IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *I.F. v. Gilead Sciences, Inc.,*
2024 BCSC 1479

Date: 20240814
Docket: S214133
Registry: Vancouver

Between:

I.F. and P.S.

Plaintiffs

And

Gilead Sciences, Inc. and Gilead Sciences Canada Inc.

Defendants

Before: The Honourable Mr. Justice Brongers

Reasons for Judgment on Costs

Counsel for the Plaintiffs:	D. Klein N.C. Hartigan B.D. Ryan
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Written Submissions Received:	May 13 and 27, 2024 June 3, 2024
Place and Date of Judgment:	Vancouver, B.C. August 14, 2024

Introduction

[1] This is my decision on costs further to my reasons for judgment indexed as *I.F. v. Gilead Sciences Inc.,* 2024 BCSC 480 ("Reasons").

[2] The parties to this proceeding are the plaintiffs I.F. and P.S. (collectively referenced as the "Plaintiffs"), and the defendants Gilead Life Sciences, Inc. and Gilead Sciences Canada Inc. (collectively referenced as "Gilead").

[3] The Reasons relate to three applications that were heard during a hearing that took place from September 26 to 28, 2023:

> (a) the Plaintiffs' class action certification application;
>
> (b) the Plaintiffs' application for leave to tender a tardy affidavit; and
>
> (c) Gilead's application to dismiss the plaintiffs' claims (entailing a Rule 9-5 application to strike and a Rule 9-6 application for summary judgment).

[4] In my Reasons dated March 22, 2024, I allowed the Plaintiffs' two applications and dismissed Gilead's application. At para. 143 of the Reasons, I wrote:

> [143] There is a strong presumption against the awarding of costs in respect of a class proceeding certification application as per s. 37 of the [*Class Proceedings Act*]. However, this presumption does not expressly apply in respect of cross-applications to dismiss claims that are proposed to be certified as class actions. If the parties are unable to agree on costs in respect of the three applications decided here, they may contact Supreme Court Scheduling within 30 days of the date of these reasons for judgment to schedule a hearing on this issue before me.

[5] After failing to reach an agreement on costs, the parties requested and were granted permission to produce written submissions on the issue. My consideration of these submissions is as follows.

The Parties' Positions

The Plaintiffs' Position

[6] The Plaintiffs say that Gilead should pay the Plaintiffs' costs in the cause for responding to Gilead's failed application to dismiss, in accordance with ordinary costs principles. The Plaintiffs submit that this was a "pre-certification application", to which the presumption against awarding costs prescribed by s. 37 of *Class Proceedings Act,* R.S.B.C. 1996, c. 50 [*CPA*], does not apply.

[7] On the other hand, the Plaintiffs expressly state in their submissions that they are not seeking costs for their successful certification application.

[8] The Plaintiffs make no mention of their successful application for leave to tender a tardy affidavit. I interpret this silence as meaning that the Plaintiffs do not seek costs for this application either.

Gilead's Position

[9] Gilead says that no costs are payable in respect of its application to dismiss. Gilead denies that this was a pre-certification application, arguing that it was inextricably linked with the Plaintiffs' certification application. Therefore, the "no costs rule" established by s. 37 of the *CPA* is engaged. Since the Court had already embarked on a certification inquiry when Gilead's application was argued, and having now granted certification, Gilead submits that it is immunized from an adverse costs award.

[10] Gilead's submissions do not address costs in relation to the Plaintiffs' two applications. I interpret this silence as agreement with the Plaintiffs that no costs should be awarded for them either.

Analysis

[11] The only matter in dispute is whether costs in the cause should be awarded to the Plaintiffs in respect of Gilead's application to dismiss.

[12] As noted by the Plaintiffs, ordinary costs principles as prescribed by Rule 14-1(9), (12), and (15) of the *Supreme Court Civil Rules,* B.C. Reg. 168/2009, militate presumptively in favour of such an award. This is because the Plaintiffs were wholly successful in opposing Gilead's pre-trial application. The issue is whether this presumption is overridden by s. 37 of the *CPA*. It states:

> **37**(1) Subject to this section, neither the Supreme Court nor the Court of Appeal may award costs to any party to an application for certification under section 2 (2) or 3, to any party to a class proceeding or to any party to an appeal arising from a class proceeding at any stage of the application, proceeding or appeal.
>
> (2) A court referred to in subsection (1) may only award costs to a party in respect of an application for certification or in respect of all or any part of a class proceeding or an appeal from a class proceeding
>
> (a) at any time that the court considers that there has been vexatious, frivolous or abusive conduct on the part of any party,
>
> (b) at any time that the court considers that an improper or unnecessary application or other step has been made or taken for the purpose of delay or increasing costs or for any other improper purpose, or
>
> (c) at any time that the court considers that there are exceptional circumstances that make it unjust to deprive the successful party of costs.

