# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Stanway v. Wyeth Canada Inc.,*
2013 BCSC 1585

Date: 20130829
Docket: S111075
Registry: Vancouver

Between:

**Dianna Louise Stanway**

Plaintiff

And

**Wyeth Canada Inc., Wyeth Pharmaceuticals, Inc., Wyeth Holdings Canada Inc., Wyeth Canada, Wyeth-Ayerst International Inc., and Wyeth**

Defendants

Before: The Honourable Madam Justice Gropper

## Reasons for Judgment
## Re: Directions for Litigation Financing Agreements

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|---|---|
| Counsel for the Plaintiff: | D. M. Rosenberg, Q.C.<br>D. Lennox<br>N. C. Hartigan |
| Counsel for the Defendants: | W. McNamara<br>N. D. W. Daube |
| Place and Date of Trial/Hearing: | Vancouver, B.C.<br>May 8, 2013 |
| Place and Date of Judgment: | Vancouver, B.C.<br>August 29, 2013 |

## Introduction

[1] The plaintiff, Dianna Stanway, seeks directions on the following questions:

a) may a court in British Columbia approve a Litigation Financing Agreement (LFA) in a class proceeding;

b) do the defendants have an interest in the approval of a LFA in British Columbia; and

c) are communications between the plaintiff and the private lender, including the LFA itself or portions thereof, privileged?

[2] This certified class action was filed in 2004. It is scheduled for trial in October 2014. Ms. Stanway hired counsel to represent her. She says she could not afford to pay for legal fees and disbursements and that counsel was therefore retained on a contingency basis. Fees and disbursements are also on a contingency basis and will only be paid if the action is successful out of the recovery.

[3] Since 2004, counsel for the plaintiff has advanced disbursements and will continue to do so as necessary. Counsel charges 10% per annum, not compounded, on these disbursements.

[4] Ms. Stanway wishes to negotiate a LFA to help cover the costs of disbursements in this action. Ms. Stanway says she will only enter into a LFA if the following terms are met:

(a) Court approval: the LFA must be subject to court approval;

(b) Notice: the LFA must be described in the notice of certification so that class members can choose whether or not to accept it by opting in/out of the class;

(c) Contingency: the LFA must be payable only in the event of success;

(d) Disbursements: the purpose of the LFA is to cover disbursements only. Given British Columbia's "no cost" rules, it is not intended to pay for an adverse cost award;

(e) Independence: the private lender shall have no say in the conduct of the lawsuit. All decisions remain the preserve of the representative plaintiff;

> (f) Qualifications: the only private lenders to be considered are those which have already been approved by Canadian courts in other cases involving LFAs;
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> (g) Confidentiality of Canadian Documents: the Plaintiff will not provide to the private lender any documents produced by the Canadian Defendants in this lawsuit which are subject to the implied undertaking rule. For greater clarity however, it is the Plaintiff's position that Canadian documents which are publicly available may be shared with the private lender. This would include documents which have already been filed as exhibits on motions in this proceeding.
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> (h) Confidentiality of American documents: the Plaintiff will not provide the private lender any documents originating from the American Defendants which are subject to the Access Order of May 24, 2006. For greater clarity however, it is the Plaintiff's position that American documents which are publicly available may be shared with the private lender. This would include documents which have been filed as trial exhibits in American proceedings, or which have been posted on the internet by the University of Southern California Drug Industry Document Archive.

## Legal Framework

### The Legislative Framework in British Columbia

[5] The *Class Proceedings Act*, R.S.B.C. 1996, c. 50 [*CPA*] grants the Supreme Court of British Columbia broad discretion to make orders it considers appropriate for the conduct of a class proceeding to ensure its fair and expeditious determination.

[6] However, the *CPA* limits the Supreme Court and Court of Appeal's jurisdiction to award costs pursuant to s. 37, which provides:

> **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.
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> (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
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> > (a) at any time that the court considers that there has been vexatious, frivolous or abusive conduct on the part of any party,
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> > (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
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> (c) at any time that the court considers that there are exceptional circumstances that make it unjust to deprive the successful party of costs.
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> (3) A court that orders costs under subsection (2) may order that those costs be assessed in any manner that the court considers appropriate.
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> (4) Class members, other than the person appointed as representative plaintiff for the class, are not liable for costs except with respect to the determination of their own individual claims.

