issue of the contract's construction before putting it to the jury, that comment was *obiter dicta* because the majority explicitly noted that it was an issue that it "need not determinatively settle": para. 70.

[29] The plaintiff also argues that the defendants' application should not be granted because, he submits, his interpretation of the *Act* is not novel. However, that is not persuasive. In R. 2-1(2)(c), it is not the actual construction of an enactment that is relevant to determining whether a jury trial is appropriate; instead, the question is whether the sole or principal question at issue is alleged to be one of construction. Therefore, the presence of opposing pleadings with regard to the construction of one or more of the legal instruments listed in that rule—not the relative merit of the duelling interpretations—is what is relevant to deciding whether or not the jury trial is appropriate: *Peters* at para. 20.

[30] Relatedly, the fact that a judge could determine the correct interpretation of the legislation and could, if necessary, not put the case to the jury is similarly irrelevant. The controlling issue is whether or not the case is alleged to be one where the principal issue is the construction of the statute. Having found that it is, it is mandatory that the jury notice be struck.

[31] As noted previously, the plaintiff argues the court should not accept the argument about the novelty of the interpretation in light of the presumptive right to a civil jury trial. The concern is that someone wanting to avoid a jury trial could simply raise the spectre of an issue of statutory interpretation in order to strike the jury notice through the operation of R. 12-6(5), R.12-6(2)(j), and R. 2-1(2)(c). I was not guided to any case law that articulated whether there was a minimum standard for the strength of legal arguments regarding the construction of an enactment to invoke the rule.

[32] However, again, the answer is found in looking to the wording of the rule in light of the overall structure of the rules. As noted above, a jury notice must be struck where the principal or sole question is alleged to be one of construction. The use of the word “alleged” implies a lower bar for establishing the strength of any arguments regarding statutory interpretation. That seems consistent with para. 20 of *Peters*.

[33] In any event, I do not find that in this case the defendants’ framing of the statutory construction issue has no merit or is purely tactical.

[34] I am aware that there is some tension in the case law about whether the applicability of a statute is part of its construction for the purpose of R. 2-1(2)(c). In *Henni* at paras. 49–50, Justice Hughes appears to imply that both interpretation and application of a statute are relevant to construction:

> [49] Similarly in this case, even if the plaintiffs are successful in establishing copyright infringement, that will not dispose of the litigation in their favour. The proper construction and application of the Release, including whether it releases proprietary rights and which of the defendants—if any—it applies to, then comes into play. These issues will remain to be determined after the facts are found with respect to whether copyright infringement is made out. The plaintiffs cannot succeed unless and until the Release is interpreted in their favour so as not to bar some or all of their claims, or not to apply to some or all of the defendants who may be found liable to the plaintiffs. In this way, it is the interpretation of the Release and its application to the facts as found that will determine the litigation.
>
> [50] When considered from this perspective, it becomes clear that interpretation of the Release is the central issue in the litigation. Neither party can succeed without that issue being resolved largely in their favour. In the result, I am of the view that the principal issue in this case is the construction and application of the Release. As such, the jury notice must be struck pursuant to Rule 12-6(2).

[35] Justice Hughes' reasoning on this point draws upon Justice McEwan's treatment of the issue in *Nelson Marketing International v. Royal & Sun Alliance Insurance*, 2003 BCSC 439, where he articulated the relevant legal test as follows:

> [20] … [I]f the findings of fact substantially dispose of the issues to be tried then [the current R. 12-6(2)] should not be applied. But if, after the facts have been found, a genuine question remains as to the significance of those facts within a [current R. 2-1(2)(c)] issue, it will be the "principle question in issue" within the meaning of the Rule, regardless of the relative length or complexity of the fact finding exercise itself.

[36] Importantly, in the cases McEwan J. considered to derive this test—*Manley v. Chilliwack Hospital et al*., 2000 BCSC 649, and *Penner v. The Great-West Life Assurance Company*, 2002 BCSC 1131—the court drew a distinction between the interpretation and application of a legal document, with the former being deemed a matter of construction for the purpose of Rule 2-1(2)(c) while the latter was not.

[37] In *Manley* at para. 32, Justice Bauman (as he then was) adopted the distinction drawn by Master Horn in *Genesis Industries Corp. v. Century Oils*

(Canada) Inc., 1993 CanLII 1563, [1993] B.C.J. No. 1030 (S.C.), between the construction of a contract and its application or enforcement. In *Penner* at para. 16, the court adopted *Manley*'s reasoning on this point, stating that of the various provisions the plaintiff relied on to make out their claim, only some would require interpretation. For most, "the issue w[ould] likely turn on whether the provision applies, not what, in the context of the contract, does the provision mean": para. 16. As a result, Justice Koenigsberg concluded that the principal issues were matters that were suitable for a jury trial: para. 16.

[38] In *Peters*, the court referred with approval to both *Manley* and *Penner*, although Justice Frankel reached a different conclusion as to how central to a matter the construction of a statute must be in order to render it inappropriate to proceed with a jury trial:

> [24] Where I differ from Mr. Justice Bauman and Madam Justice Koenigsberg is that I am of the view that if a case involves an issue of interpretation, then a jury trial is not available. It does not matter how central that question is to the litigation.

