Mann-Campbell v JUUL Labs Canada Ltd., 2023 BCSC 2153 (CanLII)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Mann-Campbell v. JUUL Labs Canada Ltd.,* 2023 BCSC 2153

Date: 20231030
Docket: S1910927
Registry: Vancouver

Between:

Owen Mann-Campbell and Robert Osborn

Plaintiffs

And:

JUUL Labs Canada Ltd., JUUL Labs, Inc., and Altria Group, Inc.

Defendants

Before: The Honourable Justice Giaschi

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiffs:	A. Leoni J.R. Kendall A. Dimson R.H. Elliot
Counsel for JUUL Labs Canada Ltd. and Juul Labs, Inc.:	D. Templer P.D.H. Williams
Counsel for Altria Group, Inc.:	S. Sofer J. Sapers E. Hayes
Place and Date of Hearing:	Vancouver, B.C. October 10-11, 2023
Place and Date of Judgment:	Vancouver, B.C. October 30, 2023

Introduction

[1] We are here for me to deliver my oral reasons in this matter. I reserve the right to amend these reasons for grammar and clarity and to provide full citations and quotations, but the result will not change as a consequence of any such amendments.

[2] There are two applications before me brought by the defendants. Both applications seek an order striking affidavit #4 of Jesse Kendall (“Kendall #4”) made May 19, 2023, or in the alternative, seeking leave to file further evidence in response to Kendall #4 at the certification hearing of this matter set to commence on December 4, 2023.

[3] The applications are opposed by the plaintiffs.

Facts

[4] The underlying action is a proposed class action against the defendants for damages for personal injuries allegedly suffered as a consequence of the use of JUUL-branded e-cigarette devices. The plaintiffs allege the e-cigarette devices are hazardous products but were falsely marketed as a desirable, safe, and healthier alternative to smoking. The plaintiffs additionally allege that the defendants conspired together to addict a new generation to nicotine or, alternatively, conspired to maintain and expand the market for JUUL products using unlawful means knowing that addiction and other injuries were likely to result.

[5] The action is and has been case managed since January 2020.

[6] On January 12, 2023, an order was made, on consent, setting a schedule for the completion of various steps prior to the certification hearing, which was then anticipated to be the week of October 10, 2023. The schedule ordered included:

a) By February 16, 2023, the defendants were to file application responses and evidence;

b) By April 3, 2023, the plaintiffs were to file any reply evidence;

c) By May 3, 2023, the plaintiffs were to serve any written submissions;

d) By June 5, 2023, the defendants were to serve their responding submissions; and

e) By June 19, 2023, the plaintiffs were to serve any reply submissions.

[7] The January 12, 2023 order permitted the parties to modify the schedule, which they did. In particular, they agreed that the deadlines for the plaintiffs to file any reply evidence and serve any written submissions were extended to April 24 and May 24, 2023, respectively.

[8] The schedule, as modified by the parties, was met except that on May 24, 2023, the plaintiffs delivered a new affidavit, Kendall #4. That affidavit primarily contains extracts from deposition

transcripts that were filed in a jury trial before the United States District Court, Northern District of California. The defendants to that action were JLI and Altria. JUUL Canada was not a defendant. The claim against JLI was settled before the trial. Consequently, only Altria remained as a defendant when the case went to trial. I understand that the case was resolved following the close of the plaintiff's case.

[9] At a case management conference on June 29, 2023, the scheduling of various applications was addressed including these applications to strike Kendall #4. During the course of that conference, plaintiff's counsel conceded that the defendants should be given a right to reply to the new evidence.

Submissions

[10] The parties appear to agree that the court's discretion to admit a late-filed affidavit is an exercise in balancing truth-seeking, fairness, and prejudice. They disagree on the relevant weight to be given to the various factors.

[11] In summary, the defendants submit:

a) The failure of the plaintiffs to comply with the schedule set at the case management conference weighs heavily against the admissibility of the affidavit;

b) It is intrinsically unfair to them for the plaintiffs to submit new evidence that they have not had an opportunity to respond to;

c) The transcripts attached to Kendall #4 have been cherry picked by the plaintiffs, which is unfair and prejudicial to them. There were 150 depositions in the US action;

d) Admission of the late-filed affidavit is costly and prejudicial to them;

e) The contents of the affidavit, being transcripts from a court proceeding, are not properly admissible as they are not sufficiently relevant. The transcripts concerned what happened in the USA whereas this proposed class action concerns what occurred in Canada. There is not a single reference in the transcripts to Canada; and

f) The transcripts are not admissible.

i. They are hearsay and do not meet the threshold test of necessity and reliability,

ii. Only Altria was a defendant to the US action when it went to trial, meaning only Altria had the opportunity to participate in deciding what deposition transcripts would form part of the trial evidence, and

iii. Section. 26 of the *Evidence Act,* R.S.B.C. 1996, c. 124 [*Evidence Act*] has not been complied with.

[12] In summary, the plaintiffs submit:

a) The deposition transcripts only became known to and available to them on April 24, 2023, when the US action was resolved. Hence, it was impossible for them to include the transcripts in earlier affidavits;

b) The existence and content of the deposition transcripts would have been known to at least JLI and Altria at the time of the respective depositions, and despite s. 5(5)(b) of the *Class Proceedings Act,* R.S.B.C. 1996, c. 50 [*CPA*] [which requires a party to swear it knows of no material facts that have not been disclosed], they did not disclose or advise of the transcripts;

c) The plaintiffs do not oppose giving the defendants an opportunity to respond to the new evidence, which addresses concerns of fairness and prejudice;

d) The defendants have had Kendall #4 since May 24, 2023, which has been more than sufficient time for them to prepare responding material;

e) The evidence is relevant to the issues to be addressed on certification, namely, whether the plaintiffs have established “some basis in fact” for the criteria set out in s. 4(1)(b)-(e), [identifiable class, common issues, preferable procedure, identifiable representative plaintiffs] of the *CPA*; and,

f) Section 26 of the *Evidence Act* is not an impediment to the evidence since:

i. it is to be used on a certification hearing, not a trial, and

ii. such transcripts are routinely admitted into evidence without strict compliance with s. 26 of the *Evidence Act*.