[7] Section 38 governs fee and disbursement agreements between the solicitor and the representative plaintiff. It provides in relevant part:

> **38** (1) An agreement respecting fees and disbursements between a solicitor and a representative plaintiff must be in writing and must
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> (a) state the terms under which fees and disbursements are to be paid,
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> (b) give an estimate of the expected fee, whether or not that fee is contingent on success in the class proceeding, and
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> (c) state the method by which payment is to be made, whether by lump sum or otherwise.
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> (2) An agreement respecting fees and disbursements between a solicitor and a representative plaintiff is not enforceable unless approved by the court, on the application of the solicitor.
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> (3) An application under subsection (2) may,
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> (a) unless the court otherwise orders, be brought without notice to the defendants, or
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> (b) if notice to the defendants is required, be brought on the terms respecting disclosure of the whole or any part of the agreement respecting fees and disbursements that the court may order.
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> …

[8] The *CPA* does not make any reference to LFAs.

[9] The British Columbia courts have not considered LFAs in the context of class proceedings.

### A Comparison of Provincial Class Proceedings Regimes with Respect to Costs

[10] It is important to address the differences between the various costs regimes in place for class proceedings in provincial jurisdictions across Canada.

[11] British Columbia is a "no costs" jurisdiction pursuant to s. 37 of the *CPA*, as are Alberta and Nova Scotia. Ontario and Quebec are costs regimes and have public agencies that provide litigation funding to class action plaintiffs. In Ontario, a class proceeding fund was established under s. 59.1 of the *Law Society Act*, R.S.O. 1990, c. L.8, which is administered by the Law Foundation of Ontario. It assists Ontario plaintiffs with disbursement expenses and indemnifies plaintiffs against adverse costs awards. In Quebec, the Fonds d'aide aux recours collectifs was established by *An Act Respecting the Class Action*, R.S.Q. c. R-2.1. It is an independent agency with board members appointed by the Quebec Ministry of Justice after consultation with the Barreau du Quebec (s. 8). It may assist a Quebec plaintiff with legal fees and disbursements in exchange for a percentage of the recovery in accordance with the regulations.

[12] There is no public agency to assist class action plaintiffs with disbursements in British Columbia.

### The Purpose of LFAs and Criticisms

[13] LFAs are another mechanism for raising funds for impecunious plaintiffs to cover costs and disbursements but they have been criticized as perverting one of the key purposes of class proceedings —increasing access to justice.

[14] LFAs have been approved in Ontario (*Fehr v. Sun Life Assurance Co. of Canada*, 2012 ONSC 2715, *Dugal v. Manulife Financial Corp.*, 2011 ONSC 1785 and *Labourers' Pension Fund of Central and Eastern Canada (Trustees of) v. Sino-Forest Corp.*, 2012 ONSC 2937), Alberta (*Hobsbawn v. Atco Gas and Pipelines Ltd.* (May 14, 2009), Calgary 0101-04999 (A.B.Q.B.)) and Nova Scotia (*MacQueen v. Sydney Steel Corp.* (October 19, 2010), Halifax 218010 (N.S.S.C.)).

[15] Adrian C. Lang and Samaneh Hosseini helpfully summarize the concerns expressed in the Ontario decisions about LFAs in their article "The Absent Party: An Examination of Third-Party Funding of Class Actions in Canada" (2013) 41:1 *Advocate's Quarterly* 1 at 18:

