SUPREME COURT OF NOVA SCOTIA
Citation: *Mitchell v. Bayer Inc.*, 2020 NSSC 172

Date: 20200520
Docket: Hfx No. 489864
Registry: Halifax

Between:

David Mitchell and Gretta Hutton

Plaintiffs

v.

Bayer Inc., Monsanto Company, Monsanto Canada ULC, Monsanto Canada Inc.

Defendants

Decision – Sequencing of Motions

Judge:	The Honourable Justice Denise Boudreau
Heard:	May 7, 2020, in Halifax, Nova Scotia
Counsel:	Raymond F. Wagner, QC, for the Plaintiffs William McNamara, for the Defendants

By the Court:

[1] This proposed class action was filed on July 4, 2019. The case has not yet proceeded to a certification hearing. The Court has been asked to determine the sequencing of upcoming motions in this matter; more precisely, whether the intended stay motion by the defendants for abuse of process should be heard before the certification motion (as requested by the defendants) or heard at the same time as the certification motion (as requested by the plaintiffs). Counsel have provided me with fulsome written and oral submissions. I thank them both for their assistance.

[2] In general terms, the pleadings allege that the defendants, who manufacture and distribute the herbicide "Round-Up", breached their duties to members of the proposed class(es). The proposed plaintiffs allege that exposure to "Round-Up" causes Non-Hodgkin's Lymphoma and that the defendants failed to warn of known risks of such exposure. The proposed plaintiffs seek certification of a national class, comprised of two subclasses, a "primary class" (those diagnosed with the illness) and a "family law class" (family members of the primary class).

[3] I am advised that since November 2018, eleven similar (or identical) proposed class proceedings have been commenced in other jurisdictions in Canada,

against these same defendants. Further, the present action is the seventh of nine actions seeking national certification (while another action seeks a national class minus Quebec). British Columbia has two proposed actions, one national, one BC only. Alberta has seen the filing of two actions and Ontario has seen four (now consolidated). The central issues in all of these proposed class actions, I am told, are essentially the same: whether "Round-Up" is a carcinogen and whether the defendants negligently failed to disclose that risk.

[4] As a result, the defendants wish to bring a motion for a stay of the present proceeding, on the basis that it is duplicative of other proceedings in other provinces that seek certification on behalf of the same classes for the same allegations, and is thereby an abuse of process.

[5] As I have already noted, the present matter has not yet been certified as a class action. In point of fact, as I understand it, none of the actions proceeding in any province have yet had a certification hearing, although some are somewhat more advanced in the process. In Saskatchewan, for example, the defendants have already made a motion for a stay of proceedings (for the same reasons as in the present matter). That motion was dismissed. However, I am advised that since that time plaintiff counsel have chosen to willingly agree to a stay in favour of a consolidated Ontario proceeding.

[6] In British Columbia the defendants have made that same stay motion and, I am advised, the motion is yet to be heard. I am also advised that the court in British Columbia has not yet definitively resolved the question that I wrestle with now, namely: should that motion be heard before certification, or at the same time.

[7] I am told that in Quebec there has been agreement to stay matters in favour of the Ontario proceeding as well.

[8] In Ontario the matter is also proceeding. A number of competing Actions have now been consolidated as one, and the court has established a timeline for the certification hearing. I am advised that motions may be made by counsel for the defendants there as well, although their nature and timing are not yet formalized.

[9] This brings me to the matter at hand. The parties disagree as to the timing of the two pending motions here in Nova Scotia (abuse of process / certification) and have asked that I rule on that issue.

[10] It is agreed by the parties, generally speaking, that the first motion that normally should be heard in a proposed class action is the certification motion. Having said that, it is also generally agreed that the scheduling and sequencing of motions are matters within the jurisdiction of the Court and at the discretion of the

Court (NS Civil Procedure Rules; *Class Proceedings Act* S.N.S. 2007, C-28, ss. 15). In other words, either option is theoretically possible.

[11] The defendants argue that their motion for stay/abuse of process should proceed first. In their view, this is the more appropriate procedure when dealing specifically with an abuse of process motion, and that such would be the more efficient, timely and cost-effective way of proceeding.

