COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Lac La Ronge Indian Band v. British Columbia,* 2024 BCCA 58

Date: 20240222
Dockets: CA48796; CA48799

Between:

Lac La Ronge Indian Band

Appellant
(Third Party)

And

His Majesty the King in Right of the Province of British Columbia

Respondent
(Plaintiff)

And

Apotex Inc., Apotex Pharmaceutical Holdings, Inc., Bristol Myers Squibb Canada, Bristol-Myers Squibb Company, Paladin Labs Inc., Endo Pharmaceuticals Inc., Endo International PLC, Endo Ventures Ltd., Ethypharm Inc., Janssen Inc., Johnson & Johnson, Noramco Inc., Pharmascience Inc., Joddes Limited, Joddes Ltd., Pro Doc Limitee, The Jean Coutu Group (PJC) Inc., 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, Roxane Laboratories Inc., Boehringer Ingelheim (Canada) Ltd./Boehringer Ingelheim (Canada) Ltee, West-Ward Columbus Inc., Sanis Health Inc., Sandoz Canada Inc., Sandoz International GmbH, 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., 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 Chief Justice Marchand
The Honourable Justice Dickson
The Honourable Mr. Justice Butler

On appeal from: Orders of the Supreme Court of British Columbia, dated December 15, 2022 (*British Columbia v. Purdue Pharma Inc.*, 2022 BCSC 2343, Vancouver Docket S189395) and December 16, 2022 (*British Columbia v. Purdue Pharma Inc.*, 2022 BCSC 2288, Vancouver Docket S189395).

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Counsel for the Respondents, Valeant Canada LP, Valeant Canada S.E.C. and Bausch Health Canada Corporation:	M. Bringeland
Place and Date of Hearing:	Vancouver, British Columbia April 4, 2023
Place and Date of Judgment:	Vancouver, British Columbia February 22, 2024

Written Reasons by:
The Honourable Justice Dickson

Concurred in by:
The Honourable Chief Justice Marchand
The Honourable Mr. Justice Butler

Summary:

The applicant seeks orders quashing appeals of orders denying the appellant leave to intervene in a class action and approving a settlement. Held: Application allowed, appeals quashed. The application should be heard and determined in advance of the appeals. The appellant lacks standing to appeal the settlement approval order and the appeal of the intervention order is manifestly meritless and raises issues that are moot.

Reasons for Judgment of the Honourable Justice Dickson:

Introduction

[1] His Majesty the King in Right of the Province of British Columbia (the "Province") applies to quash appeals of orders denying the Lac La Ronge Indian Band leave to intervene in a putative class action and approving a settlement reached by Purdue Pharma, Purdue Pharma Inc., and Purdue Frederick Inc. (collectively, "Purdue Canada") and the Province, as representative plaintiff. The application centers on issues of standing to appeal and mootness. It also raises issues concerning the sequencing of preliminary applications to quash in relation to appeals.

[2] Brought on behalf of a class of Canadian governments against Purdue Canada and other defendants involved in the pharmaceutical industry, the underlying litigation concerns the recovery of healthcare costs related to the opioid crisis. In May 2022, Purdue Canada and the class entered into the settlement in question (the "Purdue Canada Settlement"). In December 2022, the Province sought an order certifying the action as a class proceeding against Purdue Canada, for settlement purposes only, and approving the Purdue Canada Settlement under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50. The settlement has no effect on the continued prosecution of the action against the non-settling defendants.

[3] Lac La Ronge is not a party in the action, a class member, or a creditor of Purdue Canada. However, it sought leave to intervene and to be granted party status to oppose approval of the Purdue Canada Settlement at the settlement approval hearing. According to Lac La Ronge, the settlement was unfair to "those

affected by it" because it provides the class with a security interest in Purdue Canada's assets, thus limiting the assets available to satisfy claims in other opioid-related litigation, including a putative class action in which it is a plaintiff. For this reason, it submitted the settlement approval process should be paused pending further disclosure by the Province and Purdue Canada, and completion of other steps in other proceedings.

[4] After hearing Lac La Ronge's submissions, the case management judge dismissed its application for leave to intervene and approved the Purdue Canada Settlement (the "Intervention Order" and "Settlement Approval Order", respectively). Lac La Ronge filed appeals of both orders. In response, the Province brought this application to quash the appeals pursuant to s. 20 of the *Court of Appeal Act*, S.B.C. 2021, c. 6.

[5] The application requires us to consider whether it should be determined in advance of hearing the appeals, and, if so, whether Lac La Ronge has or should be granted standing to appeal, whether the appeals are moot, and whether they lack any substance or merit.

[6] In my view, the application to quash the appeals should be determined at this juncture. Although Lac La Ronge has standing to appeal the Intervention Order, the appeal manifestly lacks merit and raises issues that are moot. In addition, as an objecting non-party, Lac La Ronge has no right to appeal the Settlement Approval Order and I would decline to grant it leave to do so under s. 24(2)(c) of the *Court of Appeal Act*. For these reasons and those that follow, I would quash both appeals.

