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***THE COURT OF APPEAL FOR SASKATCHEWAN***

Citation: 2005 SKCA 105

Date: 20050829

Between:

Docket: 1148

Larry Hoffman, L.B. Hoffman Farms Inc. and Dale Beaudoin

Prospective Appellants (Plaintiffs)

- and -

Monsanto Canada Inc. and Bayer CropScience Inc.

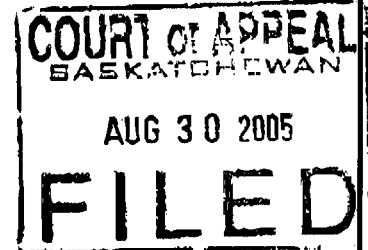
Prospective Respondents (Defendants)

Application for Leave to Appeal

Before: Cameron J.A. in chambers

Counsel:

Terry Zakreski for the prospective appellants  
Gordon J. Kuski, Q.C. and R.W. Danyliuk  
for the prospective respondent Monsanto Canada Inc.,  
Robert W. Leurer, Q.C. and Jason Mohrbutter  
for the prospective respondent Bayer CropScience Inc.



Heard: August 25, 2005

Disposition: Application Allowed

Written Reasons: August 29, 2005

By: The Honourable Mr. Justice Cameron

## CAMERON J.A.

The proposed appellants seek leave to appeal a decision of Madam Justice Smith in the Court of Queen's Bench. She dismissed an application they made to her under *The Class Actions Act*, S.S. 2001, c. C-12.01, for an order certifying their action against the proposed defendants as a class action.

Applications for leave to appeal in this Court are customarily determined along the lines set out in *Rothmans, Benson & Hedges Inc. v. Saskatchewan* (2002) 227 Sask. R. 121. As noted in that case (at para. 6):

The governing criteria may be reduced to two—each of which features a subset of considerations—provided it be understood that they constitute conventional considerations rather than fixed rules, that they are case sensitive, and that their point by point reduction is not exhaustive. Generally, leave is granted or withheld on considerations of merit and importance, as follows:

First: Is the proposed appeal of sufficient merit to warrant the attention of the Court of Appeal?

- \* Is it prima facie frivolous or vexatious?
- \* Is it prima facie destined to fail in any event, having regard to the nature of the issue and the scope of the right of appeal, for instance, or the nature of the adjudicative framework, such as that pertaining to the exercise of discretionary power?
- \* Is it apt to unduly delay the proceedings or be overcome by them and rendered moot?
- \* Is it apt to add unduly or disproportionately to the cost of the proceedings?

Second: Is the proposed appeal of sufficient importance to the proceedings before the court, or to the field of practice or the state of the law, or to the administration of justice generally, to warrant determination by the Court of Appeal?

- \* does the decision bear heavily and potentially prejudicially upon the course or outcome of the particular proceedings?
- \* does it raise a new or controversial or unusual issue of practice?
- \* does it raise a new or uncertain or unsettled point of law?

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\* does it transcend the particular in its implications?

Turning to the first of these questions, I may say I am satisfied that the proposed appeal is not frivolous or vexatious. Nor does it strike me as *prima facie* destined to fail, though I recognize that the proposed appellants, in order to succeed, would have to convince the Court of Appeal that Madam Justice Smith misconstrued or misapplied all of the prerequisites to certification set forth in section 6 of *The Class Actions Act*. The section contains five prerequisites, each of which must be satisfied before an action may be certified as a class action. Hence, the failure to satisfy even one of them is fatal. Justice Smith addressed each of them and concluded that none had been satisfied. Viewed in this light alone, and from a practical perspective, the proposed appeal might seem predestined to failure.

However, the applicants raised two arguments which tend to shed something of a different light on the matter.

First, they contended that Justice Smith erred in concluding that the initial prerequisite to certification, namely that the statement of claim disclose a cause of action as required by paragraph (a) of section 6, had not been met. She concluded that the statement of claim did not disclose a reasonable cause of action in negligence, or nuisance, or otherwise. This conclusion, the applicants say, is grounded in error of principle and serves to affect her conclusions in relation to one or more of the remaining prerequisites. It follows, according to the applicants, that should she be found to have erred in this initial respect, she is likely to have erred in subsequent respects.