[12] The proposed plaintiffs disagree. They submit that certification should be the "first order of business", and that a pre-certification stay motion will increase delays and costs to the parties, and will not promote the efficient use of court time. They seek for the court to hear both motions together.

[13] I have been provided with a number of decisions where courts faced similar debates. Quite frankly, there are persuasive cases on both sides of the argument; and at times we see different results in fairly similar cases. I presume that this is a reflection of the fact that in most of these cases there was no definitive right or wrong answer to the question; each judge simply exercised his/her discretion based on the best information at hand and his/her best judgment. The present decision will be no different.

Cases where the motion to stay was heard in advance

[14] The defendants note that in the related Saskatchewan action *(Gadd v. Bayer)*, the motion to stay proceedings was heard in advance (although it is unclear to me whether the sequencing of motions was the subject of debate in that case). The Court stated:

> [10] Second, I agree with counsel for the defendants that it is not necessary to await a certification hearing before considering an application to stay a proposed class action as an abuse of process. See especially: Johnson, at para. 7, and authorities cited there. (*Gadd v. Bayer* decision of Justice Mitchell (SKQB) dated Feb 20 2020)

[15] The defendants note that in class action cases, while it is true that motions for various other relief are often deferred until after certification, such is not the case for motions alleging abuse of process. The defendant put forward the case of *BCE v. Gillis* 2015 NSCA 32 from our jurisdiction, as an example of such a case. (Once again, however, I note that the sequencing of motions was not the subject of commentary in that case, and may not have been debated.)

[16] Cases where the motion to stay was heard in advance include for example *Johnson v. Equifax* 2018 SKQB 305 where the court noted:

> 7 There is clear authority to allow this type of application to be heard separately and in advance of the certification hearing (*Ammazzini v. Anglo American PLC*, 2016 SKQB 53 (Sask. Q.B.) at para. 21; *T.G. v. Saskatchewan* 2017 SKQB 146 (Sask. Q.B.) at paras. 8-9; *Spicer v. Abbott Laboratories Ltd*

2017 SKQB 271 (Sask. Q.B.)[*Spicer*]; and *Brooks v. R.* 2009 SKQB 54 (Sask. Q.B.) at para. 24, [2009] 7 W.W.R. 137 (Sask. Q.B.).

8 Specifically I note Justice Barrington-Foote's comments in *Spicer*:

> 28 In this case, I have all of the evidence necessary to make the decision. That is so due to the nature of the issue. The defendants' application is based on the fact that other proceedings were commenced and disposed of, including, in particular, the denial of certification in *Charlton CA* (*Charlton v. Abbott Laboratories Ltd.* 2015 BCCA 26 [2015] 9 WWR 427]. I have the relevant pleadings, chronology and decisions of the Quebec, Ontario and British Columbia courts. The plaintiff has presented evidence intended to address the lack of evidence relating to a methodology which resulted in the decision in *Charlton CA*, and discloses the nature of the harm that may have been suffered by potential class members. The plaintiff has not identified any other evidence that might form part of the certification record that would be helpful in deciding this issue. Further, if the defendants succeed, this application – unlike that in *T.G.* – will dispose of the entire action.
>
> 29 In these circumstances, it is fair and efficient that I decide this application now.

9 I find that I have all the facts relevant to the abuse of process issue before me. Therefore, it is appropriate to decide Equifax's application for a stay in advance of the certification motion.

[17] In *Bear v. Merck Frosst Canada & Co.* 2010 SKQB 284:

> 1. These are prospective class actions, commenced under the Class Actions Act S.S. 2001, c. C-12.01, in relation to the defendants' product Vioxx. The primary matter before me in each action is the application of the defendants to strike out the statement of claim. Usually such an application would be deferred to the hearing of the application for certification because, as a general rule, the certification application should be the first application heard in an Action commenced under the Act: Alves v. Sunquest, 2009 SKQB 77, 335 Sask. R. 164 (Sask. Q.B.). Where the designated judge finds a compelling reason for doing so, though, an earlier application may be heard.
>
> 2. In the circumstances of this case, I directed that the defendants' applications would be heard earlier than the certification application. Those circumstances include the action that culminated in Wuttunee v. Merck Frosst Canada Ltd., 2009 SKCA 43, [2009] 5 W.W.R. 228 (Sask. C.A.). That action, too, was a prospective class action in the Saskatchewan Court of Queen's Bench against these defendants in relation to their product Vioxx. After a lengthy certification process, in which this court certified the action first as a regular class action and then as a

