SUPERIOR COURT
(Class Action Chamber)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

N° : 500-06-001004-197

DATE : February 16, 2021

PRESIDING: THE HONOURABLE GARY D.D. MORRISON, J.S.C.

RICCARDO CAMARDA

Applicant

v.

ABBOTT LABORATORIES LTD.
APOTEX INC.
ARALEZ PHARMACEUTICALS CANADA INC.
BGP PHARMA ULC
BOEHRINGER INGELHEIM (CANADA) LTD.
BRISTOL-MYERS SQUIBB CANADA CO.
CHURCH & DWIGHT CANADA CORP.
COBALT PHARMACEUTICALS INC.
ETHYPHARM INC.
GLAXOSMITHKLINE INC.
HIKMA LABS INC.
JANSSEN INC.
JODDES LIMITED
LABORATOIRE ATLAS INC.
LABORATOIRE RIVA INC.
LABORATOIRES TRIANON INC.
MERCK FROSST CANADA & CO.

MYLAN PHARMACEUTICAL
NOVARTIS PHARMACEUTICALS CANADA INC.
PALADIN LABS INC.
PFIZER CANADA ULC
PHARMASCIENCE INC.
PRO DOC LTÉE
PURDUE FREDERICK INC.
PURDUE PHARMA
ROXANE LABORATORIES INC.
SANDOZ CANADA INC.
SANI HEALTH INC.
SANOFI-AVENTIS CANADA INC.
SUN PHARMA CANADA INC.
TEVA CANADA LIMITED
VALEANT CANADA LIMITED
VALEANT CANADA LP
4490142 CANADA INC., F.K.A. AS MEDA VALEANT PHARMA CANADA INC.

Respondents

JUDGMENT
(on an application for the communication of medical records)

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[1] Respondents to an Amended Application for authorization to institute a class action (the “Application”), jointly seek the communication of certain of Applicant’s medical and pharmaceutical records at the authorization stage, which the latter contests.

1- CONTEXT

[2] The Court must decide whether to allow such communication of the Applicant’s medical and pharmaceutical records, in addition to those which have already been communicated on a voluntary basis.

[3] For the reasons that follow, the Court will dismiss the Respondents’ Joint Application for the Communication of Documents.

2- RELEVANT ISSUES

[4] Applicant seeks to institute a class action against 34 parties, all of whom allegedly manufactured, marketed, distributed and/or sold opioids to residents of Quebec from 1996 onwards.

[5] The putative class would be all persons in Quebec who have been prescribed and have consumed such opioids and who suffer or have suffered from opioid use disorder, as well as their heirs.

[6] Applicant alleges that Respondents deliberately misrepresented that opioids were less addictive than they knew them to be and were also negligent as regards, amongst other commercial activities, the distribution, sale and marketing of opioids in Quebec, having failed to adequately warn users of the serious and potentially fatal harm associated with opioid use.

[7] He further alleges that there has been an opioid crisis in Quebec, which backdrops his claim.

[8] Applicant seeks compensatory, individual pecuniary and punitive damages on his own behalf and that of all class members.

[9] As regards his own situation, Applicant, a Quebec resident, alleges that he was prescribed opioids for nearly 12 years and was treated for severe opioid use disorder in 2018 at an in-patient medical facility.

[10] He claims that he had not been informed about the addictive and devastating effects that his use of opioids for chronic pain could cause.[1]

[11] The medical records of Applicant that Respondents presently seek to access are the following:

- (i) his complete medical records at the Royal Victoria Hospital (2006-2018);
- (ii) his complete medical records held by other healthcare providers, clinics and hospitals where he had consultations with respect to opioids or which led to the prescription of opioids;
- (iii) his complete pharmaceutical records, where prescriptions of opioids were dispensed;

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1 Application, par. 2.164.

(iv) his complete Public Prescription Drug Insurance Plan spreadsheet regarding the prescriptions of opioids he was dispensed ("PPDIP spreadsheet");

(v) his complete records with any private insurance company providing coverage for prescription medications, where prescriptions of opioids were dispensed.

[12] Essentially, Respondents jointly argue the need to access such information for the following reasons:

- If approved, the class action will be "*gigantesque*", akin to the tobacco class action, involving 34 defendants and 18 different products, over a period of 24 years, such that they should be entitled to assess Applicant's state of health for the purposes of the authorization hearing;

- Respondents need to be able to understand Applicant's history of consuming opioids;

- Respondents need to be able to verify whether Applicant was warned of the risks of opioid use;

- Respondents require complete pharmaceutical records, and not simply a list of medications taken by Applicant;

- Respondents are entitled to know which opioids Applicant actually used.

