QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2016 SKQB 324**

Date: **2016 10 04**
Docket: QBG 1611 of 2009
Judicial Centre: Saskatoon

BETWEEN:

DAWN DEMBROWSKI and ALINA POPA

PLAINTIFFS

- and -

BAYER INC., BAYER CORPORATION, BAYER HEALTHCARE PHARMACEUTICALS INC., BAYER HEALTHCARE LLC, and BERLEX LABORATORIES, INC.

DEFENDANTS

Counsel:

E.F. Anthony Merchant, Q.C. and Shane Gardner (student-at-law)	for the plaintiffs
Robert W. Leurer, Q.C., Jason W. Mohrbutter and William McNamara	for the defendants

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JUDGMENT
October 4, 2016

GABRIELSON J.

Introduction

[1] The plaintiff Dawn Dembrowski [Dembrowski] applied for certification of this action as a class action pursuant to *The Class Actions Act*, SS 2001, c C-12.01, s 6 [*CAA*].

[2] In my judgment dated September 17, 2015 (2015 SKQB 286), I found that four of the five prerequisites set out in s. 6(1) had been met but that a fifth statutory prerequisite as set out in s. 6(1)(e) of the *CAA* required, *inter alia*, a litigation plan which was not adequately addressed by the plaintiff in her certification application. I granted leave to the plaintiff to file a revised litigation plan and reserved on the issue of whether the provisions of s. 6(1)(e) would then have been met.

[3] The plaintiff then filed a second proposed workable method dated December 17, 2015. I accepted submissions from counsel concerning this second litigation plan on September 7, 2016. I reserved my decision. This is my decision regarding whether the provisions of s. 6(1)(e) have now been met.

[4] The plaintiff also raised the issue of whether costs of certification would now be awarded. Section 40 of the *CAA* was amended effective May 14, 2015 to provide that "The court or the Court of Appeal may award costs that the court or Court of Appeal considers appropriate with respect to any application, action or appeal pursuant to" (the *CAA*). The matter of costs was then argued by counsel on September 7, 2016 and will also be dealt with in this judgment.

Analysis

[5] The second litigation plan dated December 17, 2015 contains much more detail than the first which was dated December 19, 2013. I am satisfied that, with some amendments, the litigation plan meets the criteria as set out by Richards J.A. (as he then was) in the case of *Sorotski v CNH Global N.V.*, 2007 SKCA 104 at para 78, 304 Sask R 83 [*Sorotski*].

Amendments to the Current Litigation Plan

[6] There are, however, several areas that require amendment in this second litigation plan as raised by the defendants [Bayer]. Some provisions of the litigation plan appear to be contrary to *The Queen's Bench Rules*. As was stated by the Court at para. 81 in *Sorotski*, the litigation plan will evolve but, overall, I am satisfied that it will move the claim forward on behalf of class members.

[7] Section 44 of the *CAA* provides as follows:

> 44 The Queen's Bench Rules apply to class actions to the extent that those rules are not in conflict with this Act.

[8] I am satisfied that the litigation plan must comply with *The Queen's Bench Rules* unless specific leave is sought. The following provisions of the plan are not approved without specific application.

(i) *Lifting of the Implied Undertaking*

[9] Paragraph 19 of the litigation plan states:

> 19. Documentary and oral discovery shall not be subject to an implied undertaking, but any Party may apply to the Court for a Protective Order. The Court shall not grant a Protective Order unless a Party demonstrates need for confidentiality. …
>
> [Emphasis added]

[10] While some jurisdictions have enacted rules for a deemed undertaking of confidentiality, other jurisdictions have relied upon the common law which recognizes an implied undertaking of confidentiality. Saskatchewan is one such jurisdiction.

[11] In the case of *Trends Holdings Ltd. (Trustee of) v Tilson*, 2007 SKQB 115, 296 Sask R 54, Ball J. confirmed that the implied undertaking rule also applies in Saskatchewan. At para. 17 he also dealt with the rationale for the rule and its effect:

> 17 The implied undertaking rule ensures that a party obtaining disclosure of documents or testimony at an examination for discovery will not use or permit the documents or testimony to be used for a collateral or ulterior purpose. The rule applies to counsel for the party receiving disclosure and is provided by counsel as an officer of the court. Without the consent of the disclosing party, no use is to be made of transcripts and copies of documents outside of the proceedings in which they are disclosed, except with leave of the court.

[12] The plaintiff says that, as a class action has also been certified in Ontario, Quebec and the United States of America, that counsel wish to share the fruits of their disclosure and discoveries. As a judge in Saskatchewan, I have no control over what other jurisdictions may share with counsel for the plaintiff in this case, but I do have control over what counsel for the plaintiff may share. The plaintiff has given no reason why the implied undertaking rule in Saskatchewan should not be upheld. Counsel for the plaintiff shall be required to apply for the lifting of the implied undertaking with the onus remaining upon them to establish grounds for lifting the implied undertaking if they wish to share with counsel in other jurisdictions. Therefore, I do not approve of para. 19 of the second proposed workable method.