Background

The Litigation

[7] In 2018, the Province commenced the putative class action as the proposed representative plaintiff on behalf of the federal, provincial, and territorial governments in Canada. The Province alleges that the defendants, who are manufacturers or distributors of opioids, have committed a series of actionable

wrongs in connection with the ongoing opioid crisis. In particular, the Province pleads that the defendants have committed "opioid-related wrongs", as defined by the *Opioid Damages and Health Care Costs Recovery Act*, S.B.C. 2018, c. 35, and claims they are liable to the Canadian governments for opioid-related healthcare, pharmaceutical, and treatment costs incurred by class members from 1996 to the present and in the future. It seeks recovery of those costs.

[8] The plaintiff class includes federal, provincial, and territorial governments seeking recovery of healthcare costs related to the opioid crisis. It does not include other levels of government, patients or family members who have suffered damages as a result of opioid-related harms.

[9] Other proceedings related to the opioid crisis are also ongoing in Canada. These include a proposed class action filed by Lac La Ronge in the Saskatchewan Court of King's Bench in 2021.

The Purdue Canada Settlement

[10] In May 2022, the Purdue Canada Settlement was reached following lengthy negotiations between class counsel and counsel for Purdue Canada. Pursuant to its terms, Purdue Canada is obliged to pay $150 million to the class over a seven-year period, provide limited scope documentary disclosure, and provide access to interview a number of Purdue Canada's senior commercial employees. The payment is protected by Purdue Canada's agreement to grant the class a security interest over its personal and real property (the "Security Interest").

[11] Specifically, s. 4.3 of the Purdue Canada Settlement provides:

> 4.3 Security Agreement
>
> … Purdue Canada shall deliver to the Canadian Governments:
>
> a) a … security agreement substantially in the form appended hereto as Schedule C, granting to the Canadian Governments a security interest in all of Purdue Canada's present and future personal property, assets and undertaking …

[12] Although the underlying litigation is a proposed class action, all class members independently executed the Purdue Canada Settlement and elected to participate in the action for purposes of its implementation.

[13] In June 2022, the Purdue Canada Settlement was publicly announced by several Canadian governments. On November 15, 2022, the Province, as the representative plaintiff, applied for its approval by the BC Supreme Court.

The Bankruptcy Proceedings

[14] Purdue Pharma L.P. is a U.S. entity ("Purdue U.S."). Owned by the Sackler family, it operates a pharmaceutical business that manufactures, distributes and sells opioid medication in the United States.

[15] In September 2019, Purdue U.S. and other related U.S. companies commenced Chapter 11 proceedings in the United States Bankruptcy Court for the Southern District of New York. The purpose of the proceedings is to resolve the extensive litigation faced by Purdue U.S. and other Chapter 11 debtors in connection with opioid-related harms, and to achieve a global settlement of all opioid-related claims against Purdue U.S. and other related parties.

[16] Purdue U.S. does not own Purdue Canada, and none of the Purdue Canada entities are debtors in the U.S. bankruptcy proceedings. However, Purdue Canada is a "related party" associated with Purdue U.S.

[17] In December 2019, Justice Hainey of the Ontario Superior Court of Justice granted a motion brought by Purdue U.S. in foreign recognition proceedings for a stay under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 [*CCAA*] against related parties in Canada: 2019 ONSC 7042. The stay was granted in aid of interim injunctive and other relief ordered by the United States Bankruptcy Court and ongoing efforts to achieve a global resolution of all opioid-related claims.

[18] In October 2022, Purdue Canada applied to the *CCAA* Court to lift the stay to allow the parties in the putative class action in the BC Supreme Court to seek

approval of the Purdue Canada Settlement. Lac La Ronge appeared at the lift-stay hearing and sought an adjournment to prepare opposing materials. Justice Conway denied the adjournment application and lifted the stay against Purdue Canada to allow the settlement approval hearing to proceed. In doing so, she issued an endorsement expressly retaining Lac La Ronge's ability to address *CCAA* issues before the *CCAA* Court.

[19] The endorsement provides, in relevant part:

> … the "Objecting Municipalities" and "Objecting First Nations" (Objecting Parties) sought an adjournment to put their position before this court. The adjournment was contested by Purdue Canada and others for a number of reasons – in particular, this settlement was announced in June 2022, this motion was brought several weeks ago, and there is a hearing before the B.C. Court on December 15 and 16, 2022 for certification and approval of the settlement.
>
> The Objecting Parties were concerned that granting the lift-stay order and having the certification and settlement motion heard by the B.C. Court would deprive them of seeking relief in this court with respect to any matters concerning the settlement under the CCAA.
>
> Counsel, with the assistance of this court, worked out an order to resolve the concerns of both Purdue Canada and the Objecting Parties. The order avoids an adjournment, grants the lift-stay for the certification and settlement approval motion to proceed before the B.C. Court in December, and protects the ability of any party to seek a decision or direction from this court with respect to the settlement under the CCAA (subject to any arguments that any party may make on the motion, including arguments about this court's jurisdiction). The BC Court's role is focused on the certification and settlement approval. This court's role is focused on issues related to the settlement that arise under the CCAA.
>
> [Emphasis added.]

The Settlement Approval Hearing

[20] As Justice Conway noted, the settlement approval hearing was scheduled in the BC Supreme Court for December 15 and 16, 2022. In late November, Lac La Ronge applied for leave to intervene in the proceeding. In early December, Darryl Gebien, a plaintiff in another proposed class proceeding in Ontario, brought a similar application.

[21] Lac La Ronge sought the following relief:

> 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.

