2003 SKQB 564

Q.B.G.
No. 67

A.D. 2002
J.C.S.

IN THE QUEEN'S BENCH

JUDICIAL CENTRE OF SASKATOON

BETWEEN:

LARRY HOFFMAN, L.B. HOFFMAN FARMS INC. and DALE BEAUDOIN

PLAINTIFFS

- and -

MONSANTO CANADA INC. and AVENTIS CROPSCIENCE CANADA HOLDING INC.

DEFENDANTS

T.J. Zakreski	for the plaintiffs
G.J. Kuski, Q.C., and A.M. Quayle	for Monsanto Canada Inc.
R.W. Leurer and J.W. Mohrbutter	for Aventis Cropscience Canada Holding Inc.

FIAT

G.A. SMITH J.

December 31, 2003

[1] The plaintiffs in this matter have filed an application for an order certifying the within action as a class action pursuant to s. 4 of *The Class Actions Act*, S.S. 2001, c. C-12.01. The defendants, Monsanto Canada Inc. ("Monsanto") and Bayer Cropscience Inc. ("Bayer") (the proper name of the defendant Aventis Cropscience Canada Holding Inc.), have brought applications for an order pursuant to Rules 77 and 317 of *The Queen's*

Bench Rules, and/or ss. 7, 14 and 44 of *The Class Actions Act* granting them leave to cross-examine Larry Hoffman, Dale Beaudoin, J. Wallace Hamm, Dr. David Peter Stonehouse, Gary Smith, and Dr. Brenda Frick on their respective affidavits which have been filed in support of the plaintiffs' application for certification.

[2] The applications are brought on the ground that cross-examination on the said affidavits is both desirable and necessary to ensure an adequate evidentiary record for a fair determination of the request for certification in accordance with the criteria for certification set out in s. 6 of the Act. The applicants argue that cross-examination on these affidavits is desirable or necessary to allow the defendants to test the completeness, veracity and proper scope of the plaintiffs' evidence, to assist the Court in interpreting the said affidavits and in resolving ambiguities and inconsistencies therein, and in assessing contradictory evidence that has been filed in relation to the certification application. Evidence obtained through cross-examination is also said to be necessary in order to enable the defendants to fully develop their own arguments in relation to certification.

[3] The plaintiffs oppose the applications for leave to cross-examine their affiants on the ground that "the proposed examination is a costly, time-consuming and unnecessary exercise, having regard to the matters the Court is to determine in the application for certification".

Applicable Rules and Statutory Provisions

[4] The relevant provisions of *The Class Actions Act* are as follows:

4(1) One member of a class who resides in Saskatchewan may commence an action in the court on behalf of the members of that class.

(2) The member who commences an action pursuant to subsection (1) shall:

(a) apply to the chief justice of the court for the designation of a judge to consider an application mentioned in clause (b); and

(b) apply to the judge designated pursuant to clause (a) for an order:

(i) certifying the action as a class action; and

(ii) subject to subsection (4), appointing the member as the representative plaintiff for the class action.

6 The court shall certify an action as a class action on an application pursuant to section 4 or 5 if the court is satisfied that:

(a) the pleadings disclose a cause of action;

(b) there is an identifiable class;

(c) the claims of the class members raise common issues, whether or not the common issues predominate over other issues affecting individual members;

(d) a class action would be the preferable procedure for the resolution of the common issues; and

(e) there is a person willing to be appointed as a representative plaintiff who:

(i) would fairly and adequately represent the interests of the class;

> (ii) has produced a plan for the class action that sets out a workable method of advancing the action on behalf of the class and of notifying class members of the action; and
> (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.
>
> 7(1) The court may adjourn the application for certification to permit the parties to amend their materials or pleadings or to permit further evidence to be introduced.
>
> (2) An order certifying an action as a class action is not a determination of the merits of the action.
>
> **14** The court may, at any time, make any order it considers appropriate respecting the conduct of a class action to ensure a fair and expeditious determination and, for that purpose, may impose on one or more of the parties any terms it considers appropriate.
>
> **44** *The Queen's Bench Rules* apply to class actions to the extent that those rules are not in conflict with this Act.