[13] Four jurisprudential authorities that have considered s. 37 of the *CPA* were brought to my attention by the parties in their written submissions:

a) *British Columbia v. Apotex Inc.,* 2020 BCSC 1335:

b) *Nickel v. Weyerhaeuser Company Limited,* 2018 BCSC 570;

c) *The Consumers' Association of Canada et al. v. Coca-Cola Bottling Company et al,* 2006 BCSC 1233, aff'd *The Consumers' Association of Canada v. Coca-Cola Bottling Company et al*, 2007 BCCA 356 [*Consumers' Association*]; and

d) *Edmonds v. Accton Super-Save Gas Stations Ltd.,* 5 C.P.C. (4th) 105*,* 1996 CanLII 4102 (B.C.S.C.).

[14] All of these cases set out as a general proposition that s. 37 of the *CPA* does not displace the ordinary costs principles set out in the *Rules* prior to certification of a class action. This was expressed by then Justice Brenner in *Edmonds* in these words:

> [4] With respect to the contention that the court ought to be mindful of s. 37 of the *Class Proceedings Act*, it is clear in my view that that provision only applies and becomes operative once the court embarks upon an application for certification under the statute. Until such time as a certification hearing commences, the litigation is ordinary litigation and it is governed by the Rules of Court.

[15] In *Consumers' Association,* the Court of Appeal held:

> [12] The *Class Proceedings Act* provides protection to plaintiffs with respect to costs orders, but not prior to the certification application. The statute gives no direction to the Court as to the awarding of costs if the proceedings are dismissed prior to the application for certification. It follows that when the action is dismissed prior to the application for certification the ordinary rule applies, namely, that costs follow the event.

[16] While not cited by the parties, the Court of Appeal's decision in *Smith et al. v. Canada (Attorney General),* 2006 BCCA 407, is to the same effect:

> [6] ... First of all, this action was struck out prior to certification and therefore it had not crossed the threshold of the no costs regime. As was pointed out by Mr. Justice K. Smith, while a member of the Supreme Court, in *Killough v. Canadian Red Cross Society*, [1998] B.C.J. No. 3019 (Q.L.), prior to certification the ordinary rules as to costs should apply. He said, at paragraph 15:
>
> > THE COURT: In my view, s. 37 has no application here. Subsection (1) deals with costs of the certification application. We have not dealt with that yet. Subsection (2) deals with costs in a class proceeding and it is clear from s. 2 of the Act that there is no class proceeding until a certification order is made under s-s (2). In my view, we are dealing with an ordinary action at this stage and the ordinary rules should apply. The plaintiffs should have their costs of the adjournment application in the cause and I so order.

[17] Accordingly, the question is whether Gilead's application to dismiss was a pre-certification application that was addressed and decided prior to the court having determined the Plaintiffs' certification application. If so, ordinary costs principles under the *Rules* apply. If not, s. 37 of the *CPA* applies.

[18] In my view, Gilead's application to dismiss was a pre-certification application. This is notwithstanding the fact that it was heard during the same three-day hearing at which I heard the Plaintiffs' certification application.

[19] This can be seen at paras. 36–38 of the Reasons in which I set out the analytical framework for considering the parties' applications. They indicate that I addressed and adjudicated Gilead's application to dismiss first, prior to deciding the Plaintiffs' certification application:

> [36] First, I will analyze the Plaintiffs' proposed cause of action as set out in the ANOCC in order to properly characterize it.
>
> [37] Second, I will consider the question of whether it is plain and obvious that the Plaintiffs' claim cannot succeed and, if the answer is no, the question of whether the Plaintiffs' claim raises no genuine issue for trial. The former question will be assessed by reference to just the ANOCC, while the latter question will entail consideration of the parties' evidence. If either of these two questions are answered in the affirmative, the Plaintiffs' claim will be dismissed.
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> [38] If both questions are answered in the negative, however, this will mean that I am satisfied that the first condition for certification – a viable cause of action - has been met. I will then proceed to the third and final stage of the analysis. This will entail a consideration of the four remaining conditions for certification: (1) identifiable class, (2) common issues, (3) preferable procedure, and (4) suitable representative plaintiff and litigation plan. If all four are established on the evidence, then the proposed class action will be certified.

