CITATION: Darmar Farms Inc. v. Syngenta Canada Inc. et al., 2021 ONSC 6411
COURT FILE NO.: 2613/16
DATE: 20210929

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Darmar Farms Inc., Plaintiff

AND:

Syngenta Canada Inc. and Syngenta AG, Defendants

BEFORE: Rady J.

COUNSEL: Michael Peerless, Matthew Baer, Emily Assini, for the Plaintiff

Eric Block, Stephanie Sugar, Madeleine Brown, for the Defendants

HEARD: May 11, 2021

ENDORSEMENT

Introduction

[1] The plaintiff asks for an order certifying this national class action (excluding Quebec residents) and appointing it as the representative plaintiff of Canadian corn producers. It alleges that Syngenta negligently brought to the Canadian market two types of genetically modified corn seed, Duracade and Viptera, which contained the MIR-162 trait knowing that the seed had not yet been approved for import by China. The seed had prior North American approval for sale in Canada and the United States. The plaintiff alleges that the seed was prematurely commercialized domestically, resulting in the contamination of North American seed. In November 2013, China rejected North American corn shipments due to the presence of the MIR-162 trait. The rejection is said to have resulted in a glut of corn on the domestic market and a concomitant depression in the price of corn. The plaintiff seeks to recover those losses from the defendants on behalf of "all corn producers in Canada who priced their corn for sale after November 18, 2013".

[2] The plaintiff submits that this case is ideal for class certification and easily satisfies all five statutory criteria required for such an order.

[3] The defendants counter that the plaintiff has failed to demonstrate that it or any class member has a viable claim, or has sustained any loss, or that there are class-wide common issues. They say that there is no evidence of standard of care, causation or a methodology to calculate damages on a class-wide basis. They submit that this lawsuit is not the preferable procedure and the plaintiff is not an appropriate representative of the class. The only concession the defendants make is that there is a possible cause of action for premature commercialization by virtue of the Court of Appeal ruling in this case on the plaintiff's

appeal from the decision on the defendants' earlier Rule 21 motion (*Darmar Farms Inc. v. Syngenta Canada Inc.,* 2019 ONCA 789).

The Statutory Requirements for Certification

[4] The *Class Proceedings Act,* R.S.O. 1992, c. 6 provides as follows:

> 5(1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,
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> (a) the pleadings or the notice of application discloses a cause of action;
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> (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
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> (c) the claims or defences of the class members raise common issues;
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> (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
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> (e) there is a representative plaintiff or defendant who,
>
> (i) would fairly and adequately represent the interest of the class,
>
> (ii) has 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, and
>
> (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

The Evidence

[5] As is so often the case on certification motions, the record is extensive. It contains the following:

- the affidavit of Emily Assini (one of the plaintiff's lawyers);
- the affidavit of Chelsea Smith (also for the plaintiff);
- the affidavit of the principal of the plaintiff, Dale McFeeters;
- the affidavit and expert report of Dr. Andrew Schmitz (for the plaintiff);
- the affidavit and reply expert report of Dr. Andrew Schmitz;
- the affidavit and expert report of Dr. Bill Deen (on behalf of the defendants);

- the affidavit and associated expert report of Dr. Al Mussell (for the defendants);
- the affidavit and associated expert report of Charles E. Finch (also for the defendants);
- a Joint Transcript Brief containing the transcripts and exhibits from the cross-examinations of Mr. McFeeters, Dr. Schmitz, and Mr. Finch as well as the list of undertakings, under advisements, and refusals from each witness and the answers subsequently provided; and
- the plaintiff's Response to Demand for Particulars.

[6] Mr. McFeeters is the founder and president of the plaintiff, which is a cash crop commercial farm producing corn, soybeans, and some wheat. It is the case that Darmar never knowingly planted either Viptera or Duracade.

[7] Syngenta AG is described in the Statement of Claim as a global agribusiness, agrochemical and biotechnology corporation based in Switzerland. Syngenta Canada Inc. is described as an indirect wholly owned subsidiary of Syngenta AG.

[8] Dr. Schmitz is an agricultural economist who teaches food and resource economics at the University of Florida. Dr. Mussell is an agricultural economist, Dr. Deen an agroecologist and Mr. Finch an economist.

The Proceedings

[9] On December 1, 2015, the action was commenced and amended several times, most recently on January 15, 2021. The plaintiff's original claim is helpfully summarized in the Court of Appeal's decision at paras. 13-25. The allegations are excerpted here:

> 13 North America is the largest producer and exporter of corn in the world. At the relevant time, China was a large and growing export market for North American corn.
>
> 14 The North American corn industry is interconnected and mutually interdependent. Genetically modified seeds inevitably commingle with other seeds.
>
> 15 Approvals are required before commingled crops can be sold. Major industry associations, of which Syngenta is a member, have publicly recognized that there is a potential for major trade disruptions if approvals in major international markets are not obtained before a product is commercialized.
>
> 16 After being warned by industry associations not to introduce another MIR genetic trait without approval in export markets because of the detrimental consequences that can result from premature commercialization, Syngenta undertook not to cause damage to the corn market by introducing such a product

without necessary global approvals. Darmar and other class members are alleged to have reasonably relied on this undertaking.

17 In 2010, Syngenta's Agrisure Viptera product containing MIR 162 was approved for use in North America by the relevant American and Canadian regulators. However, in 2010 China had not approved the product. Syngenta only started the approval process in China in 2010, knowing it would take two to three years for approval, or longer if its application was incomplete or incorrect, which it was.

