

Hoffman et al v. Monsanto and Bayer

Mr. Zakreski for Plaintiffs
Mr. Danyliuk for Monsanto
Mr. Leuer and Mr. Mohrbutter for Bayer

FIAT

I have before me applications by the two defendants to strike all or portions of certain affidavits filed by the Plaintiffs in support of the certification application. As I have already set out in some detail the principles which in my view should be applied in relation to evidence admissible on the certification application, these reasons will be brief.

I indicated to counsel during the hearing that I am not prepared to take a narrow view of relevance to the certification application prior to the hearing of that application, when I will have all of the material before me, including the parties' arguments. It may be that much of the material filed by the parties will turn out to have little relevance, or little probative value. That decision is, necessarily, one which can be better made at the time. In my view, affidavit evidence should be struck prior to that time only where it is clearly irrelevant, or clearly does not comply with the rules of evidence, and where leaving the averments on the file is likely to prejudice the opposite parties or the proper conduct of the certification hearing.

My rulings on these applications is as follows:

1. The affidavit of Robert Willick

While I agree that isolated sentences in this affidavit express subjective opinion, these can easily be disregarded and do not call for a response from the defendants. The affidavit as a whole is in my view broadly relevant and questions as to its weight should await the certification hearing. The application to strike is dismissed.

2. The affidavit of Martin Pratchler

This affidavit offers an anecdote relating to swathes of canola, which he was told was Roundup Ready canola, blowing on to his land during harvest. He complains that Monsanto has not been diligent in identifying the crop as Roundup Ready or in cleaning up the field. Again, while this affidavit may turn out to have little probative value on the issues that will be before the Court on the certification application, it is in my view broadly relevant to the issues raised in the pleadings and offers some evidence that members of the proposed class are affected by cleanup problems, even if they do not

grow or market canola. This is an issue that is relevant to the section 6 criteria. I am not prepared to strike this affidavit at this point in the proceedings.

3. The Affidavit of Marc Loiselle

The objections to this affidavit were largely withdrawn in light of Mr. Zakreski's explanation of the apparent incompleteness of Exhibit B. Monsanto complains that the affidavit is "anecdotal". I do not see why that in itself is a fault. The plaintiff must show on the certification application that members of the proposed class have, in fact, suffered the damage claimed. The application to strike this affidavit is dismissed.

4. The Affidavit of Douglas Sawatsky

This affidavit attests to an experience of contamination of mustard seed with GM canola seed, affecting the ability to use the mustard seed in organic farming and costing the farmer cost of GM testing and replacement of seed. It is admissible on the same grounds as the affidavits above mentioned.

5. The Affidavit of Brian Kozisek

While on initial reading portions of this affidavit (paras. 4-6) appeared to me to be argument as to how Ms Miller's affidavit should be read, rather than proper factual averments, I am satisfied that this is more a question of awkward phrasing than of substance. I am not prepared to strike this affidavit.

The defendants' applications are dismissed.

A handwritten signature in cursive script, appearing to read "G. Smith J.", is written in black ink on the right side of the page.

February 26, 2004