2002 SKQB 190

Q.B.G. A.D. 2002
No. 67 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

Terry J. Zakreski for the plaintiff

Gordon J. Kuski, Q.C. and Richard W. Danyliuk for the defendant, Monsanto

Robert W. Leurer and Jason W. Mohrbutter for the defendant, Aventis

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FIAT SMITH J.

May 2, 2002

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[1] Both defendants in a proposed class action proceeding have brought applications for orders extending the time for the defendants to file their statements of defence until a reasonable time following the plaintiffs' application for certification of the claim as a class action proceeding and the adjudication in relation to that application. The plaintiffs oppose the applications and seek to compel the defendants to file

statements of defence within the time limits specified for ordinary actions pursuant to the *Rules of Court*.

[2] In the action, which is expressly stated to have been brought pursuant to *The Class Actions Act*, the plaintiffs, who are certified organic farmers in Saskatchewan, claim to bring the action on behalf of all organic grain farmers in Saskatchewan who were "certified organic farmers" at any time between January 1, 1996, and December 31, 2001, by any of six named "certification organizations." The claim alleges that these organic farmers have lost the ability to market organic canola due to the contamination of organic canola crops caused by adventitious cross pollination from open-pollinated varieties of genetically modified canola "marketed and/or licensed and/or sold by [Monsanto Canada Inc., ("Monsanto") and Aventis Cropscience Canada Holding Inc. ("Aventis")]" in Saskatchewan. It claims further that the defendant Monsanto has been granted approval to conduct field trials of genetically modified wheat which will have a similar consequence for the sale by organic farmers of organic wheat and the plaintiffs claim an injunction restraining the release of genetically modified wheat into the Saskatchewan environment. The plaintiffs also expressly reserve the right to amend their claim to permit organic grain farmers residing outside of Saskatchewan to opt into the class action, if it is certified.

[3] The defendants have each demanded extensive particulars relating, *inter alia*, to the precise standards of certification in relation to "contamination" by grain from genetically modified crops of each of the alleged certification organizations and when these standards came into effect. Extensive replies to these demands have been furnished by the plaintiffs, resulting in demands for further and better particulars and further replies. Some of the demands have been refused, and issues remain outstanding as to whether the defendants may seek or be entitled to further particulars. The particulars

provided to date, augmented to some extent by research of the defendants, suggests that the six named organic certification organizations have different standards and varying definitions in relation to genetically modified crops and that their respective standards were adopted at different times relative to the six year period covered by the plaintiffs' claim. The replies to the demands for particulars indicate that the original named plaintiffs in this action have been certified as organic farmers by only one of these six certification organizations, although other members of the proposed class of plaintiffs may have been certified by any of the others, at any time in the six year time frame alleged.

The Relevant Legislation and Rules of Court

[4] Each of the following provisions has some relevance to the issue before me:

The Queen's Bench Act, 1998, S.S. 1998, c. Q-1.01

> **2** In this Act:
>
> "**action**" means:
>
> (a) a civil proceeding commenced by statement of claim or in any other manner authorized or required by this Act or the rules of court; or
>
> (b) any other original proceeding between a plaintiff and a defendant;

The Class Actions Act, S.S. 2001, c. C-12.01

2 In this Act:

"**action**" means an action as defined in *The Queen's Bench Act, 1998*;

. . .

"**class action**" means an action certified as a class action pursuant to Part II;

. . .

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.

(3) An application pursuant to clause (2)(b) must be made:

(a) within 90 days after the later of:

(i) the date on which the statement of defence was delivered; and

(ii) the date on which the time prescribed by *The Queen's Bench Rules* for delivery of the statement of defence expires without it being delivered; or

(b) with leave of the court at any other time.

. . .

6 The court shall certify an action as a class action on an application pursuant to section 4. . .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 the other class members.

. . .

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.

The Rules of Court (of general application)

100(1) Except where otherwise ordered, a defendant who intends to defend the action shall serve and file a Statement of Defence:

(a) within 20 days after the day of service of the Statement of Claim where the defendant is served in Saskatchewan;

. . .

provided that a Statement of Defence may be served and filed at any time before the action is noted for default.

. . .

152 Each party shall admit such of the allegations contained in the pleadings of the other party that he knows to be true.