> multi-jurisdictional class action, the Court of Appeal quashed the certification order. Subsequently Mr. Bear, Mr. Gurnsey and Mr. Rybchinski commenced these actions. The defendants have responded with their applications to strike out the actions.
>
> 3. In determining that the defendants' applications would be heard earlier than the certification hearing, I noted that:
>
> > (a) The defendants already have been involved in extensive litigation in Saskatchewan with respect to Vioxx in the context of a prospective class action;
> >
> > (b) The nature of these actions and of the Wuttunee action is the same, being a proposed class action against the defendants by those who purchased or ingested Vioxx; and
> >
> > (c) In a prospective class action, the transition from their statement of claim to certification hearing most often does not happen quickly or inexpensively.
>
> 4. In these circumstances I concluded that it would be unfair to require the defendants to participate again in the certification process before their applications are heard. In short, I concluded that the circumstances demonstrated a compelling reason for hearing the defendants' applications earlier that the hearing of the certification application…

[18] In *Fantov v. Canada Bread Company Ltd* 2019 BCCA 447:

> 70 In Brooks, Justice Zarzeczny acknowledged that there may arise circumstances where it is appropriate to decide an application to stay a multi-jurisdictional class action for abuse of the court's process in advance of certification. I agree with that proposition..

[19] In *Baxter v. Canada (Attorney General)* [2005] O.J. No. 2165 (Ont. S.C.J.), the third parties wished to being certain motions in advance of certification (including a motion to challenge the court's jurisdiction regarding third parties outside of Ontario, as well as a motions to dismiss the action by certain third parties). The Court noted:

> 14 Admittedly, there are instances where, as indicated in both Attis and Moyes, there can be exceptions to the rule that the certification motion ought to be the first procedural matter to be heard and determined. It may be appropriate to make an exception where the determination of a preliminary motion prior to the certification motion would clearly benefit all parties or would further the objective of judicial efficiency, such as in relation to a motion for dismissal under Rule 21 or summary judgement under Rule 20. Such motions may have the positive effect of narrowing the issues, focusing the case and moving the litigation forward. An exception may also be warranted where the preliminary motion is time sensitive or necessary to ensure that the proceeding is conducted fairly. (authorities omitted)
>
> 15 However, there is an important distinction between Rule 20 and 21 motions that are brought by the defendant and those that are brought by third parties. In many cases, Rule 20 and 21 motions brought by the defendant have the potential to render the certification motion unnecessary if they are determined prior to certification, thereby furthering the objective of judicial economy. Rule 20 or 21 motions brought by third parties in relation to claims against those third parties do not have the same potential to render the certification motion unnecessary....

Cases where the stay motion was heard at same time as certification

[20] The proposed plaintiffs argue that the defendant's stay motion should be held in conjunction with the certification hearing.

[21] They note firstly the general over arching rule, that a certification motion should be the first motion heard. They also note the significant risk of delay, interlocutory appeal, and "piecemeal" litigation that, in their view, would result if the defendant's motion was heard first. The Court in *Alves v. Sunquest* 2009 SKQB 77 noted (at para. 32):

> In my view to obtain an exception to the general rule that the certification motion should be the first motion heard on a class action, the defendants must provide a compelling reason for the court to treat matters sequentially...