18 Even though China had not approved Agrisure, Syngenta brought Agrisure to market in North America for the 2011 crop year. As was inevitable, and foreseeable and foreseen by Syngenta, Agrisure "contaminated" the corn supply from the North American market through cross-pollination and commingling.

19 In November 2013, North American corn exports to China were found to be contaminated with Agrisure resulting in China's rejection of all corn from North America. This led to a glut of corn available for sale in North America and a drop in corn prices. This continued until after December 2014, when Agrisure was finally approved in China.

20 Syngenta is alleged to have been negligent in commercializing its product when it knew or should have known that doing so before approvals in China had been obtained would have the effect of contaminating the entire North American corn supply with a genetic trait that would lead to the closing of that export market and a corresponding drop in prices.

21 Syngenta is alleged to have made negligent misrepresentations about the importance of the Chinese market; the timing and substance of its application for Agrisure approval in China – in particular, the timing of when China was likely to approve Agrisure; its ability to channel Agrisure to non-Chinese markets; and its ability to contain the infiltration of Agrisure to the North American corn supply. The alleged misrepresentations were made "in commercial advertising and/or promotion for MIR 162 corn products, including Agrisure Viptera and Agrisure Duracade".

22 Darmar and class members relied on Syngenta's representations regarding the market in China and the status of regulatory approvals for Agrisure in China in deciding to plant corn; had they known the true facts they would have planted alternate crops or made other uses of their lands. Such reliance is alleged to have been reasonable on the part of Darmar and class members, as well as foreseeable to Syngenta.

23 Syngenta is alleged to owe a duty because: (i) the interdependence and interconnectedness of the corn market where genetically modified crops and seeds are sold made Darmar and class members vulnerable, and made the risk of harm from premature commercialization or negligent misrepresentations foreseeable;

> and (ii) Syngenta's membership in industry associations, their warnings to Syngenta, and Syngenta's undertaking in response gave rise to the expectation in Darmar and other class members that Syngenta would not release incorrect information would not release incorrect information and would refrain from selling and distributing Agrisure in a manner that would foreseeably cause harm.
>
> 24 Darmar also alleges that Syngenta's "false or misleading representations" were contrary to s. 52 of the *Competition Act.*
>
> 25 Darmar planted corn in increasing quantities in 2013, 2014, and 2015. It did not purchase or plant any Agrisure. The claim alleges that corn growers who did not purchase Agrisure (such as Darmar), and those who did, were all damaged by the conduct of Syngenta.

[10] The claims of negligent misrepresentation and pursuant to the *Competition Act* originally advanced in the claim referred to at paras. 21, 22 and 24 of the Court of Appeal's reasons, did not survive the Rule 21 decision and subsequent appeal.

[11] The premature commercialization claim, which I had struck, was reinstated by the Court of Appeal because it was not plain and obvious that the claim had no reasonable prospect of success. The defendants' leave to appeal application to the Supreme Court of Canada was dismissed (*Syngenta Canada Inc. v. Darmar Farms Inc.*, 2020 CanLII 87857 (S.C.C.).

[12] The Statement of Claim was amended to accord with the Court of Appeal's decision and the plaintiff now focuses on the premature commercialization claim, the particulars of which are set out at para. 47 as follows:

> (a) Prematurely commercializing Agrisure products on a widespread basis without reasonable or adequate safeguards;
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> (b) Releasing a product into the market without regulatory approval;
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> (c) Instituting a careless and ineffective stewardship program;
>
> (d) Actively failing to provide assistance to stakeholders in the form of channeling and stewardship programs without which growers and non-growers could not reasonably avoid contamination and commingling;
>
> (e) Failing to enforce or effectively monitor its stewardship program;
>
> (f) Failing to refrain from actively misleading the Plaintiff and class members;
>
> (g) Failing to warn the Plaintiff and class members;
>
> (h) Manipulating the Plaintiff and class members and interfering with their personal rights;

(i) Not living up to a commitment to ensure MIR-162 corn would not appear in export shipments;

(j) Selling Agrisure Viptera and/or Agrisure Duracade products to thousands of farmers with knowledge that they lacked the mechanisms, experience, ability and/or competence to effectively isolate or channel those products in such a way as not to negatively impact exports and/or North American market value;

(k) Acting in a manner inconsistent with industry standards and the conduct of other biotechnology companies;

(l) Failing to adequately warn and instruct farmers on the dangers of the foreseeable reality of and economic consequences of contamination by MIR-162 and at least the substantial risk that growing Agrisure Viptera products would lead to the loss of the Chinese market;

(m) Distributing misleading information regarding the timing of China's approval of Agrisure Viptera and/or Agrisure Duracade;

(n) Breaching other duties of care to the Plaintiff and putative class members, details of which are known only to the Defendants; and

(o) Alternatively acting and failing to act with conscious disregard for the rights of others, including the Plaintiff and putative class.

[13] A similar action has been commenced in Quebec. It is stayed pending the outcome in this proceeding. A claim that was pursued in the United States was certified as a class action by the United States District Court of Kansas. The action was settled and the resolution approved by the Court on December 7, 2018.