153 A party shall plead specifically any matter, fact or point of law which:

(a) makes a claim or defence of the other party not maintainable; or

(b) if not specifically pleaded, might take the other party by surprise; or

(c) raises issues not arising out of the preceding pleadings.

154 Where a party in a pleading denies an allegation of fact in a previous pleading of the other party, he shall not do so evasively but shall answer the point of substance.

155 Where it is intended to prove a different version of the facts than that pleaded by the other party, a mere denial of the version so pleaded is not sufficient, but a party shall plead his own version of the facts.

The Rules of Court, Part XI: Class Actions

76 In this Division:

"Act" means *The Class Actions Act;*

. . .

"designated judge" means the judge designated by the Chief Justice to consider an application for certification of a class action and appointment of a representative plaintiff.

. . .

77(1) The rules in this Division apply to actions and application brought under the 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.
>
> . . .
>
> **83** After a certification order has been granted, a party may only amend any pleading filed by that party with leave of the court.

[5] The defendants make a number of arguments that it would not be appropriate to require them to file statements of defence prior to the certification proceedings in relation to this claim. They argue that this Court has jurisdiction under the *Act* and the *Class Actions Rules*, as well as under the general *Rules of Court*, to extend the time for filing statements of defence until after the certification proceedings. In this case, it is argued that it is desirable and fair to do so for a number of reasons. It is said that the completion of pleadings is neither necessary nor desirable for proper determination of the certification application, and that the complexity of class actions in general and of this action in particular make it difficult for the defendants adequately to plead in defence prior to that determination, which will decide which, if any, of the claims made will be certified as raising common issues for the purpose of a class action and, if the action is certified, will define the class and/or sub-classes of plaintiffs.

[6] The defendant Aventis, in particular, argues that it believes that it may have additional and different defences to the purported claims depending upon which organizations certified the farmers within the class that is certified as well as when they were certified and that, therefore, "Aventis does not know critical aspects of the claim against it, including such fundamental matters as what group or groups of persons may

be included in the action, for what period of time, what standards are relevant to the action and other such matters."

[7] Monsanto argues that, as one of the tests for certification is whether the claim asserted discloses a reasonable cause of action, and it may want to challenge some of the causes of action asserted on this basis, it should not be required to plead prior to that determination, which is best made in the context of the certification proceeding.

[8] Both defendants argue that any defence filed now would necessarily have to be amended if the action is certified as a class action, in order to properly address the issues that are defined as common issues in that certification. They point out that *Rule* 83 requires leave of the court to amend after certification. Therefore, it would be a waste of time and money for the defendants to file a defence prior to the determination of those matters.

[9] The position of the plaintiffs is that both the *Act* and the *Rules* clearly contemplate that the certification application will be made only after the statement of defence is filed. They argue that this Court has only limited jurisdiction to grant the delay sought under *Rule* 100 and ought to exercise it cautiously. They say that they will be prejudiced by being required to proceed with the certification application without knowing what position the defendants will take with regard to certain allegations in the statement of claim. Counsel pointed out that *Rules of Court* 152-155 require defendants to admit such allegations as they know to be true, specifically plead positive defences, and not to plead evasively. He argued that the plaintiffs are entitled to know, prior to the certification hearing, what position the defendants will take in relation to certain allegations in the statement of claim that would be common to all of the claims asserted, such as whether the defendants are corporate bodies, whether they have marketed

genetically modified canola, as alleged, and whether such canola is capable of cross-pollinating with other non-genetically modified crops, as alleged. In addition, he points out that he has provided extensive particulars and detailed information to the defendants in response to their demands for particulars, and he should have the opportunity to demand such information in relation to any defences raised, as well as any documents referred to in those defences, which may be of assistance to him in preparing for the certification application.

[10] The plaintiffs also argue that the statements of defence will assist the Court in defining the common issues on the certification proceedings, and to allow the defendants to delay risks bifurcating the proceeding, for their defences might raise new issues that would have to be defined as common issues, necessitating an amendment to any certification order granted.

[11] The issue of whether the defendants should be required to file a statement of defence prior to the certification application is an issue that has not yet been the subject of a written decision in this province. Class action legislation is relatively new in Canada. *The Class Actions Act* has only been in effect in this province since the beginning of this year and similar legislation is presently in place in only three other common law jurisdictions: Ontario, British Columbia and Newfoundland (in the last case, only since April 1 of this year). The case authority in Ontario and British Columbia on the issue before me is conflicting.