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Second, and more significantly perhaps, they contended that Justice Smith approached the whole of the prerequisites on an excessively exacting standard, having regard in particular for the purpose of the *Act*. This, they say, extends to each of the criteria and to every turn in her decision.

These strike me as arguable propositions, and I find it difficult to say that the proposed appeal, when viewed in this light, is *prima facie* predestined to failure.

These appear to be the only considerations of relevance to the question of merit, for the circumstances do not lend themselves to any suggestion that the proposed appeal is apt to unduly delay the proceedings or be overcome by them. Nor can it be said that it is apt to unduly or disproportionately add to the cost of the proceedings.

Hence, I have come to the conclusion that the proposed appeal is not so devoid of apparent merit as to warrant denying leave to appeal.

Turning to the second question—that concerning the importance of the issues raised by the proposed appeal—it seems to me, generally speaking, that the proposed appeal raises issues of sufficient importance to warrant the attention of this Court. *The Class Actions Act* was enacted only recently and Justice Smith's decision constitutes the most comprehensive application of section 6 of the *Act* thus far undertaken in this Province. Indeed, it is more than that. It stands as the seminal authority in the Province on class actions. Similar enactments have been in existence for some time in other jurisdictions, so a fair body of jurisprudence now exists, but thus far that jurisprudence has

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found comparatively little application in Saskatchewan, especially in this Court. Depending on how the Saskatchewan enactment compares in its specific provisions to those found in other enactments, that jurisprudence may or may not be wholly relevant.

Without suggesting that Justice Smith's decision is in any respect flawed, I do believe her appreciation and application of the prerequisites of section 6 raises some issues of sufficient importance generally, to warrant consideration by this Court.

For example, much was said in argument before me about the rigour with which Justice Smith applied each of the prerequisites to certification found in section 6 of the *Act*.

On the one hand, she was said to have subjected the plaintiffs' application for certification to more exacting or rigorous standards than called for by the *Act*, especially in light of the purpose of the *Act* and the standards applied by the courts in other jurisdictions.

On the other, she was said to have approached the application rigorously, in the sense of carefully and thoroughly, but not to have applied the prerequisites of section 6 on an excessively rigorous or exacting standard, having regard in particular for section 40 of the *Act*, which generally precludes recovery of costs as between the parties to a class action irrespective of its outcome. In light of this, there was said to exist the potential for great injustice in the absence of a rigorous application of the prerequisites to certification, for a defendant may then be subjected to a complex and highly

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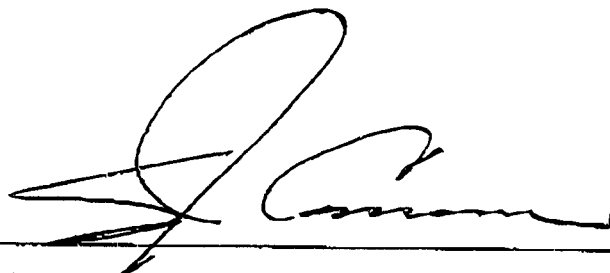
costly class action of dubious merit and unable, even though the action be successfully defended, to recover any of its costs as against the plaintiff.

The arguments extended well beyond this, but this issue of whether or not Justice Smith subjected the plaintiff's application to an excessively exacting or rigorous standard stuck me in particular as an issue of sufficient importance generally to warrant consideration by this Court. This seemed especially so to me in light of the fact her decision stands as the seminal authority in this Province on class actions.

Speaking more generally, and in sum, I may say that I am satisfied the proposed appeal raises some comparatively new and potentially controversial points of law, that it transcends the particular in its implications, and that it is of sufficient importance to the practice pertaining to this subject to warrant attention by this Court.

Accordingly, I have decided to grant leave to appeal to the proposed appellants. In accordance with the *Act*, I make no order as to costs on the application.

DATED at the City of Regina, in the Province of Saskatchewan, this 29th day of August, A.D. 2005.

A handwritten signature in black ink, appearing to read 'Cameron J.A.', written over a horizontal line.

CAMERON J.A.