The Law

[14] The following general propositions are well settled by appellate decisions:

- certification is mandatory when the five statutory criteria are satisfied (*CPA* s. 5(1));
- certification is not a test of the merits of an action but rather involves a consideration of the form of action and not whether it is likely to succeed: *Hollick v. Toronto (City),* 2001 SCC 68; *Pro-Sys Consultants v. Microsoft,* 2013 SCC 57;
- the Canadian approach at the certification stage does not allow for an extensive assessment of the complexities and challenges that may arise at trial: *Pro-Sys Consultants Ltd. supra* at para. 105;
- the role of the Court is gatekeeper: *Pro-Sys Consultants Ltd. supra.* In that decision, the Court emphasized "the importance of certification as a meaningful screening device". The Court acknowledged that while certification is not a merits assessment, it does not "involve such a superficial level of analysis into the

sufficiency of the evidence that it would amount to nothing more than symbolic scrutiny" at para. 103;

- each case turns on its own facts. There must be "sufficient facts to satisfy the [motions] judge that the conditions for certification have been met to a degree that would allow the matter to proceed on a class basis without foundering at the merits stage by reason of the requirements of the *CPA* not having been met: *Pro-Sys Consultants Ltd.* at para. 104;

- the Court is not required to resolve conflicting facts and evidence but it must focus instead on whether there is an evidentiary record to support certification: *McCracken v. Canadian National Railway Co.,* 2012 ONCA 445;

- the record need not be exhaustive: *AIC Limited v. Fisher,* [2013] 3 S.C.R. 949. I would observe this is decidedly not a motion for summary judgment where the court is entitled to assume that the evidentiary record is complete.

[15] What follows is a discussion of the five statutory criteria and whether they are satisfied. If they are, certification follows.

Section 5(1)(a) – Is there a cause of action?

[16] The test under this heading is the same as for a motion pursuant to Rule 21 of the *Rules of Civil Procedure*: See *1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.* (2002), 62 O.R. (3d) 535 (S.C.J.).

[17] The Court of Appeal has ruled that the claim for negligent premature commercialization should be permitted to advance at this stage of the proceeding.

[18] Accordingly, the defendants properly concede that this criterion is satisfied.

Section 5(1)(b) – Is there an identifiable class of two or more persons?

[19] It is critical to carefully define the class because the definition will identify potential claimants and delineate who is entitled to notice and relief, and who will be bound by the result: *Sun-Rype Products Ltd. v. Archer Daniels Midland Co.,* [2013] 3 S.C.R. 545 at para. 57.

[20] The Statement of Claim does not contain a specific class definition. Rather, the plaintiff seeks relief "on its behalf and others similarly situated in Canada…" (para. 1 of the Fresh as Amended Statement of Claim). Paragraph 56 begins by saying that the plaintiff is "…bringing this action on behalf of a class of persons in Canada who produce corn, to be further defined in the motion for certification…"

[21] In its Notice of Motion for certification, the plaintiff proposes the following class definition:

> All corn producers in Canada who priced their corn for sale after November 18, 2013

[22] The rationale for the November date is that Chinese rejection of North American corn occurred at that time. The plaintiff alleges that the price of corn was depressed as a result.

[23] *Hollick* instructs that a class definition must be "defined by reference to objective criteria" with a "rational relationship between the class and the common issues". See also *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.). In that case, Justice Goudge noted at para. 45:

> The [plaintiffs] are required to show that the three proposed classes are defined by objective criteria which can be used to determine whether a person is a member without reference to the merits of the action. In other words, each class must be bounded and not of unlimited membership. As well, there must be some rational relationship between the classes and the common issues. The [plaintiffs] have an obligation, although not an onerous one, to show that the classes are not unnecessarily broad and could not be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of the common issues.

[24] The plaintiff submits that the proposed class definition can be determined by objective criteria, with clear boundaries and without delving into the claim's merits. All class members have an interest in a determination of the common issues. The defendants disagree.

[25] Both parties rely on *Lau v. Bayview Landmark Inc.,* 1999 CarswellOnt 3442 (C.A.) in support of their positions. In that case, Justice Winkler noted:

> …a class proceeding cannot be created by simply shrouding an individual action with a proposed class. That is to say, it is not sufficient to make a bald assertion that a class exists. The record before the court must contain a sufficient evidentiary basis to establish the existence of the class. As stated by Sharpe J. in *Taub v. Manufacturers Life Insurance Co.* (1998), 40 O.R. (3d) 379 (Ont. Gen. Div.) at 381:
>
> > Most class proceedings arise from situations where the fact of wide-spread harm or complaint is inherent in the claim itself. Obvious examples are claims arising from mass disasters such as subway or air crashes or claims based on allegations of harm from wide-spread pollution. I do not say that there must be affidavits from members of the class or that there should be any assessment of the merits of the claims of other class members. I do say, however, that there must, at the very least, be some basis in fact for the court to conclude that at least one other claim exists and some basis in fact for the court to assess the nature of those claims that exist that will enable the court to determine whether the common issue and preferability requirements are satisfied.

[26] The defendants' submission has three components. First, they say there is no evidence that the plaintiff and another person actually suffered a loss. At para. 65 of their Factum, they express their position in this way: "To identify if a claim exists, there must be proof of damage". They rely on *Sun-Rype supra* and in particular, the following comment by Rothstein J.:

> [W]here the proposed certified causes of action require proof of loss as a component of proving liability, the certification judge must be satisfied there is some basis in fact that at least two persons can prove they incurred a loss. Establishing that the class as a whole has suffered a loss does not obviate this requirement (para. 76).