[12] It is clearly the normal practice in Ontario to permit the defendants to delay filing statements of defence until after the determination of whether and how the action will be certified as a class action, and this is often done by agreement of the parties on the assumption that the claim to be responded to may be very different depending on whether

the certification motion is, or is not, successful. See *Moyes v. Fortune Financial Corp.* [2001] O.J. No. 4455 (Ont. Superior Court) where Nordheimer J. described this practice, citing *Mangan v. Inco Ltd.* (1996), 30 O.R. (3d) 90 (Ont. Gen. Div.) as authority.

[13] In the latter case, Winkler J. held that the equivalent to what is s. 4(3) of our *Act* did not contemplate holding a certification motion prior to delivery of the statement of defence. I agree with this conclusion insofar as our provision is concerned. The purpose of s. 4(3), in my view, is to ensure that the certification application is brought early in the proceedings of a proposed class action. However, it clearly contemplates that the statement of defence will be filed prior to the certification application. Winkler J. went on to find, however, that under s. 12 of the Ontario *Class Proceedings Act, 1992*, S.O. 1992, c. 6 the court has wide discretion to make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditions determination. He reasoned that, although the *Act* itself appeared to contemplate that the statement of defence would be filed prior to certification proceedings in a class action, "While in some instances it may be in a defendant's interest to deliver a statement of defence prior to the certification motion, it is not, strictly speaking, necessary for such a determination."[At p. 4] He concluded in that case that the statement of defence might have to be entirely reformulated in response to the outcome of the certification hearing and that, therefore, in light of the complexity of the matter, and the amount of time and effort involved in drafting a defence, an order should issue granting leave to the defendant to defer filing the statement of defence pending disposition of the certification issues. He commented that, although in the absence of agreement by the parties it was a matter to be determined by the designated class proceedings judge, "in the preponderance of cases the statement of defence will not be required for determination of the certification motion." [At p. 5]

[14] Section 12 of the Ontario statute is worded identically to s. 14 of the Saskatchewan Act, except that the term "class proceeding" is used in lieu of "class action". However, the Ontario statute contains no definition of "class proceeding", while the Saskatchewan *Act*, like the British Columbia *Act*, defines "class action" (or "class proceeding", in British Columbia) as an action (or proceeding) certified as such under the statute.

[15] Martinson J., in *Scott v. TD Waterhouse Investor Services (Canada) Inc.* [2000] B.C.J. No. 2524 (B.C. S.C.), a recent decision in British Columbia, took a different view on the issue of the timing of statements of defence in relation to the certification application. He pointed out that the British Columbia legislation, (like the Saskatchewan legislation, but unlike the Ontario legislation) restricts the definition of "class action" to proceedings that have been certified as such, and therefore concluded that the discretion accorded by the equivalent of s. 14 in our statute does not come into play until after a proceeding is certified as a class proceeding. He reasoned as follows:

> An originating action, commenced pursuant to s. 2(1) of the Class Proceedings Act, is an ordinary action governed by the Rules until certification. An ordinary action is converted into a class action upon certification: s. 4 of the Act. It is only upon such certification that the Act gives the court the power to make "any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination": s. 12 of the Act. [At para. 26]

[16] He was, in addition, of the view, contrary to the Ontario position, that it is desirable, and, indeed, necessary, that the statement of defence be filed prior to the certification application.

> Because the Act focuses on certifying the originating action as the class action, the process involved is to isolate certain issues from the pleadings in the originating action that are identified as suitable to be tried on a common basis. In order to isolate the common issues, all the issues must be identified. To do that, the pleadings in the originating action must be closed and the issues joined. It is the pleadings of both sides that lead to a joining of issues of fact and law for determination: Bullen & Leake's Precedents of Pleadings, 11th ed. (London: Sweet & Maxwell, 1959) at 2. A statement of defence is therefore required. [At para. 40]

[17] The present motion requires this Court to decide, for the first time in this Province, between these two views. The analysis of Martinson J. seems to me to raise two issues. The first is whether the Saskatchewan legislation should be interpreted restrictively, such that the originating action is treated as an ordinary action strictly governed by the ordinary *Rules of Court* with no additional discretion accorded to the judge designated to deal with the action, until after certification. The second issue is whether, in general, or in this particular case, a statement of defence is necessary or desirable prior to the certification hearing.