Principles

[13] Although I have been referred to several authorities, the principles to be applied are not in serious dispute and I do not need to refer to most of the authorities.

[14] As a case management judge, I have the discretion to allow the evidence notwithstanding that it may be case splitting and notwithstanding that its introduction would or could be in breach of the scheduling order, as modified by the parties: *Tietz v. Affinor Growers Inc.*, 2022 BCCA 307, para. 71 [*Tietz*].

[15] The test to be applied to admit the evidence in a proceeding such as this is flexible. I am to balance the interests of truth-seeking, fairness, and prejudice. The objective is to ensure that each party has a full and fair opportunity to present its case: *Cantlie v. Canadian Heating Products Inc.*, 2014 BCSC 2029, at paras. 11–12; *Cannon v. Funds for Canada Foundation*, 2011 ONSC 2960 [*Cannon*]; *Bowman v. Kimberly-Clark Corporation*, 2022 BCSC 1864, at para. 9. In *Tietz,* at para. 71, Justice Willcock observed that “Of all the imperatives in the rules of civil procedure, none carries more weight than the objective of attaining a just result”.

Analysis

[16] Applying the test as set out, I am of the view that the impugned affidavit should be admitted but that the defendants are to be given an opportunity to respond.

[17] A significant factor in my decision is that the transcripts were not available to the plaintiffs prior to April 24, 2023, which was after the deadline imposed in the scheduling order. This is not a case of deliberate ambush tactics or inadvertence by the plaintiffs. Their failure to comply with the schedule set out in my order of January 12, 2023, as modified by the parties, was unavoidable.

Moreover, the plaintiffs attempted to minimize the consequences of the late availability of the evidence by providing the defendants with an unfiled copy of the impugned affidavit as soon as the transcripts became available.

[18] In relation to fairness and prejudice, the concerns raised by the defendants, such as that the transcripts have been cherry picked, can be addressed by giving the defendants an opportunity to respond to the evidence.

[19] The defendants' concerns about cost and delay are not, in my view, significant. The cost of responding to the new evidence is, proportionally, not likely to be significant. The delay occasioned by the new evidence is also not likely to be significant as the defendants have had the new evidence for five months, and, presumably, have considered how they might respond to it. In the circumstances, the concerns about cost and delay must give way to the objectives of ensuring a just result by giving each party a full opportunity to present its case.

[20] Concerning the relevance of the impugned affidavit, I observe that in *Cannon* at para. 11, Justice Strathy (as he then was) wrote that questions of relevance are “best addressed… in the context of the full evidentiary record, and arguments, on the certification motion”. In *Tietz*, Willcock J. made a similar observation at para. 78. I agree with these sentiments. At this stage of the proceeding, I am not prepared to say more than that portions of the transcripts could be relevant to some of the issues that I will need to decide at the certification hearing.

[21] The defendants submit that the transcripts are not admissible as they do not comply with s. 26 of the *Evidence Act*. That provision outlines a procedure for the admission of “evidence of a proceeding or record” of foreign courts. The *Evidence Act* provides that such evidence is admissible if it is "an exemplification or certified copy" purporting to be under seal. The defendants say that the transcripts attached to the affidavit are not exemplifications or certified copies under seal. The plaintiffs concede that the transcripts are not certified copies but say they are under the seal of the issuing court and that, in any event, the authenticity of the transcripts is not disputed.

[22] The only case authorities on this issue to which I have been referred that address the admissibility of transcripts from other court proceedings are:

a) *Cantlie v. Canadian Heating Products Inc.*, 2017 BCSC 286, where depositions made in a US proceeding and attached to an affidavit were admitted into evidence on the certification hearing on the basis of necessity and reliability (see paras. 58, 156, and 158); and

b) *Barroqueiro v. Qualcomm Incorporated*, 2023 BCSC 1662, where Justice Brundrett at paras. 90–91 refused to strike affidavits that attached transcripts and trial exhibits from a foreign proceeding. In doing so, he noted that the rules allowed evidence on information and belief.

[23] It is to be observed that s. 26 of the *Evidence Act* was not addressed in either case. I have been provided no other authorities that address the meaning and effect of s. 26 of the *Evidence Act,* or how it interacts with Rule 22-1(4) of the *Supreme Court Civil Rules*, which requires that evidence in a chambers proceeding must be given by affidavit.

[24] Bearing in mind (1) that the transcripts are proffered for a certification hearing and not for a trial, and (2), that the authenticity of the transcripts is not in serious issue, I am of the opinion that any non-compliance with s. 26 of the *Evidence Act* is not fatal.

Order

[25] Weighing and balancing all of the above factors, I decline to strike Kendall #4 made May 19, 2023. The plaintiffs have leave to file same, if they have not done so already. However, the defendants are given leave to file responding materials, if they so wish.

[26] [Submissions Relating to a Schedule]

[27] THE COURT: All right. So just to sum up, then, the schedule is:

a) November 14,2023 - responding materials to be delivered by the defendants;

b) November 20, 2023 - plaintiff to serve amended written submissions;

c) November 27, 2023 - the defendants are to serve their amended written submissions;

d) December 1, 2023 - the plaintiff is to serve written reply submissions; and

e) December 4, 2023 - certification hearing.

"Giaschi J."