[27] The defendants submit that there is no evidence that the plaintiff itself suffered any loss. Furthermore, Mr. McFeeters confirmed at this cross-examination that he has not spoken to any other potential member of the class and has no information about any loss other producers say they have sustained.

[28] Second, they assert that potential claims by purchasers of Viptera are not included. By the plaintiff's proposed definition, they are excluded because they are not similarly situated to the plaintiff, which is a non-purchaser of Viptera (see para. 2 of the plaintiff's Statement of Claim).

[29] Finally, they suggest that the limitation period for any corn producer would be statute barred because the alleged loss arose on November 18, 2013 when China first rejected a corn shipment. The claim was commenced more than two years later.

[30] I have concluded that the plaintiff has met its burden. First, there is another claim for damages advanced by a Quebec corn producer. Second, both Mr. McFeeters and Dr. Schmitz gave evidence on this point.

[31] In response to an undertaking given at Mr. McFeeters' cross-examination, the plaintiff produced documentation which appears to show a reduction in corn pricing after the Chinese ban. There are copies of contracts showing that corn was priced at $220.00 per tonne as of January 1, 2013, which dropped to $205.00 per tonne one year later and $175.00 per tonne six months after that.

[32] Dr. Schmitz concludes that the defendants' actions damaged North American corn producers generally including in Canada. At para. 15 of his report he refers to "negative demand shock" and its negative impact on market prices. (paras. 15-24). He refers to the expert opinions of Professors Carter and Babcock in the U.S. litigation about damage suffered by American producers (paras. 30-31). He addresses the link between Canadian and U.S. prices (paras. 32-24). He concludes that there is a correlation between American and Canadian corn prices. Just as U.S. corn producers sustained a loss, so too did their Canadian counterparts.

[33] Dr. Schmitz touches upon what the plaintiff alleges is the interconnected nature of the North American market. At para. 32 he speaks to the link between Canadian and U.S. corn prices. He refers to the "law of one price" prevailing in the North American market. He points out that "market unification is…supported by the free trade arrangement that exists

between Canada, Mexico, and the U.S. under the terms of the North American Free Trade Agreement".

[34] I disagree with the defendants that the plaintiff must prove it sustained damages at the certification stage. Rather it must lead some evidence now. Of course, it will lose at trial if it cannot prove damages. That is not the issue for the court now.

[35] Mr. McFeeters' evidence and the existence of another class proceeding, coupled with Dr. Schmitz's opinion about the impact of the embargo on Canadian producers generally, surpasses the necessary evidentiary threshold. Further, as in *Lau* and *Taub,* the fact of wide-spread harm or complaint is inherent in the claim itself because of the alleged reduction at which corn could be sold following the Chinese rejection, which would arguably affect all of those selling corn.

[36] Justice Rothstein's comment quoted above must be read in context. The case involved claims by direct and indirect purchasers of high-fructose corn syrup. At para. 58, he observes:

> I do not take issue with the class definition on its face. It uses objective criteria, it does not turn on the merits of the claim, and it cannot be narrowed without excluding members who may have a valid claim. Where the difficulty lies is that there is insufficient evidence to show some basis in fact that two or more persons will be able to determine if they are in fact a member of the class. (Emphasis added)

[37] The concern expressed by the Court in this decision was that indirect purchasers could not self identify whether they had purchased a product containing high-fructose corn syrup and therefore had suffered a loss.

[38] In this case, members of the class can easily self identify. Subject to my comment below, were they a corn producer? Did they price corn after November 18, 2013?

[39] With respect to the argument that Viptera purchasers are necessarily excluded, class members need not be identically situated. It is sufficient if they share a central commonality: *Good v. Toronto (Police Services Board),* 2016 ONCA 250. Here, the common characteristics are the production of corn and the impact of the Chinese embargo on North American and Canadian corn prices generally, and the plaintiff and the Quebec producers as representative plaintiffs, in particular.

[40] The limitation argument is at the very least premature.

[41] Limitations issues cannot be determined at this stage and on this record: *Cloud supra* at para. 61. It is not clear on this record when the Chinese rejection and the underlying reasons were communicated to authorities, exporters or the corn producers themselves. In other words, when did they know or ought to have known that Chinese authorities rejected North American corn. Nor is it clear when the alleged glut occurred or its impact on North American markets. It was not likely instantaneous. These are all matters for trial.

[42] Furthermore, the way in which corn is priced undoubtedly has an impact on when corn producers knew or ought to have known that they had sustained a loss. This is because of the way in which pricing is set for commodities such as corn. As I understand it, in very simple terms, the common benchmark price for American and Canadian corn is the Chicago Board of Trade Near-Term Futures Price. It involves a projection of what future prices will be for corn in certain delivery months. The reduction in the price of corn arguably could not be discovered, and had not crystallized until future contracts for the sale of corn were made based on CBOT futures pricing. I recognize that the defendants have led evidence that the price of corn is dependant on a considerable number of factors and is not solely reliant on futures pricing. The point is that on this record, discoverability is a live issue.

[43] All of that said, I do have some concern that the meaning of the term "corn producer" is undefined. Does it encompass only corn farmers? Or does it include those who prepare corn for market? In my view, the term requires refinement so that the class can be identified with precision. I note that the Court of Appeal used the term corn growers rather than producers in its reasons for decision. I prefer that definition. Assuming the definition is refined or clarified, this criterion will be satisfied.