[18] The first of these issues requires an interpretation of s. 14 of the Act, which I repeat here for convenience:

> **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.

[19] It is my view, with respect, that the narrow scope given to this provision in *Scott* is overly restrictive and, in particular, that it is implausible to view every potential class action simply as an ordinary action, subject to the ordinary rules, without distinction, until after the proceeding is certified. The originating action in this case is expressly "Brought under *The Class Actions Act*." This procedure is contemplated by s. 4 of the *Act* and by *Rule* 78(1) of the *Class Actions Rules*. Paragraph 3 of the statement of claim expressly claims that the action is brought on behalf of members of a proposed class, set out in some detail in that paragraph. One remedy sought, an injunction prohibiting the release of genetically modified wheat in this province, would seem to depend, for its plausibility, on establishing potential damage to a class of plaintiffs substantially larger than the two organic farming operations of the named plaintiffs. Counsel for the plaintiff requested that a judge be designated pursuant to the *Act* prior to receipt of the statement of defence, and all applications made in relation to this action, prior to the application for certification, have been made to me as the designated judge. While circumstances might vary from case to case, it is highly implausible to consider this action as simply an ordinary action, prior to determination of whether it is to be certified as a class action.

[20] While s. 44 of the *Act* provides that the *Rules of Court* apply to class actions except where they are in conflict with the Act, the *Rules* themselves give the Court discretion as to their strict application. It is my view that in the case of a action commenced as a proposed class action, that discretion must be exercised in a way that reflects the purpose, philosophy and special procedures of this new legislation. In particular, even prior to certification, the court must be mindful of a number of matters: of the need to insure that the certification application is brought early in the proceedings without undue delay; of what will be necessary or useful prior to the certification application or for the purpose of that application; and also of what ordinary requirements

may, in some contexts, make little sense in light of the anticipated certification proceedings and the fact that the action as it is ultimately certified may be quite different from the originating action, or, as in this case, that the action, if certified as a class action, will raise issues and have a significance quite different from what it would have if considered simply as an ordinary action between the named plaintiffs and the defendants. In its determinations on these matters as well the court must be mindful at all times of the requirements of fairness as between the parties to the proceeding.

[21] In relation to the issue raised by this application, it is in my view highly relevant that the Ontario practice has evolved, with apparent approval of appellate courts, that statements of defence should not, in most cases, be required prior to the certification of the proceeding as a class proceeding. That this procedure has worked well for several years in Ontario would strongly suggest that, as a rule, it is not necessary to have the statement of defence for the purpose of the certification proceeding. In my view, this makes sense, as the question of what issues are to be defined as common issues will, in most circumstances, simply be the question of which of the matters that the plaintiffs must prove in order to establish their cause of action or the remedy sought are common among the class sought to be certified. Resolution of this issue can be made on the basis of the statement of claim and the affidavit material filed on the application. It is not, in my respectful view, a question, at this stage, of where or to what extent there is "joinder of issues", as suggested by Martinson J., for "joinder of issues" is, necessarily, party specific. That is, until an action has been certified, any admissions made by the defence in relation to the originating action, if that action is viewed as clearly distinct from the ultimate class action, are not, in any case, for the benefit of the class.

[22] On the other hand, the Ontario practice clearly recognizes that there may be exceptional circumstances where it is desirable either from the point of view of

fairness between the parties, or the efficacy of the certification hearing, that a statement of defence be filed prior to the certification application. It is also recognized that in some cases the defence may itself prefer that its statement of defence be filed prior to the application and considered in the certification hearing.