> In the decisions released to date, the Ontario courts have found that third-party funding arrangements are not *per se* contrary to the law of maintenance and champerty or public policy. However, the courts have indicated that such arrangements will be carefully scrutinized on a case by case basis and subjected to continued court oversight. By way of summary, the courts have identified the following approaches that will be taken with respect to motions for the approval of third-party funding arrangements:
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> - all such arrangements should be disclosed and approved by the court;
> - the court must be convinced that there is no improper motive on the part of the funder and that the arrangement does not take advantage of vulnerable litigants by setting a recovery amount for the funder that is unreasonable or unfair. The cases to date make it clear that whether the reasonableness of this amount can be ascertained at the early stages of litigation may depend on whether the funder has agreed to cap its fees. While in *McIntyre Estate* [*v. Ontario (Attorney General* (2002), 218 D.L.R. (4th) 193 (O.N.C.A.) at paras. 79 - 80] and *Metzler* [*Investment GMBH v. Gildan Activewear Inc*. (2009), 81 C.P.C. (6th) 384 (O.N.S.C.)] the courts held that it was not possible to assess the reasonableness of fees based on a percentage of recovery at the early stages of litigation, such proposed fees were approved as reasonable in *Dugal* and *Sino-Forest* where the funder had agreed to a cap;
> - courts are clearly concerned that third-party litigation funding may pose a threat to the independence of representative plaintiffs and class counsel. As such, the courts will review the terms of each agreement, including terms requiring disclosure of information to the funder or participation of the funder in settlement discussions, to ensure that the agreement leaves control of the litigation and settlement in the hands of the plaintiffs. For instance, in *Metzler*, the court held that a term allowing the funder to terminate the funding agreement without cause created the potential for conflict of interest as it created the potential for the funder to influence the decision-making within the litigation to fulfill its own motivations; and
> - courts have shown concern about potential improper disclosure of defendants' confidential information to third-party funders who are not parties to the proceedings.

[16] In contrast, the Alberta and Nova Scotia courts (no costs regimes) have not adopted the same critical view of LFA approval. Those courts have approved third party funding arrangements on an *ex parte* basis without releasing reasons (18).

[17] Lang and Hosseini suggest that there are additional concerns with third-party litigation funding that have not, as of yet, been addressed by the courts. These concerns include "to what extent costs indemnities outsourced to third parties who are removed from the litigation process will be counterproductive to the principle that in appropriate cases, costs should be awarded against unsuccessful representative plaintiffs" (19) and "shifting of costs awards onto third parties is the risk that plaintiffs who are no longer responsible for paying adverse costs awards will turn down reasonable settlement offers and thereby protract litigation and drive costs up further" (20).

**Issues of Privilege and Standing with Respect to LFAs**

[18] As reviewed above by Lang and Hosseini, a central concern of courts and defendants with respect to LFAs has been improper disclosure of privileged information. This concern was disposed of in *Fehr*. In that decision, Mr. Justice Perell held that LFAs are not privileged. He considered that in a class proceedings context, privilege over a contingency agreement is more illusory than real because an agreement regarding the funding of litigation does not involve solicitor/client communications. He found at para. 77:

> In the case at bar, at this juncture, the nature of the third party agreement is not known, but I foreshadow the discussion below to say that in determining whether to approve a third party agreement, it will be necessary to consider the particularities of the funding agreement. I also foreshadow to say that in my opinion, disclosure of the type and details of the third party funding to the defendant is in the interests of the administration of justice and disclosure to the defendant may help fill an adversarial void in the process of approving or refusing third party funding agreements.

[19] Perell J. held it would be unnecessary and improper for a LFA to disclose information about the merits of the litigation or its conduct because disclosure of

such information would indicate that the third party financer had assumed control of the client's litigation (at para. 130).

[20] He further considered that no privilege attaches to the term of a LFA because it is waived. He observed:

> [139] It is arguable that when a plaintiff applies for third party funding, among other things, he or she puts in issue who is actually controlling the litigation and whether the third party funding agreement is champertous or in compliance with any regulatory regime that might apply. The terms of the agreement may have implications to whether the representative plaintiff and Class Counsel have conflicts of interest. In these circumstances, fairness requires that any privilege associated with the terms of the third party funding agreement be treated as waived.
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> …
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> [142] But I add the observation that because there is no privilege in the third party funding agreement, then as a matter of best practices, an applicant for third party funding should not include extraneous and otherwise privileged information in a third party funding agreement.

[21] Perell J. recognized the need for transparency in the LFA approval process. He agreed with the conclusions reached by Mr. Justice Strathy (as he then was) in *Dugal* that third party funding agreements were not categorically or necessarily champertous and that there were reasons to approve the third party funding agreement, such as promoting access to justice. However, Perell J. adopted a stricter view of court oversight required for LFAs. He added that the court's jurisdiction over the management and administration of proposed and certified class actions entails that a third party funding agreement must be promptly disclosed to the court and that it cannot come into force without court approval. It must be transparent and it should not be allowed to operate clandestinely (paras. 89 - 90).