[22] On the application, Lac La Ronge sought to supplement the record produced by the Province and Purdue Canada. It proffered affidavit evidence that included additional details on the U.S. bankruptcy proceedings, their potential settlement, and a related pledge of Purdue Canada's assets after payment of the settlement sum secured by the Security Interest.

[23] The judge allowed Lac La Ronge to present substantive submissions in opposition to approval of the Purdue Canada Settlement during its intervention argument. In its Notice of Application, it articulated its position for why the settlement should not be approved:

> 23. There is a legitimate concern as to whether any funds would remain from Purdue Canada Defendants' assets for other Canadian unsecured creditors if this Honourable Court approves the security interest …
>
> 27. The security interest proposed in the *Settlement Agreement* would have the effect of limiting the assets available to satisfy the claims of Canadians in other class actions…

[24] At the hearing, Lac La Ronge argued that it had a direct interest in the Purdue Canada Settlement because it "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": Notice of Application at para. 40. If permitted to intervene, it advised that it would argue: there was no identifiable class; a class proceeding was neither fair nor preferable; and, the Security Interest was 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.

Reasons for Judgment

[25] The judge delivered oral reasons on both applications. As noted, he dismissed Lac La Ronge's application for leave to intervene and approved the Purdue Canada Settlement.

Intervention Application: 2022 BCSC 2343

[26] The judge began by outlining the nature of the applications and summarizing the claims and positions of Lac La Ronge and Mr. Gebien, whom he described as "persons who have sued, or intend to sue, Purdue Canada in lawsuits separate and apart from the present action": at para. 11. After noting their claims were putative class actions, he observed that "[c]urrently neither intervenor is a creditor of Purdue Canada, despite their submission that they may be in the future": at para. 11.

[27] The judge rejected Lac La Ronge's submission that it had a right to intervene based on the notice requirements and other provisions of the *Class Proceedings Act*. Rather, he stated, his decision on whether to grant the application for leave to intervene was a discretionary determination. He quoted from *R. v. Bornyk*, 2014 BCCA 450 and *Carter v. Canada (Attorney General)*, 2012 BCCA 502, noting that *Carter* provides that interventions are generally permitted in two situations: first, where the applicant has a direct interest in the litigation, in that the result will directly affect its legal rights or impose an additional legal obligation with a direct prejudicial effect; and, second, where, despite the absence of a direct interest, the litigation raises public law issues that legitimately engage the applicant's interests and the

applicant brings a different and useful perspective to those issues. Then the judge applied the *Carter* test.

[28] On the first branch of the test, the judge concluded that Lac La Ronge had no direct interest in the litigation. He observed that Lac La Ronge is not a government body as defined in the *Opioid Damages and Health Care Costs Recovery Act* that has incurred healthcare costs due to the opioid crisis, nor is it a class member, a representative of a class member, or a potential party in the action. He also observed that Lac La Ronge had not yet advanced a formal claim against Purdue Canada. Further, he stated, he found 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": at para 25.

[29] More specifically, the judge did not accept Lac La Ronge's submission that it had a direct interest in the Purdue Canada Settlement based on the Security Interest:

> [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 in 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.
>
> [Emphasis added.]

[30] Turning to the second branch of the test, the judge asked whether Lac La Ronge brought a different and useful perspective that would assist him in resolving the issues at the settlement approval hearing. He rejected Lac La Ronge's submission that the Purdue Canada Settlement created a preference that directly

engaged its interests or provided a useful context within which to hear submissions. He emphasized the nature of the court's duty in the settlement approval process, namely, to protect the interests of absent class members. Further, he stated that the proposed intervention was not narrow in scope, and it appeared to pose a risk of delaying and diverting the settlement proceedings into side issues.

[31] The judge was not convinced that Lac La Ronge offered a unique and different perspective of value at the settlement approval hearing. He characterized Lac La Ronge's oral submissions as "wandering and unfocussed", noted the parties were ably represented by experienced counsel, and observed that the non-settling defendants were also present and represented by counsel: at paras. 39–40. He concluded that Lac La Ronge did not bring a different and useful perspective to the issues or the settlement approval applications that would assist in their resolution. Rather, the proposed intervention was "likely to take the litigation away from those directly affected by it": at para. 42.

[32] For those reasons, the judge dismissed Lac La Ronge's application for leave to intervene.

Settlement Approval: 2022 BCSC 2288

[33] After summarizing the background, terms, and purpose of the Purdue Canada Settlement and another settlement, the judge observed that court approval is required for a binding settlement in class proceedings. He described the guiding principle, namely, "that a settlement must be 'fair and reasonable and in the best interests of the class as a whole'": at para. 19, citing *Wilson v. Depuy International Ltd.,* 2018 BCSC 1192 at para. 58. Then he noted that the court must consider the collective interest, which was facilitated by the fact that all class members had approved the Purdue Canada Settlement and the other proposed settlement: at para. 20. He noted further that he need not dissect the proposed settlements with an eye to perfection, and they must simply fall within a zone of reasonableness to be approved: at para. 21.

[34] Next, the judge confirmed that he had considered all aspects of the Purdue Canada Settlement and the other settlement. In particular, he stated, this included the following considerations:

> [22] …
>
> - experienced counsel have undertaken extensive investigation into the adequacy of the settlements;
> - all class members have opted in and consented to the settlements, and there are no absent class members;
> - the class member governments are sophisticated governmental entities capable of assessing their own interests and the public interest;
> - there is no reason to believe that any collusion or extraneous considerations have influenced negotiations;
> - on a cost/benefit analysis, the plaintiff class appears to be well-served by accepting the settlement; and
> - extensive information has been available to members of the class to consider the proposed settlement agreements.