Section 5(c) – Are there common issues?

[44] Section 1 of the *Class Proceedings Act* contains this definition of common issues:

> (a) common but not necessarily identical issues of fact; or
>
> (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts.

[45] The Supreme Court of Canada outlined the relevant principles in *Western Canadian Shopping Centres Inc. v. Dutton,* [2001] 2 S.C.R. 555. The Chief Justice wrote at para. 39:

> The commonality question should be approached purposively. The underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis. Thus an issue will be "common" only where its resolution is necessary to the resolution of each class member's claim. It is not essential that the class members be identically situated *vis-à-vis* the opposing party. Nor is it necessary that common issues predominate over non-common issues or that the resolution of the common issues would be determinative of each class member's claim. However, the class members' claims must share a substantial common ingredient to justify a class action.

[46] Justice Belobaba in *Simpson v. Facebook,* 2021 ONSC 968 succinctly observed at para. 43:

> The applicable law on this point is not in dispute. It is fundamental to class action certification that the plaintiff adduce some evidence (some basis-in-fact) for both the existence and commonality of each of the proposed common issues. Here, the

focus is on the first part of this requirement, the evidentiary basis for the *existence* of a proposed common issue. As the Court of Appeal noted in *Fulawka*:

> While the evidentiary basis for establishing the existence of a common issue is not as high as proof on a balance of probabilities, there must be some evidentiary basis indicating that a common issue exists beyond a bare assertion in the pleadings.

[47] The Divisional Court said in *Kuiper v. Cook*, 2020 ONSC 128 (Div.Ct.) the standard is low but not "subterranean".

[48] The plaintiff submits that the central issues raised by the pleading and captured in the proposed common issues as framed are common to all class members.

[49] It proposes the following common issues:

1. Did one or both of the Defendants owe a duty of care to the Class to use reasonable care in how it commercialized its genetically modified seeds?

2. If the answer to number 1 above is yes, did one or both of the Defendants breach that duty to the Class?

3. Did the conduct of one or both of the Defendants negatively impact the price at which the Class sold its corn?

4. If the answer to number 3 above is yes, by what amount?

5. If one or more of the above common issues are answered affirmatively, can the amount of damages by the Defendant(s) be determined on an aggregate basis? If so, in what amount?

6. Should punitive and/or aggravated damages be awarded against one or both of the Defendants?

[50] The plaintiff says the answers to these questions will avoid duplicative fact finding and inconsistent decisions of the legal issues. The fact that the court will be obliged to give nuanced answers to some of the questions or that damages may require individualized analysis is not a bar to certification. It says it has led the evidence that adequately meets its burden.

[51] The defendants note that the plaintiff has the onus to show there is some basis in fact for the common issues and in particular, that the proposed issue in fact exists, and it can be answered in common on a class-wide basis. They rely on *Pioneer Corp. v. Godfrey*, 2019 SCC 42 and several Ontario cases that were released after or soon before *Pioneer*. I do not believe there is any disagreement between the parties with respect to this proposition. It is consistent with the Supreme Court of Canada's direction in *Hollick supra* and *Pro-Sys supra.* The defendants submit that the plaintiff has not satisfied its onus.

[52] I am satisfied that the plaintiff has cleared the low bar regarding some evidence or basis in fact for the proposed common issues.

[53] The proposed issues are common to the class, the answers to which will advance the litigation. The claim for premature commercialization is novel and its components not yet fully fleshed out.

[54] However, it is grounded in negligence, which has certain, well-established components:

1. did the defendant(s) owe the plaintiff a duty of care?

2. did the defendant(s) breach the standard of care?

3. did the plaintiff suffer damages that were caused by the defendant(s)' negligence?

[55] Judgment on proposed common issues 1, 2 and 3 will determine the defendants' liability for all class members because they pertain to the duty, breach and causation components of a negligence claim.

[56] As I understand it, the claim for negligent premature commercialization will require the plaintiff to prove that the defendants owed it a duty not to market Viptera or Agrisure before it had secured the requisite approvals from key foreign importers. The duty arose from the defendants' alleged undertaking not to commercialize its products before global approvals were secured.

[57] It is posited that the undertaking was given in response to industry concerns about what could happen if genetically modified seed was sold domestically. It would inevitably lead to the comingling of GMO and non-GMO seed that could affect the markets outside North America in which corn was sold.

[58] The concern arose because of a North American market that is interconnected and interdependent. So, a duty arises because of:

- an interconnected and interdependent market that created a class-wide vulnerability;

- publicized industry concerns; and

- an undertaking given or responsibility not to commercialize GMO seed before it received approval from key markets.

[59] Dr. Schmitz provides expert evidence in support of the first two components of the claim as I have outlined it. The interconnected nature of the North American market is addressed in Dr. Schmitz's report at paras. 15-24 and paras. 32-34. The defendants have led evidence through their experts that the market is not homogenous but is highly idiosyncratic. I return to this evidence in more detail later in the discussion of damages.

[60] I would simply observe that the relative strengths and weaknesses of the expert evidence are not to be evaluated now: *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.,* 2010 ONCA 466 at para. 45. The fact the "the defendant can marshall cogent and compelling evidence going to the claim's merits is not relevant": *Baroch v. Canada Cartage,* 2015 ONSC 40 (S.C.J.) at para. 23. At this stage, it is sufficient that the plaintiff has led some evidence on the issue.

