THE COURT OF APPEAL FOR SASKATCHEWAN

Citation: 2006 SKCA 132 Date: 20061123

Between: Docket: 1148

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

(Plaintiffs) Appellants

- and -

Monsanto Canada Inc. and Bayer Cropscience Inc.

(Defendants) Respondents

-and-

Saskatchewan Environmental Society and Friends of the Earth Canada

Proposed Interveners (Non-Parties)

Before:
Cameron J.A. in chambers

Counsel:
Devon Page for the Proposed Interveners
Terry J. Zakreski for the Appellants
Gordon J. Kuski, Q.C. for the Respondent Monsanto Canada Inc.
Robert W. Leurer, Q.C. for the Respondent Bayer Cropscience Inc.

Application for Leave to Intervene:

Heard: November 22, 2006
Disposition: Application Dismissed
Reasons By: The Honourable Mr. Justice Cameron

CAMERON J.A.

Saskatchewan Environmental Society and Friends of the Earth Canada have applied under Rule 17 of *The Court of Appeal Rules* for leave to intervene in an appeal pending before the Court.

The appeal is from an order of the Court of Queen's Bench denying class action status to an action brought by Larry Hoffman, L.B. Hoffman Farms Inc. and Dale Beaudoin, as plaintiffs, against Monsanto Canada Inc. and Bayer Cropscience Inc., as defendants. The plaintiffs allege that, as organic farmers, they and others like them suffered losses in their farming enterprises as a result of the development and commercial introduction by the defendants of genetically modified canola. In consequence they claim damages. In reality, the action is driven by a public interest organization called the Saskatchewan Organic Directorate, Organic Agriculture Protection Fund. This organization is concerned with the introduction of genetically modified grains and oil seeds into Saskatchewan.

The appeal, which was brought by the plaintiffs with leave, is generally concerned with whether the judge who declined to certify the action as a class action correctly interpreted and applied the provisions of *The Class Actions Act,* S.S. 2001, c. C-12.01, especially those of section 6. The judge is said to have subjected the application for certification to more exacting or rigorous standards than called for by the *Act*, especially in light of the purposes of the *Act* and the standards applied by other courts in other jurisdictions.

Turning to the application for leave to intervene, I begin by noting that the

framework of principle governing applications of this nature was set forth by Mr. Justice Sherstobitoff in *R.* v. *Latimer* (1995), 128 Sask. R. 195 (Sask. C.A.) at pp. 196-97:

> In considering an application to intervene, appellate courts will consider: (1) whether the intervention will unduly delay the proceedings; (2) possible prejudice to the parties if intervention be granted; (3) whether the intervention will widen the *lis* between the parties; (4) the extent to which the position of the intervener is already represented and protected by one of the parties; (5) whether the intervention will transform the court into a political arena. As a matter or discretion, the court is not bound by any of these factors in determining an application for intervention but must balance these factors against the convenience, efficiency and social purpose of moving the case forward with only the persons directly involved in the *lis*.

I have considered the application to intervene with these and other criteria in mind, including those mentioned in *Brand* v. *College of Physicians and Surgeons of Saskatchewan* (1990), 72 D.L.R. (4th) 446 (Sask. C.A.); *Canada (Attorney General)* v. *Saskatchewan Water Corporation* (1991), 92 Sask. R. 295 (Sask. C.A.); and Muldoon, *Law of Intervention—Status and Practice* (Aurora, Ontario: Canada Law Book Inc., 1989).

Having regard for these criteria and the material before me I may say that, while there is something to be said for granting leave to intervene—Mr. Page put the case for intervention very well—I have not been persuaded to do so. I say that for several reasons.

To begin with the appeal is focused not so much on the subject matter of the action, as I have said, as on *The Class Actions Act* and its requirements. It is principally the judge's approach to the *Act* and its application that is called into

question on the appeal, and that is where the case on appeal derives its legal significance. I realize that the case on appeal raises the question, among others, of whether the pleadings disclose a cause of action, and that the causes of action are alleged to have arisen out of the development and commercial introduction of genetically modified canola. This adds the flavor of environmental litigation to the case generally, but that is not the focus of the case on appeal. The subject matter if the action is incidental to the appeal, which is primarily concerned with the *Act* and its requirements, including the proper approach to its application.

Then there is the delay that will be occasioned in the hearing of the appeal should I grant the application to intervene. The appeal has been long in the making and is now set down for hearing on December 11 and 12. These two days have been set aside for argument, the panel has been struck, the material has been distributed, and the study of the case has begun. The interveners propose to file a lengthy factum, one that would serve to add to the breadth of the case on appeal and call for factums in reply by the respondents. Counsel for the respondents informed me that they could not have their factums in reply prepared before December 11 and would not, therefore, be ready to go on that date. In consequence, the appeal would have to be adjourned and the hearing rescheduled were I to grant leave to intervene. I do not suggest this is fatal, for the hearing of the case could be rescheduled, though rescheduling entails inefficiency and considerable inconvenience, including inconvenience to the Court.

Turning from delay to prejudice, I may say I am not particularly concerned by prejudice to the respondents, since such prejudice as may befall them can be made up for by an appropriate order for costs.

I am concerned, however, with widening the *lis* between the parties should I grant leave to intervene, for I believe the issues on appeal would take on an added dimension should I grant leave to intervene. And the focus is apt to shift. As I say, the case on appeal is presently focused, and should remain focused, on *The Class Actions Act* and its interpretation and application. And the legal significance of the case on appeal, as distinct from the case generally, lies in the judge's approach to the requirements of the *Act*. Hence, I regard this factor as weighing against the application.

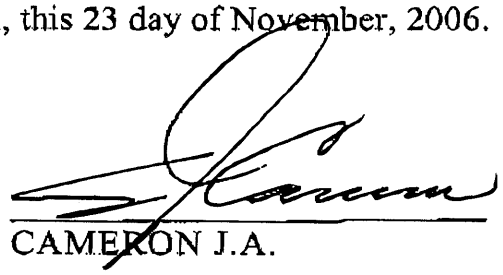
That brings me to the next factor, namely the extent to which the concerns of the proposed interveners is already represented and protected. It seems to me that their concern, or their position if you will, is already represented and protected by the appellants and the organization that stands behind them. These parties, and this organization, have able counsel in Mr. Zakreski. And I have no doubt he will present their case on appeal as fully and ably as anyone could. If the proposed interveners think his case on appeal can be improved, it is open to them to offer him their advice. Judging by his submissions on the hearing of the application to intervene he would welcome that advice.

The long and short of it is, and I say this with the greatest of respect for the proposed interveners and their counsel, I do not think they can usefully contribute to the resolution of the issues on appeal. I say this having in mind, once again, the comparatively narrow focus, and the true legal significance, of the case on appeal. I also have it in mind that the position of the applicants largely tracks that of the appellants on appeal and that, in consequence, the applicants' position tends merely

to echo that of the appellants.

For these reasons, then, I have decided to dismiss the application to intervene. In all the circumstances, including the objects of the proposed interveners, I shall leave each of the parties to the application to bear their own costs.

Dated at Regina, Saskatchewan, this 23 day of November, 2006.



CAMERON J.A.