[35] The judge acknowledged that the Purdue Canada Settlement was negotiated by the Purdue Canada defendants, who remained solvent, against the backdrop of bankruptcy proceedings in relation to their U.S. counterparts. He also accepted that the settlement would result in significantly greater benefits for the class than they would likely have obtained by advancing their claims through the U.S. bankruptcy process. He further accepted that there were considerable risk factors associated with the ongoing litigation, and noted the non-settling defendants had withdrawn their objections to the proposed settlements: at paras. 23–25.

[36] Based on the materials presented, the judge found that a *prima facie* case for certification for settlement purposes was made out in respect of both proposed settlements; both were fair, reasonable, and in the best interests of class members. Accordingly, he certified the class, for settlement purposes only, as between the parties to the proposed settlement agreements and in accordance with their terms, and approved both settlements: at paras. 26–30.

The Applications

[37] Lac La Ronge filed notices of appeal with respect to "all parts of" the Intervention Order and the Settlement Approval Order. It seeks the same relief in both appeals: orders granting it leave to intervene in the certification and settlement approval hearing in the court below, and orders dismissing the application for certification and settlement approval. It has not sought a stay of the Settlement Approval Order.

[38] Shortly after Lac La Ronge filed the notices of appeal, the Province applied for orders quashing both appeals.

Sequencing Decisions

[39] Counsel for the Province wrote to the Registrar seeking a direction that the application to quash be heard in advance of the appeals of the Intervention Order and the Settlement Approval Order. Lac La Ronge responded that the application should be heard at the same time as the appeals.

[40] The Registrar considered it appropriate for the application to quash to be heard in advance of a full hearing of the appeals. Pursuant to Rule 60(4) of the *Court of Appeal Rules*, B.C. Reg. 120/2022, he set the application before a division of the Court. Lac La Ronge applied to cancel or vary that direction, and it sought an order that the application be heard together with the appeals.

[41] In reasons indexed at 2023 BCCA 117, Justice Skolrood dismissed Lac La Ronge's application to cancel or vary the direction of the Registrar. He held that the Registrar had discretion to order the application be heard in advance of the appeals, and saw no basis upon which to interfere with his discretionary decision. In his reasons, Skolrood J.A. observed that "it will be for the division hearing the applications to decide whether to permit them to proceed on a preliminary basis or to require them to be heard alongside the appeals": at para. 37.

[42] After Lac La Ronge's application to cancel or vary the Registrar's direction was dismissed, the Province filed an Amended Notice of Application seeking orders

quashing the appeals. In the Amended Notice, the Province cites ss. 20, 24, 44 and 45 of the *Court of Appeal Act*, Rule 60 of the *Court of Appeal Rules*, and the inherent jurisdiction of this Court as the legal basis for the application.

Positions on Application to Quash the Appeals

[43] The Province contends that Lac La Ronge has no standing to appeal the Settlement Approval Order as it is not a party to the action, nor is it bound by that order. In addition, it says, the appeals are so devoid of substance or merit that they are an abuse of process. Further, the Province argues the appeals are moot because the settlement approval hearing has concluded, the Settlement Approval Order has not been stayed, and there is no longer anything in which Lac La Ronge can intervene. For these reasons, it submits, this Court should quash both appeals and award it costs.

[44] Purdue Canada takes the same position as the Province. In doing so, it emphasizes that it is a going concern, Lac La Ronge is not its creditor, and Lac La Ronge is a stranger to the action. It characterizes the appeals as tactical and Lac La Ronge's objection to the Purdue Canada Settlement as a challenge to its freedom to contract. Like the Province, Purdue Canada seeks orders quashing both appeals and awarding it costs.

[45] Lac La Ronge responds that the application to quash should be heard and decided together with the appeals so that the appeals can be argued fully on their merits. In any event, it submits, it applied for party status below, and, as a party to an order under appeal, has standing to appeal. It also submits that the judge erred in finding it was not a creditor of Purdue Canada; holding that it had no interest in the Security Interest; and, approving the Purdue Canada Settlement given that the *CCAA* proceedings are ongoing and he lacked jurisdiction to do so. Moreover, it says, the proposed settlement was unjust due to the impact of the Security Interest on other litigants such as itself who are pursuing opioid-related claims against Purdue Canada. According to Lac La Ronge, the appeals have merit, the issues

raised are not moot, and, that being so, the application to quash should be dismissed and costs should not be awarded to the Province and Purdue Canada.

Discussion

Should the applications to quash proceed in advance of the appeals?

Statutory Framework

[46] Section 20 of the *Court of Appeal Act* provides:

> 20 (1) The court may, on application, make any order the court considers appropriate to give effect to a preliminary objection in relation to an appeal.
>
> (2) A justice may, on application,
>
> (a) quash an appeal on the basis that the court lacks jurisdiction, or
>
> (b) make any order the justice considers appropriate to give effect to a preliminary objection in relation to an appeal, other than an order dismissing the appeal.