[61] With respect to component two, Dr. Schmitz deposes at para. 12 as follows:

> 12. Although Viptera had been approved in North America by 2010, it had not yet been approved in China. In fact, it wasn't until 2010 that Syngenta started the Chinese regulatory approval process… Syngenta received numerous warnings from industry participants that it was putting the industry as a whole at risk by launching Viptera. For example, the U.S. National Grain and Feed Association (NGFA) stated in its newsletter that it had discussed the issue of Chinese regulatory approval with Syngenta in March and June of 2011. The same newsletter stated that the North American Export Grain Association (NAEGA) "alerted Syngenta in August 2010 of the importance of obtaining Chinese regulatory approval prior to product launch." The NAEGA and NGFA went on to release a joint statement in August 2011 that stated the following:
>
> > "The grain handling and export industry have communicated consistently, clearly and in good faith with biotechnology providers and seed companies about the importance of biotech-enhanced events in commodity crops receiving regulatory approvals or authorizations – prior to commercialization – in key export markets where foreign governments have functioning regulatory systems that approve biotech-enhanced traits.
> > …
> >
> > Putting the Chinese and other markets at risk with such aggressive commercialization of biotech-enhanced events is not in the best interest of U.S. agriculture or the U.S. economy."

[62] He cites a NGFA Newsletter of July 14, 2014 and a Joint Statement by NGFA and NAEGA on media reports of lawsuits involving Syngenta's Viptera corn seed.

[63] There is also considerable disclosure in connection with the Response to Demand for Particulars dated May 30, 2017. See the plaintiff's Consolidated Motion Record Tab 8, which elaborates the evidentiary basis for some of the allegations in the Statement of Claim. There are quotations from literature, news stories and publications, sometimes with specific reference to various documents, attached as Schedules, which are arguably supportive of the pleaded allegations.

[64] So, by way of example, Schedule A at p. 18 of the Record attaches an article dated April 25, 2007 from Farm World, described as a weekly farm newspaper source. It is an article that reports warnings from the National Grain and Feed Association and North American Export Grain Association of "Syngenta's 'ill-conceived' plan to commercialize its

Agrisure biotechnology–enhanced corn seed risks endangering U.S. corn and corn product exports. Agrisure has not obtained regulatory approval for food and feed use in Japan and other U.S. export markets".

[65] Similarly, a copy of a publication entitled "Excellence Through Stewardship" described as a "Guide for Product Launch of biotechnology – Derived Plant Products" and "Advancing Best Practices in Agricultural Biotechnology" has been produced. It contains policy statements and policy guidance from the Biotechnology Industry Organization for the commercial launch of "biotechnology-derived plant production in a Commodity Crop", which includes corn. See Tab 8 p. 189ff. These are but two examples of the kind of evidence the plaintiff relies upon to satisfy the some basis-in-fact requirement.

[66] On the issue of evidence of an undertaking by the defendants, it seems to me as I read the pleading that the essence of the plaintiff's allegation may not be that there was an explicit undertaking in a contractual sense. Rather, it arose as an incident of a shared responsibility and agreement among industry participants to act in accordance with principles of good stewardship in an interconnected and interdependent market.

[67] The Response to Demand for Particulars outlines some of the evidence on which the plaintiff relies. Para. 1(d) discloses the following:

> 1(d) In response to the particulars demanded at paragraph 1(d), Syngenta represented that it is "committed to the principles of good stewardship, which are exemplified through the responsible management of [its] products across their lifecycle [including] commercialization" and its support for the Biotechnology Industry Organization Product Launch Policy on its website in November 2007, previously found at http://www.syngentabiotech.com/biopolicy.aspx. Syngenta's Jeff Cos has orally expressly indicated Syngenta's support for this policy and pledged that Syngenta would implement it.

[68] It is not yet clear to what extent reliance is a component of the claim. The plaintiff and defendants take opposite views. The plaintiff submits it is not a component (see para. 38 of the plaintiff's Factum). The defendants urge that it is (paras. 75, 77 and 82 of the Defendants' Factum). The Court of Appeal agreed that the claim for negligent misrepresentation failed because Darmar's alleged reliance was "for a purpose beyond the purpose of Syngenta's representations": *Darmar supra* at para. 68. The plaintiff had originally pleaded that the defendants' representations about the timing of approvals in China were made for the purpose of promoting and selling its own product (see para. 29 of the Statement of Claim and para. 67 of the Court of Appeal decision). However, Darmar had alleged that it relied on the representations in its decision to plant corn but not its decision about whether or not to purchase the defendants' GMO product. Consequently, the court concluded that any reliance was for a purpose other than what the defendants intended.

[69] The premature commercialization claim seems to rest on a different footing. I quote an excerpt from the Court of Appeal's decision:

> 76 … Darmar alleges it relied on that undertaking, and alleges it had an expectation based on that undertaking that premature commercialization would not occur. Although a bare allegation of reasonable reliance or expectations may qualify as a conclusory statement of fact, here the reliance and expectations are alleged to have arisen from a statement made in response to concerns from industry associations about the prospect of the very harm that is alleged to have occurred here. Some factual basis for the conclusions is therefore present. Reliance and expectations are important factors in a full proximity analysis: *Deloitte,* at para. 29. [Emphasis original]

[70] With respect to Questions 3 and 4, as already touched upon, Dr. Schmitz outlines his opinion about why the Chinese rejection of North American corn caused a decline in corn prices at Part II of his Affidavit. So, for example, at para. 15 he says that the "loss of the Chinese export market suddenly and unexpectedly lowered the demand for North American corn, causing what is known in economics as a "negative demand shock". He then explains how such a shock affects price. He refers to media reports, for example in the Wall Street Journal and online on the NGFA website.