[22] In this spirit of greater transparency, the Ontario courts have granted standing to defendants to appear at motions for the approval of LFAs for the following reasons:

a) the defendant may have an interest in ensuring that adequate provision has been made to satisfy an adverse costs award under the Ontario *Rules of Civil Procedure*, R.S.O. 1990, Reg. 194;

b) the defendant may have an interest in ensuring that the implied undertaking rule is complied with; and

c) the defendant may have an interest in ensuring that a private financer is not controlling the litigation.

[23] A defendant's right to standing in British Columbia is less certain. Section 38(3) of the *CPA* provides that agreements respecting fees and disbursements between a solicitor and the representative plaintiff may be brought without notice to the defendants. There is no equivalent provision under the Ontario *Class Proceedings Act*, 1992, S.O. 1992, c. 6. This distinction arises from the no costs regime in place in British Columbia. However, it is not clear that the concerns relating to LFAs are diminished in a no costs regime.

## Position of the Parties

### The Plaintiff

[24] The plaintiff argues that the LFA should be approved in the British Columbia Supreme Court as it advances the best interests of the class members. It also promotes access to justice and greater consumer choice. Finally, it allows plaintiff's counsel to focus on litigating the matter rather than devoting time to addressing the funding of disbursements.

[25] In any event, she says that costs awards are not relevant in British Columbia and the plaintiff will not seek costs indemnity from a private financer.

[26] The plaintiff says the conditions she has set out in the proposed LFA address the concerns raised by the defendants. The terms (particularly paragraphs 4 (g) and (h)) ensure the implied undertaking rule is complied with and the private financer is not controlling the litigation.

[27] The plaintiff also notes that in accordance with s. 38(3) of the *CPA*, the defendants do not have standing to appear on a LFA motion and are not entitled to notice. She points to the no costs regime in Alberta and Nova Scotia, where the courts have approved LFAs under seal through *ex parte* motions.

[28] The plaintiff maintains that some communications must remain privileged. She will have to engage in confidential communications with a private financer. The confidential communications will include an opinion letter from her counsel concerning the merits of the litigation and a litigation budget in respect of the amount of money needed. The plaintiff argues that these "highly sensitive topics" reveal her litigation strategy and trial stamina. Disclosure of this information to the defendants would put her at a severe disadvantage. She refers to *Fehr*, where Perell J. held that while the LFA may not be privileged, other communications related to the agreement are "no business of the defendant" (para. 161).

[29] The plaintiff says that if a LFA is successfully negotiated and approved by this Court, she anticipates disclosing certain terms of it to class members in the notice of certification. The notice will include the fact that a LFA has been negotiated, the incremental costs of the LFA to class members and the right of class members to exclude themselves from the litigation and the LFA by opting out and in. The defendants would receive that information in the finalized notice.

**The Defendants**

[30] The defendants assert third party funding is a significant issue and has been addressed by different provinces in different ways. They submit that each jurisdiction must develop a practice that is in accordance with the governing legislation for class proceedings.

[31] The defendants say that the plaintiff, thus far, has not disclosed most of the details concerning her intended proposal. It is therefore premature to consider its approval.

[32] The defendants say that even where a LFA can enhance access to justice, this benefit must be balanced against risks, including concern for the torts of maintenance and champerty and the integrity of the court process when it is used as a vehicle for profit or an instrument in the pursuit of an interest other than that of the litigants. The LFA may interfere with the plaintiff's control of litigation. The LFA might encourage the commencement of litigation that would not otherwise be undertaken or continued. The LFA may compromise a lawyer and client relationship and impair the lawyer's professional judgment and carriage of litigation on behalf of the client. Confidential or privileged information may be disclosed to the third party financer. The defendants further note that the third party financer owes no duty of loyalty to the plaintiff as counsel does in a contingency agreement.

[33] The defendants assert that the British Columbia legislature has chosen to address and balance the financial risk to a class action plaintiff by enacting a no costs class action regime. This legislative decision does not support the inference that LFAs should be made available to class action plaintiffs in this province. The defendants argue that the benefit to the plaintiff arising from the approval of a LFA is limited in any event; it is a benefit solely to plaintiff's counsel.

[34] In addition, the defendants argue that the LFA should not be privileged. The defendants must know the case to which they are responding. The Court cannot simply rubber stamp a LFA; rather, it is required to examine and consider its particulars. The Court should have the benefit of the defendants' submissions. In order to make those submissions, the defendants must have access to the LFA. As LFAs are controversial and import serious risks to the integrity and administration of justice, the approval process for a LFA must be transparent.

