

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Marshall v. Allergan Inc.*,
2025 BCSC 182

Date: 20250110
Docket: S151970
Registry: Vancouver

Between:

Raymond Edson Marshall

Plaintiff

And

Allergan Inc.

Defendant

Brought pursuant to the *Class Proceedings Act*, R.S.B.C. 1996, c. 50

Before: The Honourable Mr. Justice Milman

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

D.M. Rosenberg, K.C.

Counsel for the Defendant:

R. Johal

Counsel for the Proposed Defendant, Apollo
Endosurgery Inc.:

Mary Buttery, K.C.
E. Laskin

Place and Date of Hearing:

Vancouver, B.C.
January 10, 2025

Place and Date of Judgment:

Vancouver, B.C.
January 10, 2025

[1] **THE COURT:** All right. I am going to give you a decision now. It seems to me that the issue is more straightforward than the submissions that have been made to me would suggest.

[2] This is an application by the plaintiff in this proposed class action to add two new defendants. The application is brought in a rather unusual context in the sense that there are other extant proceedings brought by the same law firm advancing essentially an identical cause of action against the current defendant in this proceeding and the new defendants who are proposed to be added. I will refer to that other proceeding as the “Second Action”.

[3] In these unusual circumstances, and having heard the submissions of counsel, I am satisfied that it is appropriate to grant the relief sought, but on terms.

[4] Only one of the two proposed defendants has responded to the application and appeared to make submissions. Both parties who did respond stress what is alleged to be the abusive manner in which the matter has been brought before the Court. Their submission is that the Court ought not to tolerate having two parallel actions underway seeking the same relief, whether in the form of a proposed class action or otherwise.

[5] I am sympathetic to that submission, which is why I asked counsel during the course of submissions whether the appropriate solution to this is simply to grant the relief sought on the condition that the Second Action be stayed.

[6] That led to some more focused submissions on the advantages and disadvantages or fairness or unfairness of proceeding in that manner. Having heard those submissions, I remain of the view that that is the appropriate answer to this problem – that is, to grant the relief sought on the condition that the Second Action be stayed.

[7] The proposed new defendant who is before me has acknowledged that there is no prejudice or not significant enough prejudice to justify opposing that relief given

the circumstances. The only alternative would be to force the plaintiff to proceed in the Second Action, rather than this one.

[8] The main area of prejudice asserted in this scenario involves the additional exposure of the existing defendant, Allergan Inc. If I were to refuse the application on the basis that the plaintiff should proceed instead in the Second Action, the effect would be to potentially preclude a number of potential class members from participating in the action because the Second Action was commenced later and some of their claims may be statute-barred in that context.

[9] I am sympathetic to that concern. I am particularly sympathetic to it because I have not been given a very good explanation for the delay in bringing forward this application. The proceedings taken by the plaintiff here to add these parties comes very late in the day. Counsel for the plaintiff has candidly acknowledged that there is not a very good explanation for it, and so, that factor weighs heavily against the relief sought.

[10] On the other hand, I agree with the submission that has been made to me, namely, that given that this is a proposed class action, there are other interests at stake here that need to be weighed. I have concluded that, on balance, the interests of these absent class members have to prevail over that of the existing defendant in preferring a shorter class period.

[11] I think the appropriate way to deal with the concern is to go the alternative route that is mentioned in the caselaw, as summarised in *The Owners, Strata Plan No. VIS3578 v. John A. Neilson Architects Inc.*, 2010 BCCA 329. There, Neilson J.A., writing for the Court, noted at para. 48 that the court retains a discretion to grant the relief sought here while preserving a limitation defence for trial. In this context, if this comes to be a certified class action, that will be an individual issue, although I do not want to foreclose the opportunity for the defendants to argue that this can be dealt with on a class-wide basis. I will not say more than that, but I will preserve the limitation defence as part of my order.

[12] To summarise, my order will be that the relief sought by the plaintiff is granted. The proposed new defendants are to be added. The plaintiff has leave to file the proposed amended notice of civil claim in the form that is attached to the application. However, it will be a term of my order that the Second Action will be stayed and that any limitation defence presently available to the defendants will be preserved, notwithstanding the addition of the new defendants and the amendment of the claim in that manner.

[13] THE COURT: All right. Can I have a volunteer to draw the order?

[14] CNSL D. ROSENBERG: I'll be happy to draw that.

[15] THE COURT: All right. And that leaves everything except, I think, for costs. So do counsel wish to – did you want to address anything else before we –

[16] CNSL M. BUTTERY: In terms of your order to preserve the limitation period, that's for all defendants, correct?

[17] THE COURT: Yes.

[18] CNSL M. BUTTERY: Thank you.

[19] THE COURT: Yes. All right.

[20] CNSL D. ROSENBERG: I won't be asking for costs even though we were successful.

[21] THE COURT: All right. Thank you. Ms. Buttery, did you want to speak to costs?

[22] CNSL M. BUTTERY: It did seem like we spent a lot of time getting to what is a logical conclusion that ought to have been done before. I would ask for costs in any -- not payable forthwith, but costs in any event of the cause.

[23] CNSL D. ROSENBERG: This is a class proceeding. It is clearly unusual for there to be costs. But, also, I don't agree that it took us a long time to get here

because of any action by the plaintiff. The facts are that we brought the application to add defendants and nobody proposed any alternative. I don't see any behaviour here that would merit costs against the plaintiff. In fact, if anything, we were successful in the relief that we sought and we –

[24] THE COURT: Well, on terms.

[25] CNSL D. ROSENBERG: On terms, but we also consented to the terms.

[26] THE COURT: During the hearing.

[27] CNSL D. ROSENBERG: Yes. But -- but there is no reason -- we had to get here to this today through this method. Nobody had consented to anything else or proposed anything else.

[28] THE COURT: Mr. Johal, I didn't ask you if you wanted to weigh in on costs. Do you have a submission to make or not? No.

[29] All right. I think what I am going to do, not without some reluctance, is to leave my order silent as to costs because it is a class action. Because of the unusual way in which this came before me, I -- the plaintiff was successful. I understand the defendant's frustration in terms of the way in which the application was brought forward, but in the end, the plaintiff did achieve more or less what the plaintiff wanted to. For that reason, I am not going to make an order as to costs given the presumption in class actions that the court ought not to do that except in exceptional circumstances, and I do not think we quite get there here.

“Milman J.”