[13] Respondents contend that the Application contains "*only bald, vague and imprecise allegations*" regarding Applicant's use of opioids, describing numerous examples which they consider to qualify as such.[2]

[14] It was argued that it would be a "*miscarriage of justice*" if Respondents were not given a chance to access the evidence at this stage so as to defend themselves.

[15] Applicant refuses to provide all the requested medical records, arguing that Respondents are seeking to build and present their defence at the authorization stage, particularly in order to contest Applicant's allegation that he had not been informed of the addictive and devastating effects that opioid use could cause.

[16] In this regard, he argues Article 1473 C.C.Q. in that the Respondents have the burden to prove, on the merits, that Applicant knew or could have known of the product

[2] *Defendants' Joint Application for the Communication of Documents*, par. 10.

defects or could have foreseen the injury. That is not, he argues, his burden, certainly not at the authorization stage where he need only demonstrate a defendable case.

[17] Moreover, Applicant has already provided Respondents with information from his medical records, which is not denied. Medical records regarding his detoxification for severe opioid use disorder have been given to Respondents.

3- LEGAL PRINCIPLES

[18] The filing of evidence which the Court may allow prior to authorization is to be limited to "relevant evidence" ("*une preuve appropriée*"), and this pursuant to Article 574 C.C.P.

[19] In this regard, it is not sufficient that such proof may eventually be relevant for the merits of the case, but it must, even more importantly, be relevant specifically for the authorization analysis to be conducted in accordance with Article 575 C.C.P.[3]

[20] Clearly, and as is often stated in case law, the Court is not to conclude during the authorization phase as to the merits of the claim. It is in keeping with this underlying principle that allegations of fact by applicants are treated as being true and, further, that the burden of the applicant at authorization is one of logical demonstration as opposed to the preponderance of proof.

[21] As a result, there is a very limited purpose for a judge to allow contradictory evidence to be adduced at the authorization stage since, when faced with such proof, the general rule is to treat an applicant's allegations of fact as true, unless of course they appear improbable or manifestly inexact, thereby rendering the case frivolous, untenable or clearly unfounded. That said, the concept of allowing contradictory proof at this early stage should not be treated as an open door to allowing proof at the authorization stage that would give rise to an analysis thereof as if the Court were hearing the case on the merits. That slippery slope must be avoided by the authorization judge.

[22] And given that only allegations of fact are to be taken as true, as opposed to inferences, conclusions, unverified hypothesis, legal arguments or opinions[4], it is only logical to conclude that the Court should be extremely reticent to authorize parties to adduce as so-called evidence, elements which are tantamount to such inferences, conclusions, hypothesis, arguments or opinions.

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3 *Lambert (Gestion Peggy)* v. *Écolait Ltée*, 2016 QCCA 659, at paras. 37-38.

4 *Option Consommateurs* v. *Bell Mobilité*, 2008 QCCA 2201; *Harmegnies* c. *Toyota Canada inc.*, 2008 QCCA 380, at para. 44.

[23] It is also in keeping with the objective of authorization being a filtering system that relevant proof be limited to what is essential and indispensable[5], as well as proportional, to the authorization analysis.

[24] Accordingly, and to use expression of the Court of Appeal in *Allstate du Canada, compagnie d'assurances* v. *Agostino*, the judge in deciding on relevant proof should use moderation and prudence, applying a "*couloir étroit*"[6], a narrow corridor that runs between the rigidity of enforcing the filtering process and a generous permissiveness that can mistakenly lead the judge to conduct an analysis of the merits of the claim.

[25] The Court understands from the case law that proof which is not simply contradictory in nature as regards the case on the merits, but which might possibly demonstrate on summary analysis that allegations of fact relating to essential and indispensable matters are improbable, manifestly inexact or simply false in the context of the authorization analysis, may be allowed by the judge exercising, with prudence and moderation, his or her discretion.

[26] In other words, the narrow corridor as described by the Court of Appeal in *Asselin* may indeed be narrow, but it is definitely not inexistent. The judge is to exercise discretion on a case-by-case basis, taking into consideration what is essential, indispensable and proportional for the purposes of the authorization process.

4- <u>ANALYSIS</u>

[27] Respondents' joint position to the effect that they have "*the right to a full answer and Defence with respect to each of the criteria listed at article 575 C.P.C.*"[7] is, respectively, flawed at law.

[28] At the authorization stage, they are indeed entitled to argue against Applicant's position that the governing criteria have been met.

[29] However, that does not equate to a "*full answer and Defence*", which would be tantamount to raising at this early filtering stage the level of defence appropriate to a hearing on the merits of the matter in the event a class action were to be authorized. As mentioned, this slippery slope towards the merits of the case need be avoided.