[35] The defendants argue that they have standing on a motion for approval of a LFA for the reasons set out by Perell J. in *Fehr* at para. 108. The court's practice in respect of *ex parte* submissions has been to only accept them where the delay associated with notice would result in harm or where there is fear that another party will act improperly or irrevocably if notice is given: *Ruby v. Canada (Solicitor*

*General)*, 2002 SCC 75 at para. 25. The defendants argue that they must be afforded an opportunity to be heard as their interests are affected by the introduction of a third party with a specific financial interest in the action against them. Accordingly, they should be given the opportunity to make submissions and provide crucial assistance to the Court.

[36] Finally, the defendants submit that s. 38 of the *CPA* is not applicable as it addresses the approval of an agreement respecting fees between a representative client and her solicitor, not financial arrangements involving a third party.

## Analysis

### May a British Columbia Court Approve a LFA in a Class Proceeding?

[37] I do not agree with the defendants' position that because the legislature has not specifically referred to LFAs in the *CPA*, they are not available in British Columbia. Indeed, they have been approved in other jurisdictions in spite of there being no reference to a LFA in the governing legislation. Section 12 of the *CPA* gives the Supreme Court of British Columbia broad jurisdiction to make appropriate orders. This similar provision has been relied on by the courts in Ontario and other provinces to approve LFAs provided that certain conditions are met.

### Do the Defendants Have an Interest in the Approval of a LFA in British Columbia?

[38] I accept the defendants' position that the LFA may affect their interest in that it introduces a third party with a specific financial interest in the action against the defendants. I also accept that it is a principle of natural justice that a person whose interests are affected by a proceeding be given an opportunity to speak to it. The courts and commentators have raised serious concerns in relation to the approval of LFAs. I have already referred to those concerns as summarized by Lang and Hosseini. The authors' additional concerns are clearly relevant to a costs regime but, in my view, are not relevant to my consideration to a LFA in British Columbia, a no costs regime.

[39] The plaintiff has specifically addressed those concerns in the conditions upon which she will enter into a LFA.

[40] No provision similar to s. 38 of the *CPA* exists in the Ontario legislation. The defendants point out, and I agree, that this provision only refers to agreements between the representative plaintiff and her counsel, not LFAs in particular. While it may be argued that LFAs are an adjunct to the contingency fee agreement, particularly in respect of disbursements, I do not consider that provision stands for the authority that the approval of a LFA is to be done on an *ex parte* basis.

[41] I am convinced that the defendants' input will be of crucial assistance to the Court and on that basis I find it is appropriate to give the defendants an opportunity to make submissions.

[42] I must consider whether the funding agreement appropriately manages the risks to the plaintiff's control of the litigation, the independent professional judgment of counsel and disclosure of sensitive information. While I do not in any way impugn plaintiff's counsel's ability to address these matters, I consider the defendants' participation to be advantageous. This is particularly so in the circumstances of this case where the matter has been certified and there have been several pretrial applications which I have heard and determined. If the representative plaintiff proposed a LFA at the commencement of the litigation, I may have reached a different conclusion.

**Are Communications between the Plaintiff and the Private Lender, Including the LFA Itself or Portions thereof, Privileged?**

[43] Since I have determined the defendants must have the opportunity to make submissions on the LFA, I do not find that the entire LFA is privileged. Certainly, the confidential communications between the plaintiff, her counsel and a private financer in respect of the merits of the litigation and the litigation budget will be privileged, as well as highly sensitive topics relating to the plaintiff's strategy and trial stamina. There are other features of the LFA to which the defendants will be entitled to access, specifically those addressing the specific concerns which the defendants

raise, including their concerns that the implied undertaking rule is observed and that the private financer is not controlling the litigation.

## Conclusion

[44] A LFA may be approved in British Columbia.

[45] Despite this being a no costs regime, it is of benefit to the Court to have the defendants' submissions in respect of particular aspects of the LFA. In future cases, the defendant may not always be granted with respect to applications for court approval of LFAs.

[46] The LFA is subject to privilege in respect of specific aspects: litigation strategy, litigation budget and other "highly sensitive" aspects.

"Gropper J."