[71] He also discusses embargoes and their negative impact on farm commodity products with reference to published articles. See para. 25 and 26-29 of the affidavit.

[72] He sets out what he believes is a link between Canadian and U.S. corn prices and says the "law of one price prevails" in North America at para. 21.

[73] Dr. Mussell disagrees. He suggests that Dr. Schmitz's conclusions regarding the law of one price are incorrect. He explains why beginning at para. 28 ff of his report. He agrees that CBOT futures price is an important determinant of the local cash price farmers receive from corn sales. However, he points out that there are other factors influencing Canada prices and in particular, the exchange rate and the price "basis", the latter related to local supply and demand.

[74] Both he and Dr. Deen address the highly diversified nature of Canadian corn producers. Dr. Deen speaks to the significant differences between corn producers in Canada and the United States (p. 17), and the wide range of factors that influence farmers' decisions respecting what crops to plant.

[75] His overall conclusions are found at p. 18 of his Report. He notes that "corn production systems in Canada are highly diverse" and the potential impact by the Chinese ban would have varied.

[76] Dr. Mussell concludes at para. 64 of his report as follows:

> 64 Professor Schmitz's analysis asks us to simply accept the causation that the release of Viptera varieties led to reduced decreased Chinese demand for US corn, which decreased US corn prices, which decreases Canadian corn prices, and proportionately impacted each Canadian corn producer equally. This conclusion is far too simplistic, denies any

> consideration of the reality of corn production and economics in North America, and is not reasonably supportable.

[77] It will be apparent that the focus of the defendants' experts is on the existence of multiple individual issues among potential class members.

[78] However, the fact that individual damage issues may remain after the common issues are resolved is not a bar to certification. Section 6 of the *CPA* makes that abundantly clear. It is entirely possible that individual issues will remain, but that is not fatal to certification. *Dell'Aniello v. Vivendi Canada Inc.*, 2014 SCC 1 offers the following guidance at para. 46:

> …the common question may require nuanced and varied answers based on the situations of individual members. The commonality requirement does not mean that an identical answer is necessary for all members of the class, or even that the answer must benefit each of them to the same extent. It is enough that the answer to the question does not give rise to conflicting answers among the members.

[79] In any event and in response to Question 5, the plaintiff has led some evidence in the form of Dr. Schmitz's opinion that a class-wide methodology for establishing class-wide loss exists.

[80] Section 24(1) of the *CPA* confers the jurisdiction to award aggregate damages. It provides as follows:

> The court may determine the aggregate or part of a defendant's liability to class members and give judgment accordingly where,
>
> (a) monetary relief is claimed on behalf of some or all class members;
>
> (b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability; and
>
> (c) the aggregate or part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.

[81] Dr. Schmitz proposes the use of aggregated industry data, a methodology that has been used in other cases including the related U.S. action. He explains why aggregate data can be used to quantify damages. This was the approach two experts in the U.S. litigation, Drs. Carter and Babcock used and which has been discussed in published literature, the particulars of which he cites, including his own work. See para. 37-43.

[82] He suggests that aggregate analysis is the "norm among papers dealing specifically with GMOs". He refers to the *Starlink* case and the impact on corn growers of a GMO trait found in taco shells. The trait had not been approved for human consumption in the U.S.

or Japan. Japan responded by blocking all corn imports from the U.S. Aggregate data was used to assess the impact on American corn growers.

[83] He refers to his experience in using aggregate damage assessment in Ontario when the tobacco program was eliminated and for trade disputes between American and Mexican tomato industries.

[84] He provides an overview of the methodology he suggests at paras. 46-51 of his Affidavit. There are three:

1. a comparison of average prices before and after the event;

2. the conduct of an event study; and

3. a comparison of observed prices with predicated prices from a structural and demand model.

[85] In contrast, Dr. Mussell concludes that decisions made by Canadian corn producers are "highly variable and fragmented down to the individual and local level". He says that "[d]etermining impacts on the corn industry and individual corn producers extends beyond aggregate level economics" and "individual situations and circumstances must be considered" (p. 3).

[86] Dr. Deen's opinion is similar. His Executive Summary sets out his conclusions:

> While production of corn occurs in all Canadian provinces, the scale and nature of production differs. Across provinces, and even within provinces corn producers are highly diverse. Corn producers differ in a range of attributes including size, harvest and storage methods, marketing options, availability of livestock manure, hybrid selection, input requirements, rotation options, and corn alternatives. The purpose of my report is to examine this diversity, and provide an opinion on how these various factors impact on determining the degree to which corn producers are potentially vulnerable to, or rely on, representations made by manufacturers in commercializing new products, as well as changes in the market.

[87] Mr. Finch is of the view that Dr. Schmitz's conclusions are unsubstantiated and flawed (para. 10). He suggests that the theory of negative demand shock is not made out on the facts, thereby "undermining the foundation and reliability of his proposed methodology" (para. 12). He concludes that while Dr. Schmitz's aggregate damage theory may be suitable for academic studies, it is not appropriate in this litigation setting where there are numerous relevant producer – specific factors in play (para. 14). He suggests that the myriad of individualized factors make the design of a reliable, workable methodology to calculate loss in the aggregate impossible (para. 14).