[30] As stated above, Respondents have already been provided with certain medical records in relation to Applicant's alleged use of and addiction to opioids. They admit same in their Joint Application, as follows:[8]

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[5] *Asselin* c. *Desjardins Cabinet de services financiers Inc.*, 2017 QCCA 1673, at para. 38.
[6] 2012 QCCA 678, at para. 36.
[7] Defendants' Joint Application, *supra*, note 2, par. 7.

> *In 2018, Plaintiff entered an inpatient program at the Montreal General Hospital to treat his alleged addiction. He was given Suboxone and has been in remission ever since.*

[31] The information from his medical records that Respondents already have in hand includes a diagnosis of Applicant's condition as being opioid use disorder, a confirmation that he was treated for opioid detoxification and that he was discharged after seventeen (17) days.

[32] Respondents argue that even the communication of a list of medications that had been prescribed to Applicant, which could be provided by the RAMQ, would be insufficient.

[33] Respondents are correct in observing that in many pharmaceutical cases, allegations regarding the use of certain medication have been held to be insufficiently clear and precise such that access to medical and pharmaceutical records has been authorized. In the present matter, the Court does not consider, for the purposes of assessing the demand to adduce evidence, that such allegations are vague and imprecise in that regard.

[34] Moreover, no individual Respondent needs to know, for authorization purposes, whether Applicant used their particular product; it is not essential at this stage in claims involving multiple defendants in a given industry, and this by reason of the fact that an applicant need not have a direct cause of action against each such defendant. The case law is now consistent on the subject[9].

[35] Clearly, what Respondents actually seek to obtain in the medical and pharmaceutical records is an indication by a third-party doctor, pharmacist or some other health-care provider that, at some point in time since 2006, a warning was given to Applicant concerning the dangers of opioid use. They admit as much.

[36] In the Court's view, what Respondents seek to do in the present matter is to conduct what case law has described over the years as a "fishing expedition", whereby a party attempts to access documents with the hope, not grounded on actual facts, of finding something useful to defeat a claim.

[37] Moreover, even if a medical or pharmaceutical record were to contain a reference to a third-party warning which could possibly be said to contradict Applicant's allegation, the Court of Appeal has stated that such evidence is not always of importance at the authorization stage. The proposed proof would need give rise to an

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8 Paragraph 5.

9 *Banque de Montréal* v. *Marcotte*, 2014 CSC 55, par. 43; *Baratto* v. *Merck Canada Inc.*, 2018 QCCA 1240, par. 75.

indisputable conclusion. The Court stated it as follows in the matter of *Baratto* c. *Merck Canada inc.*[10]

> *[64] Merck soutient toutefois qu'il n'y a pas lieu de tenir les faits pour avérés lorsqu'ils sont manifestement contredits par le dossier médical du requérant, ce qui, selon elle, serait le cas en l'espèce.*
>
> *[65] Je ne puis retenir sa proposition. Bien qu'il existe un certain courant permettant l'usage du dossier médical pour réfuter les allégations contenues dans une requête en autorisation, il faut qu'il soit incontestable que la cause des dommages invoqués par le requérant ne puisse être attribuée à l'intimé pour que cela permette de refuser l'autorisation demandée. Ce n'est pas le cas ici.*

[38] In the present matter, although warnings of the type Respondents hope to find might conceivably exist, they would not necessarily result in an indisputable conclusion. Instead, they could very possibly give rise to further factual debate as to whether they were actually made to Applicant, were sufficiently clear to and understood by him or were made only after he was already suffering from opioid use disorder. Such issues are better suited to the merits stage of a class action.

[39] One must also keep in mind that Respondents are not actually seeking to file any warning they, or one of them, may have given to Applicant. Nor are they even seeking to file a third-party warning. They are not asking for permission to file anything.

[40] They are seeking to access years of medical and pharmaceutical records in the hope of finding something useful that they might want to file prior to the authorization hearing. Such broad access, the Court will not authorize. So-called fishing expeditions are frowned upon in all cases; they are certainly in no better standing at the authorization stage of a class action.

[41] Given that context, what they seek to do in the present matter also stands in contradiction to the principle of proportionality.

[42] Moreover, if Respondents already possessed evidence of such a warning, they could have attempted to obtain permission to adduce it.[11] They have not done so. That is not what the Court need presently decide.

[43] Other arguments were raised by the parties, but the Court considers that it is not necessary to address those at this stage as they will not influence the outcome of the Respondents' demand and, in fact, could regrettably lead to an analysis more appropriate for other potential applications in the present matter, notably the Application in authorization.

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[10] 2018 QCCA 1240, par. 64-65.
[11] *Desjardins Cabinet de services financiers Inc.* v. *Asselin*, 2020 SCC 30, par. 72.

FOR THESE REASONS, THE COURT:

DISMISSES the joint application of Respondents for the communication of documents;

THE WHOLE with judicial costs.

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Gary D.D. Morrison, J.S.C.

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