[22] In the case of motions other than those seeking a stay for abuse of process, such are almost always heard after certification. In *Anderson v. Canada* 2008 NLTD 166, the defendant wanted to deal with a Demand for Particulars, as well as motion to add other defendants. The Court had to determine whether these motions should be heard before certification or after:

> 38 I agree with the position that where a preliminary application has the potential to dispose of the litigation or more efficiently address the objectives of the *Class Actions Act*, then it should be heard prior to the certification hearing.
>
> 39 That is not the case in the present matter and I am convinced that to permit these two applications to proceed prior to the certification hearing will cause this certification hearing stage of the intended class action to spiral down a timeless rabbit hole wherein one particular application begets another…
>
> 40 I can find no "discernable advantage" to proceeding on these applications prior to the certification hearing…

[23] A motion to add third party was deferred until after the certification motion (*Gay v. Regional Health Authority* 2014 NBQB 229). A motion to strike a third party notice was also deferred until after certification (*Attis v. Canada (Minister of Health)* [2005] O.J. No. 1337).

[24] In *Champagne v. Roman Catholic Episcopal Corporation of Canada,* 2019 NSSC 395, the defendants sought hearing dates for motions in advance of certification. Their motions sought the striking and/or staying of some of the claims, and the striking of some of the evidence filed on the motion for certification.

[25] The Court in *Champagne* considered the so-called "Branch" factors (from Ward Branch, *Class Actions in Canada*, 2nd ed (Toronto; Thomson Reuters Canada Limited, 2019)) s. 5.200) as articulated by Strathy J. in *Cannon v. Funds for Canada Foundation* 2010 ONSC 146, as to the non-exhaustive list of factors to be considered in these cases:

> (a) Whether the motion will dispose of the entire proceeding or will substantially narrow the issues;
> (b) Likelihood of delays and costs associated with motion;
> (c) Will the outcome promote settlement;
> (d) Will the motion give rise to interlocutory appeals and delays;
> (e) The interests of judicial economy and efficiency;
> (f) Whether its earlier scheduling would promote the "fair and efficient determination" of the proceeding.

[26] The Court in *Champagne* concluded the following in its case: the motion would not dispose of proceeding, since even if successful there were still 2 more defendants; the motion to strike was, in fact, duplicative of the test for certification (this factor seems to have been the most relevant to the courts decision); the potential for delay existed if motion proceeded first; and there would be no prejudice in hearing these motions at same time as certification.

[27] In *Douez v. Facebook Inc* 2012 BCSC 2097, the Court considered whether the intended motion by the defendant, seeking a declaration that Court decline

jurisdiction (*forum non conveniens*), should be heard before or after certification. The court noted the following concerns:

> 11. Both parties agree that the policy underlying the general rule that the certification application should be the first application reflects the Supreme Court of Canada's caution against "litigation by installments", as stated in *Garland v. Consumers' Gas Co.* 2004 SCC 25 (S.C.C.) at para. 90.
>
> 12. The *Garland* case was an example of what can happen when separate procedural motions are heard. That case involved two trips to the Supreme Court of Canada and 10 years before it concluded.

[28] In that context, the Court voiced a number of further concerns: that no matter the outcome of the jurisdictional motion, there would likely be an appeal by the unsuccessful party, which would lead to delay. Also, while holding a certification motion first might mean some cost to the parties, such would not be appreciably more than the alternative (appeals etc.)

[29] The Court also saw some overlap between the *forum non conveniens* issue and the test for certification under the *Class Proceedings Act*; it therefore concluded that it wanted a full evidentiary record before making either decision:

> 51 It is not appropriate for me to say too much given these issues will come back before me, but I simply want to make it clear that as a judge hearing the matters I would find it more helpful to have them heard together.

[30] In *Gill v. Yahoo! Canada Co.* 2018 BCSC 290, the defendant wished to bring a motion for stay of proceedings, as it alleged that the plaintiff had agreed to the *forum conveniens* of Ontario. It sought to have this motion heard before

certification. The Court refused to do so, noting that the motion would not dispose of the matter even if the defendant was successful, because of likely appeals; furthermore, that the Court could not be entirely sure that there would not be overlap with certification issues. The Court therefore decided to have the stay motion and the motion for certification heard together.

[31] In *Reynolds v. Hershey Canada* 2019 ONSC 1776, another proposed class action, the plaintiff put forward the claim that the defendant manufactured food products as a result of child slave-labour in Africa. He sued as a proposed representative plaintiff, on behalf of all consumers of said products. The defendant responded with their intention to file a motion to stay, arguing that this plaintiff had no cause of action. The Court was again asked to determine whether that motion should be heard prior to certification.