[39] While it might appear that there is some difference of opinion in these cases, in my view, when taken together, they are consistent because they demonstrate the enquiry is fact and pleading specific. In other words, how precisely the line is drawn between interpretation and application for the purposes of R. 2-1(2)(c)—and how this distinction impacts the appropriateness of a jury trial in the circumstances—will ultimately fall to the particular facts, pleadings, and circumstances of the case because of the wide variety of scenarios that could potentially be captured by the rule.

[40] Accordingly, I conclude the jury notice should be struck as the principal question is one of the constructions of a statute.

[41] This conclusion is sufficient to dispose of the matter. However, if I am wrong, I would have found that a jury trial would not be appropriate due to the matter's complexity for the following reasons.

V. DO CONVENIENCE, COMPLEXITY & PROPORTIONALITY OF TIME AND COST MAKE A JURY TRIAL INAPPROPRIATE?

[42] Regardless of the statutory interpretation issue, the defendants also say that the jury notice should be struck because of the need of the jury to conduct a prolonged examination of documents of a scientific nature, the complexity and intricacy of the issues, and the disproportionality between the amount involved and the extra time and cost of a jury trial.

[43] I appreciate counsel referring me to a number of authorities that discuss how the court should approach the issues of prolonged examination of documents by a jury and complexity; however, I do not intend on going through those cases at length. Again, the issue will turn on the particular facts and pleadings in the case. The case law establishes that that juries are deemed to be sophisticated, and counsel are under a duty to present a case in a manner to assist the jury along with the guidance of instructions from the trial judge: *Sartore* at paras. 8, 12–13, 19; *MacKinnon* at para. 26; *Bartram* at paras. 10–11. It is also true that the obligation of counsel to assist the jury extends to the presentation of expert evidence. Counsel needs to ensure that expert evidence is presented in such a way that a jury can understand it: *MacKinnon* at para. 24; *Cliff v. Dahl*, 2012 BCSC 276 at para. 38.

[44] The defendants point to several factors that they say contribute to the complexity and intricacy of the case as well as the requirement that jurors will have to examine lengthy scientific documents. They submit that this complexity comes, in part, from the strict regulatory framework imposed by the federal legislation governing pesticides. It was not immediately clear to me why all of that evidence would be relevant in a case centred on the sale of goods. However, the defendants argue that this information goes to the issue of whether the product is defective. It is too early at this stage for me to say that information would not be admissible and relevant.

[45] More compelling is that the case necessarily involves a complex issue relating to the causes of NHL. The plaintiff's list of documents includes medical

records from a number of healthcare providers spanning a 33-year period during which the plaintiff claims to have used Roundup. The defendants say they are still seeking production of additional medical records. I accept that the issue of whether the plaintiff's NHL was caused by the use of pesticides would be complex, requiring extensive expert evidence and scientific documents that could, on their own, preclude the case from going to a jury.

[46] The plaintiff claims the case is very simple and that he can complete his case in six days. The problem with this submission is that it fails to take into account the pleadings as a whole. The defendants plead that Roundup is safe for use when used as directed on the product's label and specifically deny that exposure to the product, or one of its chemical constituent ingredients when used as directed, can cause NHL. On that basis, the defendants deny that Roundup is unfit or unsafe for its intended use. The defendants are allowed to adduce evidence to substantiate their claim. I am unable to say at this point that the extensive regulatory evidence is irrelevant and would be inadmissible. In addition, there is at least some possibility that extended review of the plaintiff’s medical history may be admissible and relevant. That review could span over 30 years, making it a potentially onerous task.

[47] Thus, while the plaintiff believes he can present a simplified case to the jury, he cannot prevent the defendants from raising the issue of causation, which is in addition to the question of the applicability and construction of the legislation. The defendants’ arguments are not speculative nor frivolous; their position arises naturally and fairly from the pleadings and the evidence.

[48] As I understood the plaintiff's case, if the defendants succeed on their interpretation of the legislation, the case would not go to the jury. In my respectful view, it would be inefficient as well as imprudent for the court to allow a jury to be empaneled for an extensive, complicated trial where there is a possibility that it would not ultimately be used to decide the matter.

[49] The plaintiff seeks to have the application to strike the jury notice concluded far enough in advance of the trial because he said he needs to tailor his expert

evidence to whether it was going to be a jury trial or a judge-alone trial. In my respectful view, that raises the possibility that, while wanting to keep his presentation of his case simplified for a jury, he may well have a larger case in reply, especially given the issues that the defendants intend to raise and the evidence that will be adduced to support their arguments.

[50] Furthermore, I agree with the defendants that the mode of trial ought not to be significant in terms of instructing an expert. If an expert can provide an opinion that is relevant, admissible, and helpful, it should not matter whether that opinion is going before a jury or a judge.

[51] Accordingly, even if I had not found that the trial is one that involves the construction of a statute, I would have struck the jury notice under R. 12-6(5)(a).

VI. CONCLUSION

[52] For all those reasons, the jury notice is struck.

"Sharma J."