[5] Special rules governing the procedure to be followed in relation to class actions are found in Part XI of *The Queen's Bench Rules*, including Rules 76-86. Rule 77 provides as follows:

> 77(1) The rules in this Division apply to actions and applications brought under [*The Class Actions Act*];
>
> (2) Unless provided otherwise by the Act or by the rules in this Division, the general procedure and practice of the court shall apply to actions and applications brought under the Act.

[6] Although there is no special rule under Part XI directed to the issue raised in these applications, Form 5D specified by the Rules as the form for the Notice of Motion for Certification requires the applicant for certification to list any materials in support of the application including "transcripts of cross-examinations on affidavits".

[7] Under the general Rules, the issue is addressed by Rule 317(1), which permits cross-examination on affidavits on a motion only with leave of the Court:

> **317**(1) Upon any motion or petition evidence may be given by affidavit, but the court may, on the application of either party, order the attendance for cross-examination of the person making such affidavit.

Argument and Analysis

[8] The plaintiffs have directed their argument in opposition to three questions, and I will follow this suggested organization of the issues raised by these applications:

A. What is the traditional onus for cross-examination on affidavits under Rule 317(1)?

B. Is there an enhanced right of cross-examination under *The Class Actions Act*?

C. Have the Defendants demonstrated a need for cross-examination in this case?

A. What is the traditional onus for cross-examination on affidavits under Rule 317(1)?

[9] The applicants concede that under Rule 317(1) there is no inherent right to cross-examine an affiant on an affidavit filed in support of a motion or petition, and whether leave to cross-examine will be granted is a discretionary matter. This point distinguishes Saskatchewan from most other jurisdictions, where there is an inherent right to cross-examine on affidavits filed on motions. In this regard, see for example, Rule 39, *Rules of Civil Procedure*, Ontario; Rule 39, *Court of Queen's Bench Rules*, Manitoba; and Rule 314, *Alberta Rules of Court.* Further, it is clear that the general practice in this Province is not to have cross-examination on affidavits on an interim application, and that it is exceptional for leave to cross-examination to be sought.

[10] Saskatchewan jurisprudence establishes that under the general rule, in order to obtain leave to cross-examine on an affidavit, the applicant must demonstrate that the cross-examination sought will assist in resolving the issue before the court and that it will not result in an injustice. *Murray v. Murray Land Development Ltd.* (1989), 75 Sask. R. 293 (Q.B.). In general, leave to cross-examine is granted only when there is contradictory evidence before the court, but this is not always required. In *Canada Safeway Ltd. v. Saskatchewan (Human Rights Commission)* (1993), 108 Sask. R. 253 (Q.B.), cross-examination was permitted in the absence of contradictory evidence on the ground that there was a sincere and legitimate need for clarification of information deposed to, which was solely within the knowledge of the affiant. See also *Hall v. Hall* (2000), 188 Sask. R. 293 (Q.B.) for a useful review of the Saskatchewan jurisprudence on this issue.

B. Is there an enhanced right of cross-examination under *The Class Actions Act*?

[11] It is my view that the general principles described above apply in the context of an application for certification under the Act. Nonetheless, the desirability or necessity for cross-examination, and considerations of potential injustice to the parties must, of course, be judged in the context of the application in support of which the affidavits in question are filed. There are a number of characteristics of a certification application that may, in some contexts, enhance the claim of an applicant for leave to cross-examine.

[12] First, and most obviously, the criteria that must be met for a successful application for certification as a class action are set out in s. 6 of the Act, quoted above. The applicant for certification must establish, *inter alia*, the existence of an identifiable class, in connection with the issues that the plaintiffs propose to certify as common issues, the existence of common issues, and whether a class action is the preferable procedure for resolving these common issues. The proposed representative plaintiffs must establish that they are appropriate.