[47] In addition, Rules 60(1) and (4) provide:

> 60 (1) This rule applies to an application to do one or more of the following:
>
> (a) strike part of a factum;
>
> (b) raise a preliminary objection to an appeal;
>
> (c) quash an appeal before it is heard.
>
> …
>
> (4) Unless a justice or the registrar orders otherwise, an application under this rule must be heard at the time of the hearing of the appeal.

Submissions of Lac La Ronge

[48] Lac La Ronge begins its submissions on sequencing by emphasizing Skolrood J.A.'s observation that it is for this division to decide whether to permit the application to quash to proceed on a preliminary basis. It contends the onus is on the Province to overcome the presumption in Rule 60(4) that the application should be heard together with the appeals, but it has not discharged that onus. In particular, Lac La Ronge contends the issues raised on the appeals cannot be fairly and efficiently presented on a preliminary application given their complexity, novelty, and importance. Rather, it says, they require proper exploration at full-blown

appeals, not summary assessment based on a preliminary application. In Lac La Ronge's submission, this is especially true in light of the Province's argument that the appeals lack any substance or merit.

[49] According to Lac La Ronge, the Province should not be afforded a "dress rehearsal" for its arguments on the merits of the appeals on a preliminary application brought under s. 20(1) of the *Court of Appeal Act*. It says this approach is inefficient and will only compound costs, and the Province would not be prejudiced by proceeding with the appeals in the regular way. In addition, Lac La Ronge submits that in arguing they lack merit the Province is essentially asking that the appeals be dismissed, not quashed, and doing so based on snippets of evidence cherry-picked from an incomplete record. However, it says, in fairness, the Province should not be allowed to avoid a full hearing on the merits and, at the same time, argue that the appeals lack merit.

[50] In support of its submissions, Lac La Ronge notes the Province's reliance on *Coburn and Watson's Metropolitan Home v. Home Depot of Canada Inc.*, 2019 BCCA 308, leave to appeal to SCC ref'd, 38873 (26 March 2020), which also involved an appeal of a settlement approval order. However, it says, in *Coburn* the issues of standing and the merits of the appeal were not bifurcated by a prioritized application to quash. Rather, the division in *Coburn* heard full argument on both the standing issue and the merits together, at a single hearing. According to Lac La Ronge, this division should follow the same approach.

[51] Lac La Ronge also relies on *Jardine v. Hyggen*, 2018 SKCA 38 in support of its position. In *Jardine*, the Court dismissed an application to quash an appeal brought on the basis that it manifestly lacked any merit. Chief Justice Richards, writing for the court, cautioned against courts "being drawn into a practice where applications to quash become a substitute for hearing appeals on their merits", particularly where assessing the merits "involves being drawn into transcripts or other aspects of the evidence": at para. 21. In addition, he noted, the power to quash is rarely exercised because it is usually very difficult to conclude an appeal is

devoid of merit without first hearing the entire appeal. Moreover, applications to quash appeals may lead to inefficiencies and duplicative expense because they might not succeed: at paras. 16–17.

[52] According to Lac La Ronge, we should be guided by the cautions and concerns expressed in *Jardine*. Bearing those in mind, it submits that, as a matter of fairness, we should decline to quash the appeals before a full hearing of the appeals.

Analysis

[53] I am not persuaded by Lac La Ronge's submissions.

[54] I accept that a preliminary objection in relation to an appeal should generally be heard and decided at the same time as the appeal, in accordance with this Court's usual practice. That general practice is reflected in Rule 60(4) and responds to the twin procedural demands of fairness and efficiency. As I see it, those demands are largely complementary, not competing, in nature. Efficiency is context-dependent, and, appropriately conceived and targeted, it does not detract from the fairness of appellate proceedings. On the contrary, it enhances the fairness of an appeal.

[55] I also accept that the Province bears the onus of justifying a departure from this Court's general practice of hearing preliminary applications at the same time it hears the appeals brought for its determination. However, in the exceptional circumstances at issue here, I conclude the Province has discharged that onus and established the appeals can be fairly and efficiently disposed of on its preliminary application to quash.

[56] In reaching this conclusion, I do not accept Lac La Ronge's submission that by arguing the appeals lack merit the Province is really seeking their dismissal, not orders quashing them. Nor do I accept the Province would gain an unfair advantage by avoiding full-blown appeals. While rarely exercised for the reasons explained in *Jardine*, this Court has a well-established jurisdiction to quash appeals so manifestly

devoid of substance or merit that it would to be an abuse of process to allow them to continue through the normal appeal process to the point of hearing and decision: *Grewal v. Grewal*, 2017 BCCA 261 at paras. 15–16. There is nothing untoward about the Province seeking to invoke that jurisdiction on this preliminary application.

[57] These appeals are not like *Jardine*, which involved an appeal of a summary dismissal of a defamation claim with credibility issues and challenged factual findings. In contrast, on these appeals the salient facts are not in dispute, although the characterization and implications of the facts are contested. Nor are the relevant legal principles novel, complex or controversial. On the contrary, they are well-established and clear. For the reasons discussed below, the effect of applying those principles in the present context is equally clear; the appeals are bound to fail.

[58] Given the manifestly meritless nature of these appeals, I see no good reason to require anyone concerned to expend the time and resources associated with the normal appeal process. Rather, in my view, it is appropriate to determine the application to quash at this preliminary stage.

Does this court have jurisdiction to hear the appeals? If so, should they be quashed in any event?