[23] As counsel for Monsanto points out, Martinson J., in his decision in *Scott*, did not have the benefit of the trilogy of class action cases released by the Supreme Court of Canada in the last year, which have emphasized the need to give a liberal and non-restrictive interpretation to the relevant legislation and rules in order to give full effect to the purposes of class action proceedings. These cases are *Western Canadian Shopping Centres Inc. v. Dutton,* [2001] 2 S.C.R. 534, *Rumley v. British Columbia* (2002), 205 D.L.R. (4th) 39 (S.C.C.), and *Hollick v. Toronto (City)* (2002), 205 D.L.R. (4th) 19 (S.C.C.). While each of these cases addresses the question of whether the case is a proper case for certification as a class action, a different issue than that before me at this time, they also reflect a common approach to interpretative issues. In each case the Court emphasized the importance of construing the legislation generously in order to give full effect to its intended purpose. In *Hollick*, McLachlin C.J., writing for a unanimous court, commented,

> . . .In my view, it is essential therefore that courts not take an overly restrictive approach to the legislation, but rather interpret the Act in a way that gives full effect to the benefits foreseen by the drafters. [At para. 15]

[24] All three judgments point out that the principle behind class proceedings legislation is to provide a procedure that will balance efficiency with fairness in order to achieve the three principle advantages of class actions: judicial economy, access to justice, and behaviour modification.

[25] Balancing of efficiency with fairness requires the exercise of judicial discretion. This, in my view, is the point of s. 44 of the Saskatchewan *Act*. While on a literal and narrow interpretation s. 44 can be read as applying to procedures in relation to an action only after that action has been certified as a class action, this would not, in my view, advance the purposes of this legislation. In any case, the Court clearly has discretion pursuant to *Rule* 100 to extend the time for filing a statement of defence, and, in my view, the context in which this discretion must be applied may include the fact that the action is brought pursuant to *The Class Actions Act* and that the plaintiff intends to proceed to a certification hearing to determine whether the action may proceed on that basis and, if so, to define the class and the common issues to be tried as a class action.

[26] The issue before me therefore raises the question of whether, *in the context of a proposed class action*, it is either necessary or desirable to require the defendants to file a statement of defence prior to the certification hearing. This issue, requires the Court to balance fairness with efficiency, recognizing the fact that in this context pleading in defence may be difficult and could be unhelpful prior to the determination of whether the matter is to be certified as a class action, and if so, how the class or subclasses are to be defined, and what the common issues are.

[27] Nonetheless, there are clearly circumstances in which either fairness or efficacy may require that a statement of defence be filed prior to the certification application. I must now consider whether this is one of those cases.

[28] While I commented above that the definition of common issues that takes place in the certification hearing does not usually require consideration of the statement of defence, an exception arises, it seems to me, when it appears that the defendants may wish to rely on a positive defence or defences, such as limitation provisions, the statute

of frauds, contributory negligence or other statutory defences, for these may raise issues that should be considered as potential common issues in the certification process. If the defence were allowed to wait until after certification to raise such defences, it would be necessary to amend the certification order, with consequent further hearings and further delay. Alternatively, if the defence is going to bring such matters forward at the initial certification hearing in any case, the plaintiff is entitled to full notice of such an intent and may be entitled to demand particulars of such defences. This requirement may therefore be best served by simply requiring that the defence file its statement of defence in accordance with the ordinary *Rules of Court*, or such rules with such modifications as required by the context.

[29] In the instant case, it is clear from the material before me that the proposed class action, if certified, will raise broader issues than the originating action considered simply as a claim asserted by the named plaintiffs, because of the differing standards applied over different time periods by the various organic certification organizations. It is unreasonable to require the defendants to plead to all of these varying standards, when only one will be relevant if the action is not certified and proceeds merely as an ordinary action. On the other hand, the plaintiffs are in this case entitled to know, prior to the certification application, the general nature of the defences that will be raised. This requirement is in my view best served, in this case, by requiring the defendants to file a statement of defence to the claims of the named plaintiffs, reserving their defence to the allegations in relation to the proposed class of plaintiffs set out in paragraph 3 of the statement of claim until after determination of the certification application. In effect, the defendants can thereby plead to organic certification standards which the replies to the demands for particulars allege apply to Larry Hoffman, L.B. Hoffman Farms Inc. and Dale Beaudoin and delay pleading in relation to any other standards that may become relevant if the action is certified as a class action.

[30] With this qualification the applications for an order that the defendants not be required to file a statement of defence until after the adjudication of the certification application is denied.

[31] As success is divided, and the issue raised herein is a novel one arising under new legislation in this province, there shall be no order as to costs on this application.

Smith J.