[13] In applying the general principles relevant to the discretion to be exercised pursuant to Rule 317(1), it must therefore be asked whether the cross-examination sought will assist in the ultimate determination of the s. 6 enquiry. Section 7(2) of the Act makes it clear that an order certifying an action as a class action is not a determination of the merits of the action. Accordingly, cross-examination going solely to the merits of the plaintiffs' claim is not permissible. Overlap may, however, occur, between evidence relevant to the merits of the action and evidence relevant to one or more of the s. 6 criteria.

[14] In a previous ruling in this action respecting the propriety of certain affidavit material filed by the plaintiffs (233 Sask. R. 112) , the Court emphasized the importance of providing, on the certification motion, a proper evidentiary record for the resolution of these issues, commenting, in part, as follows:

> [42] I have concluded that the better position is that, on the certification application, evidence as to the merits of the action is admissible only insofar as that evidence is also relevant to an issue to be determined on the motion. Overlap may, however, occur, as there is an onus on the proposed representative plaintiff to provide some evidentiary basis tending to show that he or she is a proper representative of the proposed class, which may include evidence that he or she has suffered a loss or damage, and an onus to establish the definition of the proposed class and proposed common issues, which may require some evidence that other members of the proposed class have suffered loss or damage sufficiently similar to that of the proposed representative plaintiff to raise common issues.
>
> [43] In addition, it is now widely accepted that, despite the mandatory language of s. 6 ("The court *shall* certify an action as a class action ... if the court is satisfied that [the five criteria are satisfied]"), the court has relatively wide discretion in relation to the requirement in ss. 6(d) of the Saskatchewan **Act** that a class action be the preferable procedure, and that the exercise of this discretion requires consideration of the scope and nature of the proposed litigation as a whole and a balancing of the relevant factors. Accordingly, the desirability of providing, on the certification motion, as complete a picture as possible of the proposed action, including the scope of the issues raised both in the claim and in defence, has generally been viewed by the courts as helpful in determining whether class action proceeding is the preferable procedure. . . .
>
> [emphasis in original text]

[15] Certification of an action as a class action has a significant affect on the defendants, for defence of such an action absorbs considerable resources. They are entitled to defend such an application fully and this right entails the right to explore matters raised within the plaintiffs' affidavits, including matters pertaining to the deponents themselves, for the purpose of clarifying what may be ambiguous, expanding or narrowing the scope of what is said in the affidavit, or exploring matters going to the credibility of the affiant.

[16] Further, the issues to be resolved on a certification application are complex and trial of an issue is not a practical alternative where there is a conflict in the evidence. Thus, while the jurisprudence from other Canadian jurisdictions which do not have a restrictive rule comparable to our Rule 317(1) must be read with some caution, many decisions relating to the propriety of specific questions sought to be put by way of cross-examination of an affidavit in support of an application for certification as a class action are relevant and helpful, for the criteria for certification in those jurisdictions are closely parallel to our own.

[17] Of particular relevance in this regard is a recent Ontario decision in *Caputo v. Imperial Tobacco Ltd.* (2002), 25 C.P.C. (5th) 78 (Ont. Master), aff'd (2003), 33 C.P.C. (5th) 214 (Ont. S.C.), in which the Master held:

> A deponent may be cross examined on any fact set out in his or her affidavit but also on any fact in his or her knowledge which is relevant to the determination of the motion. Cross examination may also be directed towards the credibility of the evidence. . . . (para. 14)

[18] Finally, it is appropriate to consider that class actions legislation is relatively new in Canada, in general, and in Saskatchewan, in particular, and jurisprudence interpreting the criteria for certification is still in its infancy. This provides an additional reason why the court should be slow to unduly restrict the evidential record that either party wishes to place before the court, which might be necessary for advancing novel arguments on still unresolved issues. As the jurisprudence develops it may become correspondingly easier to rule out proffered evidence as irrelevant to the application for certification as a class action.