Governing Principles

[59] This Court is a statutory court. Accordingly, its jurisdiction to entertain an appeal must be rooted in statute. For present purposes, the relevant statutes are the *Court of Appeal Act* and the *Class Proceedings Act*.

[60] Section 13 of the *Court of Appeal Act* sets out this Court's appellate jurisdiction:

> 13(1) An appeal may be brought to the court
>
> (a) from an order of
>
> (i) the Supreme Court, or
>
> (ii) a judge of the Supreme Court, or
>
> (b) in any matter for which jurisdiction is given to the court under an enactment of British Columbia or Canada.

> …
>
> (3) If another enactment of British Columbia or Canada provides that there is no appeal or a limited right of appeal from an order or matter referred to in subsection (1), that enactment prevails.

[61] To enjoy a right of appeal, a person or entity must be party to the proceeding that produced the order. In *Cambridge Mortgage Investment Corporation v. Matich*, 2014 BCCA 377, Justice Saunders explained why:

> [24] An appellant is defined in s. 1 of the *Court of Appeal Act* as "the party bringing an appeal". To enjoy a right of appeal a person or entity must be a party to the proceeding that produced the order, and thus be bound by an order in that proceeding: *Kitimat (District) v. Alcan Inc.*, 2006 BCCA 562, *Fraser Valley Refrigeration Ltd. v. British Columbia (Attorney General)*, 2009 BCCA 576.

[62] Although the current *Court of Appeal Act* uses different wording to define "appellant", the result is the same. An intervenor is not a party to a proceeding. Accordingly, where a person or entity was granted intervenor status in the court below they have no right to bring an appeal: *The Law Society of British Columbia v. The Society of Notaries Public of British Columbia*, 2014 BCCA 233 at para. 8. Nor does having an interest in the subject matter of an order and making submissions in the court below render a person or entity "a party to the proceeding that produced the order", and thus confer standing to appeal: *Goldberg v. Law Society of British Columbia*, 2022 BCCA 388 at para. 22; *Coburn* at para. 9.

[63] In *Coburn*, Justice Harris discussed the principles that govern standing to appeal and their application. In doing so, he noted that although the proposed appellant in *Richard Niebuhr Enterprises Ltd. (c.o.b.) Niebuhr Constructions v. Vancouver (City) Board of Variance*, 2007 BCCA 528 was allowed to make submissions below in a judicial review proceeding, she lacked standing to appeal. The order in question reinstated a decision approving a development permit for a neighbourhood property, and the proposed appellant was served with the petition materials as a person "whose interests may be affected by the orders sought". Nevertheless, this Court rejected her submission that the order directly affected her because it limited her right as a neighbour to appeal the permit approval, concluded

she lacked standing, and, citing *Kitimat (District) v. Alcan Inc.*, 2006 BCCA 562, emphasized that a person not yet recognized as a full party cannot unilaterally designate themselves as such merely by filing a form.

[64] Justice Harris also referred to cases in which standing to appeal was denied where the proposed appellants, though parties to the action, were not parties to the *lis* in question in the subject order. For example, he noted, in *Oliver (Guardian ad litem of) v. Ellison* (1996), 18 B.C.L.R. (3d) 337, 1996 CanLII 1606 (C.A.), the co-plaintiff mother lacked standing to appeal a settlement approval order although she had made submissions in the court below as a friend of the court on the reasonableness of settlement reached by the Public Guardian on behalf of her child and despite the effect of the settlement on her fortunes. Nor did the federal and provincial governments have standing to appeal orders approving fee agreements for counsel representing Hepatitis C victims in *Endean v. Canadian Red Cross Society*, 2000 BCCA 638 even though they were parties in the action, made submissions in the court below, and had a continuing financial interest in the settlement: see *Coburn* at paras. 10–12.

[65] In the class proceedings context, the representative plaintiff is the party with authority to conduct the litigation on behalf of class members, including the right to terminate the proceeding by settlement. Class members who do not opt out of a class proceeding are not parties in relation to a settlement or its approval by the court. Accordingly, a class member "does not have an automatic status as a party to appeal an order approving settlement": *Coburn* at para. 16. Moreover, s. 36 of the *Class Proceedings Act* specifies the types of orders that may be appealed in class proceedings, who may appeal them, and whether an appeal is as of right or requires leave. Class members have no right of appeal in respect of a settlement approval order under s. 36: at paras. 17, 20, 24–25.

[66] Following his discussion of appeal rights under the *Class Proceedings Act*, Harris J.A. identified one additional avenue of appeal that might be available, namely, the exercise of this Court's original jurisdiction: *Coburn* at para. 41. Section

24(2)(c) of the *Court of Appeal Act* (like its predecessor, s. 9(3)) provides that on an appeal, this Court may "exercise any original jurisdiction that may be necessary or incidental to the hearing and determination of an appeal". Pursuant to s. 24(3)(b), the Court may exercise those discretionary powers "in favour of any person, whether or not the person is a party to the appeal".

[67] The test for conferring a right of appeal on a non-party focuses on whether they would have been a proper, if not necessary, party to the action. Relevant factors for consideration include whether the non-party can show that: i) their interest was not represented at the proceeding; ii) they have an interest that will be adversely affected by the decision; iii) they are or can be bound by the order; iv) they have a reasonably arguable case; and, v) the interests of justice in avoiding a multiplicity of proceedings would be served by granting them leave to appeal: *S.St.C. v. S.C.*, 2017 YKCA 7 at para. 26, citing *Société des Acadiens v. Association of Parents*, [1986] 1 S.C.R. 549, 1986 CanLII 66 at 594–595.