[32] The Court noted:

> 5 The way it has been framed by Defendants' counsel, the challenge to the cause of action will not be a minor procedural motion. Rather, it is envisaged as a substantive attack on the entire basis of the Plaintiff's claim. Counsel for the Defendant points out that previous courts have noted that whether or not a motion will potentially dispose of an entire action is an important consideration in determining whether it should proceed as a preliminary matter: *Cannon v. Funds for Canada Foundation* 2010 ONSC 146 (Ont. S.C.J.), at para. 15. In fact, Nordheimer J. (as he then was) stated in *Moyes v. Fortune Financial Corp.* [2001] O.J. No. 4455 (Ont. S,.C.J.), that a defendant's motion that the claim discloses no reasonable cause of action is an obvious one that should proceed in advance of a certification motion.

> 6 On the other hand, Winkler J. (as he then was) observed in *Attis v. Canada (Minister of Health)* [2005] O.J. No. 1337 (Ont. S.C.J.), at para. 7, that as a matter of principle the certification motion should be the first thing a court hears in a proposed class action. He went on to say, at para. 9, that where other challenges will predictably generate more motions and appeals, it is best to address all of the issues together in the certification motion. This approach reflects Plaintiff counsel's comment that the no-cause-of-action argument that the Defendant will make in a Rule 21 motion is a precise reflection of the argument it will make under s. 5(1)(a) of the CPA, and that the Defendant compromises no rights by addressing the question in the latter context.
>
> 7 The Supreme Court of Canada addressed this issue in *Garland v. Consumers' Gas Co.* [2004] 1 S.C.R. 629 (S.C.C.), at para. 90. In a memorable phrase, the Court admonished that "litigation by installments" should be avoided, as it does a disservice to the parties and to the administration of justice. Although, as Defendant's counsel points out, the Court there was referring to a proposal to hive off a portion of the case for a later date rather than a motion to dismiss, the policy concern is the same as that raised here.
>
> 8 If the cause of action is addressed in a stand-alone motion, it will almost inevitably proceed along an independent line of appeal. Only when that process has reached an end will the parties be in a position to proceed with the certification stage (unless some other preliminary challenge comes along – Defendant's counsel has already suggested there may be a jurisdictional challenge to the two foreign Defendants). I am reluctant to schedule this case in a way which will lead to that type of piecemeal approach to the litigation.
>
> 9 Under the circumstances, from a procedural point of view it is preferable for the Defendant not to bring a Rule 21 motion. Rather, it is best for the Defendant's challenge to the Plaintiff's cause of action be made under section 5(1) (a) of the CPA in response to the Plaintiff's motion for certification.

[33] In a very recent case, *Kirsh v. Bristol-Myers Squibb* 2020 ONSC 1499, the Court noted that hearing both motions together would give the Court the advantage of a complete record:

> 9 A stay of proceedings is available under Rule 21.01(3)(d) of the *Rules of Civil Procedure* and as a matter of the court's inherent jurisdiction to prevent an abuse of power. But this remedy is discretionary: *Toronto (City) v. CUPE, Local 79*

> [2003] 3 SCR 77, at para. 35. In order to properly weigh that exercise of discretion, it is important to fully understand the certification motion in all of its aspects. I will therefore proceed with the certification motion in its entirety before returning to evaluate the Defendants' request for a stay.

Conclusion

[34] As I indicated at the start, the question of the sequencing of motions appears to be entirely one of discretion, and I do not see any obviously right or wrong answer. There are arguably very good reasons for proceeding in one way or the other. I also do not see any significant prejudice to either party in either option.

[35] Looking at the issue through the lens of the "Branch" factors, I note: first, obviously if the defendant's stay motion were successful, it would dispose of the entire proceeding in this jurisdiction (or, perhaps, narrow the issues); but that is only one possible scenario. The stay motion could be unsuccessful (as it was in Saskatchewan), which would only delay the matter further. Alternatively, either result could engender an appeal and a entirely separate track of litigation, before certification. I note that the defendant has suggested the possibility of the parties' undertaking not to appeal, but that is speculative at this point. This addresses Branch factor #2 as well (the likelihood of delays and costs associated with motion, including interlocutory appeals).