(ii) *The Discovery Process*

[13] The litigation plan in paras. 20-23 contemplates that the defendants will produce multiple corporate executives for the purposes of discovery. The defendant objects to such broad deviation from the standard practice. The standard practices set out in s. 19(1) and (2) of the *CAA* state:

> 19(1) Parties to a class action have the same rights of discovery as they would have in any other action.
> (2) After the examination for discovery of the representative plaintiff or, in an action mentioned in section 8, one or more of the representative plaintiffs, a defendant may, with leave of the court, conduct an examination for discovery of other class members.

[14] Rule 5-19 specifically limits discovery to one proper officer and requires an application to the Court to examine additional representatives of a corporate defendant. While it may be that additional discoveries will be needed, that decision should not be made in advance such that counsel for the plaintiff may examine whomever they wish including expert witnesses. Therefore, paras. 22 and 23 are revised to hold that the plaintiff would have to demonstrate that there is reason to examine anyone other than the proper officer who is selected in the first instance by the corporate defendants.

(iii) *The Costs of the Giving of Notice*

[15] Paragraphs 6-8 of the litigation plan provides Trilogy Class Action Services [Trilogy] will give notice of the certification order in designated newspapers and that the defendants will pay Trilogy's reasonable fees and expenses incurred in giving any notice required by the Court within 30 days of submission of its invoices. The defendants object to paying the costs of giving notice of the certification.

[16] Section 21 of the *CAA* provides as follows:

> 21(1) Notice that an action has been certified as a class action must be given by the representative plaintiff to the class members in accordance with this section.
>
> (2) The court may dispense with notice if, having regard to the factors set out in subsection (3), the court considers it appropriate to do so.

> (3) The court shall make an order setting out when and by what means notice is to be given pursuant to this section and in doing so shall consider:
>
> (a) the cost of giving notice;
>
> ...

[17] In the case of *Markle v Toronto (City)* (2004), 42 CCPB 69 (QL) (Ont Sup Ct), Nordheimer J. expressed the following as to who should bear the costs of notice in a class action:

> 5 In terms of the costs of notice to the class members, and recognizing that this is always a matter of discretion, the normal order is that the representative plaintiff has to bear the costs of that notice. I say that is the normal order because it is the representative plaintiff that seeks certification and one of the consequences of certification is the requirement under section 17 of the Act that notice be given to the class members. It is also the responsibility of the representative plaintiff, upon certification, to have produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding. The burden of notice therefore clearly falls on the representative plaintiff. This general rule is not without possible exceptions. For example, if a defendant admitted liability and the class proceeding was certified just to determine the relief to which the class members were entitled, then that might be a case where the defendant would be ordered to bear the cost of the notice programme. There may be other situations which would warrant a departure from the general rule. This case is not one of those exceptions, however. ...

See also *Walls v Bayer Inc.*, 2007 MBQB 131 at para 51, 217 Man R (2d) 66.

[18] Similarly here, the defendants have not admitted liability such that it would not be fair and reasonable to order them to fund the giving of notice. While I expect that it would be plaintiff's counsel who would be responsible for the costs of giving notice, I see no reason to require the defendants to pay such costs until liability has been established.

(iv) The Proposed Individual Issues Resolution Process – [IIRP]

[19] The defendants object to the proposed IIRP as set out in paras. 31 and 32 of the litigation plan which they say would be implemented in part through the use of a "Claims Form" which would trigger an onus on the defendants to file a response. However, the IIRP is subject to the defendants agreeing and if not, para. 33 of the litigation plan says that the Court will determine the procedures and protocols in accordance with s. 29 of the *CAA*. I am satisfied that the plan, while not perfect, is adequate in this regard.

The Costs of Certification

[20] Although briefs were filed and submissions made at the hearing of this matter, both parties submitted that it would be premature to award costs. Although the *CAA* was changed allowing the Court to award costs as of May 2015, most of the steps in certification had already been completed prior to that date. I am satisfied that in the circumstances of this case it is not appropriate for the Court to order costs of the application for certification at this time. I leave it to the trial judge to affix such costs (if any) after the common issues have been determined.

Conclusion

[21] The motion for certification is therefore allowed. The draft order filed by the plaintiff dated December 17, 2015 shall be amended by agreement as follows:

(i) Paragraph 2 of the draft order shall be changed such that the time for commencement of the class action shall be December 10, 2004 for Yasmin and January 6, 2009 for Yaz; and

(ii) Paragraph 6 shall be changed such that class members shall have the option of opting out within 90 days of the notice publication date.

J.
N.G. GABRIELSON