[68] Ultimately, the Court in *Coburn* quashed an appeal of a settlement approval order brought by objecting non-party class members on the basis that it lacked jurisdiction under the *Court of Appeal Act* and the *Class Proceedings Act*. It also declined to grant the objecting non-party class members leave to appeal under s. 9(3) (now s. 24(2)(c)) of the *Court of Appeal Act*. Nevertheless, Harris J.A. recognized that a settlement approval order might be granted below in extraordinary circumstances that would justify the Court exercising its discretion to grant leave to appeal to an objecting non-party class member. These might include breaches of procedural fairness or demonstrable injustice in the order. What is required, he explained, are circumstances that go beyond the inherent procedures of the *Class Proceedings Act* or orders that arguably amount to a miscarriage of justice: *Coburn* at para. 48.

Submissions of Lac La Ronge

[69] Lac La Ronge submits that it has standing to appeal because it applied for party status, is a party to the Intervention Order, and is affected by both orders.

However, it says, to the extent that leave may be required to appeal the Settlement Approval Order, this Court should grant it leave under s. 24(2)(c) of the *Court of Appeal Act*.

[70] According to Lac La Ronge, the judge erred in declining to grant it leave to intervene and party status at the settlement approval hearing. In its submission, contrary to the judge's finding, it is a creditor of Purdue Canada. This is so, it says, because: the *CCAA* defines a "claim" as any "claim provable" within the meaning of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 [*BIA*]; the *BIA* defines a "creditor" as a person who has a "provable claim"; under s. 121(1) of the *BIA*, a "provable claim" includes both present and future liabilities respecting any obligation incurred before the date of bankruptcy; and hence it has a "provable claim" against Purdue Canada. Based on this reasoning, Lac La Ronge contends the judge erred in finding that it was not a creditor of Purdue Canada. He erred further, it says, in finding it had no interest in the Security Interest, whether as a creditor or not.

[71] Relying on *Monaco v. City of Coquitlam*, 2014 BCSC 2090, Lac La Ronge goes on to submit that the judge should have added it as a party at the settlement approval hearing because it has a direct interest in the Purdue Canada Settlement. In *Monaco*, Justice Abrioux (then of the trial court) pointed out that a person with a direct interest in the outcome of an action should be added as a party, not as an intervenor: at para. 20, citing *International Forest Products v. Kern*, 2000 BCSC 1087 at para. 20, leave to appeal ref'd, 2000 BCCA 501. According to Lac La Ronge, the Settlement Approval Order "creates" the Security Interest over Purdue Canada's assets, and therefore its interests are directly and adversely affected by the Settlement Approval Order.

[72] Lac La Ronge goes on to submit that *Coburn* and this case are significantly distinguishable because *Coburn* concerned the standing of objecting non-party class members to appeal a settlement approval order. However, it says, it is not a class member in the action, which means there was no process for it to object to the Purdue Canada Settlement and it cannot avoid its effect by opting out. In addition, it

says, the objecting class members in *Coburn* merely made submissions at the settlement approval hearing, whereas it made a formal application for party status. Furthermore, it argues that the exceptions to the presumptive rule against granting non-parties standing in class proceedings discussed in *Coburn* all apply in the circumstances of this case.

[73] Specifically, Lac La Ronge contends that it was procedurally unfair for the judge not to order the provision of notice under s. 2(2)(b)(ii) of the *Class Proceedings Act* to those affected by the Security Interest. It says this lack of notice prevented it from appealing the Intervention Order in advance of the settlement approval hearing. However, it submits, notice was required based on the similar nature of the subject matter of this action and other class proceedings, including its own putative class action in Saskatchewan. In addition, given the extraordinary nature of the Security Interest, it contends that non-class members should have been notified under s. 21 of the *Class Proceedings Act*. Moreover, it says, the judge lacked jurisdiction to certify a reversionary opt-in class of provincial governments and order a Security Interest that affects non-class members, and the Settlement Approval Order caused injustice due to the adverse impact of the Security Interest on other litigants affected by the opioid crisis, for whom nothing will be left to satisfy their claims.

[74] As to the merits of the appeals more generally, Lac La Ronge submits that the appeals plainly have substance and merit. In addition to the errors already discussed, it says the judge erred by not requiring the Province and Purdue Canada to make full disclosure before deciding whether to approve the Purdue Canada Settlement, citing *Jones v. Zimmer GMBH*, 2016 BCSC 1847 at paras. 40, 45. According to Lac La Ronge, the Province and Purdue Canada failed to provide full disclosure regarding the Security Interest and the international bankruptcy proceedings, and the judge erred by failing to require Purdue Canada to disclose proof of its solvency. In addition, it says, the judge erred by failing to admit the helpful evidence it proffered to supplement the incomplete record, and in finding a

class action settlement approval hearing preferable to *CCAA* proceedings for determining whether the Security Interest was fair and reasonable.

[75] Based on all of the foregoing, Lac La Ronge argues that it has standing to appeal, the appeals have merit, and, if necessary, it should be granted leave to appeal the Settlement Approval Order. In its submission, it follows that this Court has jurisdiction to hear the appeals and they should not be quashed.