[36] I see no effect on settlement in either option (Factor #3).

[37] In terms of the interests of judicial economy and efficiency (Factor #4), either option has inherent and possible benefits and risks. At first blush, the notion of having the stay motion first has some attractiveness since, were the motion successful, the matter might be concluded. However, as I have mentioned, that is but one possible outcome.

[38] In the final analysis, that factor, as well as the last (i.e. which option would promote the "fair and efficient determination" of the proceeding) most influence my decision here. In my view, the most efficient and fair use of court time and resources, is to hear these matters together.

[39] The defendant's motion to stay this proceeding is a very important and impactful one, with potential and significant repercussions to all parties involved. I believe that in order to make the right decision on that motion, and also to use court time efficiently, I need to have a full record before me, as did the Courts in *Douez* and *Kirsh*.

[40] The *Class Proceedings Act* provides the following:

> 7 (1) The court shall certify a proceeding as a class proceeding on an application under Section 4, 5 or 6 if, in the opinion of the court,
>
> (a) the pleadings disclose or the notice of application discloses a cause of action;

> (b) there is an identifiable class of two or more persons that would be represented by a representative party;
>
> (c) the claims of the class members raise a common issue, whether or not the common issue predominates over issues affecting only individual members;
>
> ...

[41] The *Act* also provides that a certification order shall state, among other things, the nature of the claims or defences asserted on behalf of the class, the relief sought by the class, and the common issues.

[42] As we currently stand, the proposed plaintiff's certification motion has not yet been put forward. We do not know the reasoning or justification for the two proposed classes it has put forward. We do not know the proposed common claims, for either of these classes. We also do not know the defendant's position as to certification, since of course at this point, they cannot know either, as they do not know what will be proposed.

[43] It seems to me that these are very important parts of the record that need a fulsome fleshing out, before I could properly consider a motion for a stay for abuse of process on the basis that "the same" litigation is taking place elsewhere.

[44] I acknowledge that I am not in possession of the defendant's stay motion, and that if it were filed, presumably there would be some evidence put before me

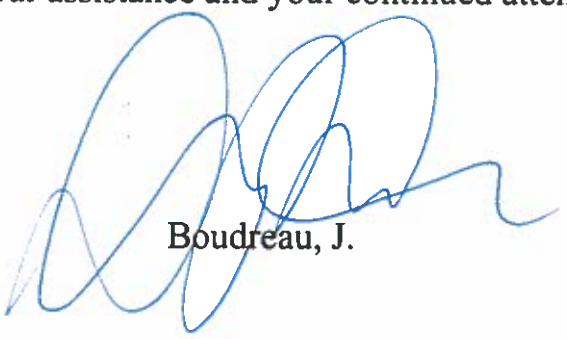
there. But it would not be the full record on this request for a class action proceeding, which in my view, I would need.

[45] It also seems to me that, while I cannot know for sure, I believe there is very likely overlap between the issues to be discussed and decided at both this stay motion and this certification motion. Perhaps the issue of whether a national class should be certified in Nova Scotia overlaps with whether the Nova Scotian action should be stayed in favour of another province.

[46] Therefore, while I acknowledge that both options are possible, it seems to me that the best use of our time and resources is to have both motions heard at the same time. I would then have the entire record at my disposal in order to make the best decision possible for all parties involved, on both motions. This is essentially the same conclusion reached by the courts in the *Facebook, Yahoo*, *Hershey,* and *Kirsh* cases. I find their reasoning on this issue entirely persuasive.

[47] Could counsel please provide me with their proposed schedule of "milestones" and filings for these motions, both evidence and submissions. As you know, due to the COVID-19 situation, the Court is presently in a situation of reduced hearing dates, but that is in a state of constant evolution. We will discuss further once you provide me with your proposed timelines.

[48] I thank you both for your assistance and your continued attention to this.



Boudreau, J.