[20] This sequential adjudication is also apparent at paras. 74–75 of the Reasons:

> [74] For the reasons set out above, I cannot grant Gilead's application to dismiss the Plaintiffs' claim. Simply put, Gilead has not met its burden to show either that the claim does not disclose a reasonable cause of action (Rule 9-5 of the *Rules*) or that the claim does not give rise to a genuine issue for trial (Rules 9-6 of the *Rules*). Gilead's application to dismiss will therefore be denied.
>
> [75] For the same reasons, I find that the Plaintiffs have met their burden to establish that their pleadings as proposed in the ANOCC disclose a reasonable cause of action. Therefore, the first statutory condition for class action certification (s. 4(1)(a) of the *CPA*) is met. Accordingly, I will proceed to consider whether the four remaining conditions (s. 4(1)(b), (c), (d), and (e) of the *CPA*) are established as well.

[21] Furthermore, there would be no issue surrounding the characterization of Gilead's application to dismiss if it had been heard and adjudicated in a separate

hearing, sequenced to take place prior to a hearing of the Plaintiffs' certification application at a later date. Such a request for a summary dismissal would undoubtedly have been treated as a pre-certification application. It would be elevating form over substance if this characterization were to change simply because the two applications were presented in a single hearing for the sake of efficiency. A similar finding was made in *Nickel,* as follows:

> [5] In my opinion Mr. Nickel is in no better position in regard to costs than were the plaintiffs in *Consumers' Association* case. Weyerhaeuser applied to dismiss Mr. Nickel's claim before the action was certified as a class proceeding. For convenience the dismissal application was heard over the same three days as was the certification application but that cannot change the principle applied in *Consumers' Association.*

[22] Finally, there is also no issue that if Gilead's application to dismiss had been granted, ordinary costs principles would have applied to presumptively entitle Gilead to a costs award, as was the case for the successful defendants in *Nickel, Consumers' Association, Smith,* and *Edmonds.* Indeed, Gilead's own notice of application indicated that Gilead was seeking its costs in the event its application had been allowed. It cannot have been the Legislature's intention when enacting s. 37 of the *CPA* that this provision would operate to deny plaintiffs a pre-certification costs award if they successfully oppose a dismissal application, but permit defendants to obtain such an award if the dismissal application is allowed.

Conclusion

[23] In sum, I find that s. 37 of the *CPA* only applies to the Plaintiffs' certification application. Section 37 of the *CPA* does not apply to Gilead's application to dismiss, as it was decided prior to adjudication of the Plaintiffs' certification application. For the same reason, s. 37 of the *CPA* does not apply to the Plaintiffs' application for leave to file a tardy affidavit either.

[24] By operation of s. 37(1) of the *CPA*, no costs are payable in respect of the Plaintiffs' certification application unless one of the circumstances set out in s. 37(2) of the *CPA* are found to exist. These include vexatious or abusive conduct, the taking of unnecessary or improper steps, or an exceptional situation that makes it

unjust to deprive the successful party of costs. There is no suggestion that any such circumstances are present here. Accordingly, there will be no costs awarded in respect of the Plaintiffs' certification application.

[25] Turning to Gilead's application to dismiss, ordinary costs principles under the *Rules* apply. The Plaintiffs successfully opposed the application. They are presumptively entitled to an award of costs in the cause by virtue of Rule 14-1(9), (12), and (15). I can see no reason to depart from this presumption, and such an award will be made.

[26] Ordinary costs principles also apply to the Plaintiffs' successful application for leave to tender a tardy affidavit. It was not opposed by Gilead, and the Plaintiffs have not asked for their costs to produce it. In these circumstances, the Plaintiffs will bear their own costs of this particular application.

Disposition

[27] Gilead is ordered to pay the Plaintiffs their costs in the cause of Gilead's application to dismiss at Scale B.

[28] No costs are payable by or to any of the parties in respect of the Plaintiffs' certification application, and in respect of the Plaintiffs' application for leave to tender a tardy affidavit.

"Brongers J."