Analysis

[76] In my view, Lac La Ronge clearly has standing to appeal the Intervention Order. As an applicant for leave to intervene and party status at the settlement approval hearing, it was a party to the proceeding that produced the Intervention Order, by which it is bound.

[77] However, given its lack of success on that application, Lac La Ronge is equally clearly not a party to the Settlement Approval Order and thus lacks standing to appeal that order. As is apparent from *Coburn* and the other authorities discussed above, making submissions at a settlement approval hearing does not confer party status or standing to appeal, and an entity not yet recognized as a full party cannot unilaterally designate itself as such. It follows that, unless leave is granted under s. 24(2)(c) of the *Court of Appeal Act*, Lac La Ronge has no standing to appeal the Settlement Approval Order and the appeal of that order should be quashed.

[78] Given that Lac La Ronge does have standing to appeal the Intervention Order, the next question is whether that appeal is so devoid of merit that it would be an abuse of process to allow it to continue through the normal appeal process. I conclude the appeal is manifestly meritless, and, for that reason, should also be quashed.

[79] I reach this conclusion bearing in mind the standard of review in respect of discretionary orders made by case management judges. As Justice Butler observed in *British Columbia v. The Jean Coutu Group (PJC) Inc.*, 2021 BCCA 219, such

orders are afforded a high degree of deference on appeal. In particular, this Court will interfere with the discretionary order of a case management judge only where the judge erred in principle, failed to consider or weigh all relevant circumstances, clearly and demonstrably misconceived the evidence, or made an order resulting in a clear injustice: *Jean Coutu Group* at paras. 30–32.

[80] In my view, it is abundantly clear from his reasons that the judge made no such error in declining to grant Lac La Ronge leave to intervene and party status. He identified and applied the *Carter* test based on a manifestly full and accurate appreciation of the relevant principles, evidence, and circumstances. There is no prospect that the Intervention Order will be overturned on appeal.

[81] Contrary to Lac La Ronge's submissions, there was no basis upon which the judge could have concluded that Lac La Ronge was a current creditor of Purdue Canada or that Purdue Canada was insolvent. The evidence simply revealed that Lac La Ronge is a plaintiff in a putative class action for opioid-related harms, and Purdue Canada is involved in the *CCAA* proceedings as a related party of Purdue U.S. Although circumstances might change at some point in the future, the judge was obliged to deal with matters as they demonstrably stood.

[82] Nor could the judge have concluded that Lac La Ronge had a direct interest in the Purdue Canada Settlement, the Security Interest, or the Settlement Approval Order. Regardless of their potential effect on its future financial prospects, Lac La Ronge is a complete stranger to the litigation. It is not bound by the Settlement Approval Order and that order does not determine any of its future legal rights.

[83] Further, there is no merit to Lac La Ronge's submissions regarding the judge's other purported errors. As he recognized, the multi-jurisdictional provisions of the *Class Proceedings Act* were not engaged, notice was not required, and the evidence presented provided a sufficient basis for him to assess whether the Purdue Canada Settlement should be approved. Moreover, in *Sandoz Canada Inc. v. British Columbia*, 2023 BCCA 306, leave to appeal to SCC granted, 40864 (9 November 2023), this Court ruled that the judge did not err in upholding the constitutional

validity of multi-Crown class actions contemplated by the *Opioid Health Care Costs Recovery Act*.

[84] I also agree with the Province and Purdue Canada that the issues raised by the appeals are moot. The settlement approval hearing has concluded, the Purdue Canada Settlement has been approved, and there is no live controversy that affects or may affect the rights of the parties: *Independent Contractors and Businesses Association v. British Columbia (Attorney General)*, 2020 BCCA 245 at paras. 7–10. As the appeal of the Settlement Approval Order should be quashed because Lac La Ronge lacks standing to appeal, there is nothing left for it to intervene in. The dispute has disappeared.

[85] For substantially the same reasons that I would quash the appeal of the Intervention Order, I would not grant Lac La Ronge leave to appeal the Settlement Approval Order under s. 24(2)(c) of the *Court of Appeal Act* as a non-party. In particular, in my view, Lac La Ronge would not have been a proper party in the settlement approval process in the court below. In addition, and importantly, I see no possible injustice to Lac La Ronge associated with the Settlement Approval Order given that Justice Conway expressly preserved its right to object to the Security Interest in the Purdue Canada Settlement in the *CCAA* proceeding. In my view, that is plainly the proper forum for its expressed concerns.

Should this court award costs in favour of the Province and Purdue Canada?

[86] Finally, regardless of the outcome of this application, Lac La Ronge submits that this Court should not award costs to the Province and Purdue Canada. In support of its submission, it emphasizes that costs were neither sought nor ordered in the court below. It also emphasizes that costs are generally not awarded for or against an intervenor, and that this was a no-costs certification application pursuant to s. 37(1) of the *Class Proceedings Act*.

[87] In my view, the Province and Purdue Canada are entitled to their costs on the application. Lac La Ronge lacks standing to appeal the Settlement Approval Order,

the appeal of the Intervention Order is manifestly meritless, and Lac La Ronge sought status as a party, not as an intervenor.

Conclusion

[88] For the foregoing reasons, I would quash both appeals and award costs of the application to the Province and Purdue Canada.

"The Honourable Justice Dickson"

I AGREE:

"The Honourable Chief Justice Marchand"

I AGREE:

"The Honourable Mr. Justice Butler"