[19] This point is illustrated by the ruling in *Hoy v. Medtronic, Inc.*, 2000 CarswellBC 2430 (B.C.S.C.), where the defendant sought to cross-examine the affiants of two affidavits from U.S. attorneys who were assisting the plaintiffs in order to show that the lawyers were trying to recoup their investment loss in relation to an earlier unsuccessfully attempted class proceeding against the defendant in the U.S. The British Columbia Court commented, at paras. 9-10:

> 9 . . . Although the argument may be novel, it is one which deserves the opportunity to be developed. It may only be developed with evidence. That evidence is currently only within the knowledge of the plaintiff's counsel and the U.S. counsel who are assisting them. If the defendants establish that the litigation is driven primarily for the lawyers' own ends, it is at least arguable that such ends were not intended by the legislature in its enactment of the *Class Proceedings Act* . . .
>
> 10 However, at this stage, the issue is not completely formed and cannot be until counsel has the opportunity to develop it further based on the evidence they hope to acquire at the cross-examination. . . .

C. Have the defendants demonstrated a need for cross-examination in this case?

[20] Both defendants have outlined in some detail matters they wish to pursue on cross-examination relevant to the issues of the existence of an identifiable class (whether there are objective criteria from which a court can determine that the proposed members of the class have a cause of action against the defendants), the existence of common issues and whether a class action is the preferable procedure. The brief of the defendant Aventis, in particular, sets out in some detail the position that Aventis intends to argue in relation to each of those issues and the relevance of an opportunity to cross-examine the plaintiffs' deponents in relation to that position. The same considerations would apply to the defendant Monsanto.

[21] It is neither necessary nor desirable for me to set out these considerations in detail at this stage in the proceeding. I am satisfied from the material filed that the applicants' desire to cross-examine on the affidavits in question is based upon a real and sincere need to clarify issues raised in those affidavits relevant to the certification criteria, resolve or clarify conflicts in the evidence, test the credibility of the deponents, or to obtain further information relevant to the defendants' positions that is solely within the knowledge of the deponents. The transcripts of the cross-examinations will serve to amplify the evidentiary record before the Court in relation to the certification application in a way that will assist the Court in determining that application.

[22] In addition, I am satisfied that the plaintiffs will not be prejudiced by the order sought. Nor will the matter be unduly delayed. The defendants have assured the Court that the cross-examinations will be short – in most cases less than one half day – and that they will co-operate so that it will not be necessary for each defendant to conduct

a full cross-examination of each affiant. All the affiants sought to be cross-examined except for Dr. Stonehouse reside in Saskatchewan. The defendants are prepared to travel to Dr. Stonehouse's place of residence to cross-examine him if the plaintiffs so choose.

[23] It is possible at this stage to define the scope of the examinations only in general terms. Cross-examination is not permissible solely to attack the merits of the plaintiffs' claim. Similarly, whether the claim discloses a cause of action is an issue to be determined solely on the basis of the pleadings. However, a liberal view of relevance should be applied in relation to questions directed to the other criteria set out in s. 6 of the Act even if such questions inevitably touch on the merits of the proposed action. As proposed by the defendant Monsanto, the test is whether the issue proposed to be canvassed on cross-examination is relevant to the question before the Court on the application for certification, and not an issue to be determined at trial. As the Court held in *Caputo (supra)*:

> A deponent may be cross examined on any fact set out in his or her affidavit but also on any fact in his or her knowledge which is relevant to the determination of the motion. Cross examination may also be directed towards the credibility of evidence. . . . (at para 14)

Conclusion

[24] Both defendants shall have leave to cross-examine the following plaintiff affiants, Larry Hoffman, Dale Beaudoin, J. Wallace Hamm, David Peter Stonehouse, Gary Smith and Brenda Frick, on their respective affidavits filed in support of the

plaintiffs' application for certification of this action as a class action.

J.