[88] I recognize that there is a lively debate between the respective experts about whether damages can be approached on an aggregate basis.

[89] Whether Dr. Schmitz's evidence, once fully developed, will be accepted by the trial judge is not a determination I must make. Perhaps it is not surprising that the defendants' experts disagree with Dr. Schmitz. It is entirely possible that their opinion evidence will be accepted and preferred by the trial judge. The point is that it is not for me to say. I return to the comment made by Justice Belobaba in *Baroch supra.* The fact that the defendants have led cogent and compelling evidence questioning the plaintiff's expert's conclusions is not relevant.

[90] Canadian courts have repeatedly said that a certification motion is not the time for finely calibrated assessments of the expert opinions. There is good reason. Certification hearings are supposed to be heard at an early stage of the lawsuit, usually before documentary disclosure and examinations for discovery. The expert's opinions are almost invariably complex and involve matters usually beyond the knowledge of the trial judge. There is no substitute for full disclosure, or for *viva voce* evidence from the experts with examination-in-chief and cross-examination to explore and explain the strengths and weaknesses of an expert's opinion. There is also an opportunity for a trial judge to ask, within certain limitations, questions to clarify areas of concern.

[91] It is axiomatic that the strength of an expert's opinion rests upon the validity of their assumptions of certain facts. The trial judge determines whether those assumptions are borne out through the findings of fact made following trial. At this stage, the plaintiff need only demonstrate that a methodology for calculation exists.

[92] Before leaving this topic, the wording of Question 5 is problematic. It suggests that the plaintiff need only prove one of the first four questions before moving to a consideration of aggregate damages. I disagree. The plaintiff must prove that there was a duty of care and a breach of the standard of care and the breach caused a loss. It seems to me that Question 5 should be amended accordingly.

[93] The aggravated and punitive damage claim referred to in Question 6 is also suitable for certification. That issue "depends exclusively on the conduct of the defendants and the answers to the other proposed common issues, and it should not be affected by individual common issues…": *Anderson v. St. Jude Medical Inc.* (2003), 67 O.R. (3d) 136 at para. 61 (S.C.J.).

Section 5(1)(d) – Is a class action the preferable procedure?

[94] One of the leading cases on the preferability analysis is *AIC Limited v. Fisher supra*. It provides important guidance to motions judges. It notes at paras. 22 and 23 that the inquiry is to be conducted through the lens of the three principal goals of class actions, namely access to justice, judicial economy, and behaviour modification. The overriding question to be answered is whether other viable means are available to resolve the issues raised in the claim.

[95] On the access to justice analysis, at paras. 26-38, the *AIC* decision instructs that a motions judge is to consider:

1. barriers to access to justice;

2. whether a class action redresses those barriers;

3. the alternatives to a class action;

4. whether the alternatives remedy the barriers; and

5. whether alternatives measure up to a class proceeding.

[96] The plaintiff submits that this step of the analysis is straight forward and easily answered in its favour. It meets the triple goals identified above. A common issues trial will avoid duplication of judicial resources to try the same fundamental issues and avoids inconsistent verdicts, court costs, including the cost of court services.

[97] The plaintiff emphasizes that the sheer expense of bringing individual claims when measured against the potential return tips the balance significantly in its favour.

[98] Finally, the plaintiff submits that a class action encourages large corporations to take their responsibility to consumers seriously.

[99] The defendants counter that the plaintiff has failed to demonstrate that a class action is preferable. Because there is no evidence of common issues, the case is "antithetical" to both efficiency and proportionality. They contend that Mr. McFeeters' assertion at his cross-examination that the issues are better dealt with as a class action and it would be cost prohibitive otherwise should be given no credence and is insufficient.

[100] The defendants point out that there are other adequate means to seek compensation through insurance and federal government programs. Dr. Mussell discusses these avenues of compensation in his report of May 22, 2020. He notes that "corn producers have access to the suite of Federal-Provincial-Territorial Business Risk Management (BRM) programs provided by governments", available to all on an individualized basis. He describes AgriInsure, a crop/production insurance program; AgriInvest, a deposit-matching program; and AgriStability, an operating margin protection program. He explains how each program works and how each varies significantly between individuals. They are all designed to cushion risks in Canadian agriculture. The intent of the programs "is to insulate producers from variations in the market, to some extent". He acknowledges that official statistics regarding enrolment in BRM programs are scarce. He cites a 2017 federal audit of the programs and reports findings for 2014/2015.

[101] There is also an emerging private business risk management industry. I think it is fair to say that it is in its infancy, is not widely available and has limited interest.

[102] The defendants raise the limitation argument again at this juncture. They close their submission on this issue by saying that to permit the claim to proceed would "saddle the court with a massive and unworkable action without any evidentiary foundation that it can or would reasonably succeed".

[103] Shortly put, I agree with the plaintiff that a class proceeding is the preferable procedure. The sheer expense that would be required to bring an individual action, including to

marshall the necessary expert evidence, is enormous and would serve as an absolute barrier to any but the most well-resourced litigant. The cost of duplicating procedural steps repeatedly would be prohibitive.

[104] Such a conclusion is a matter of experience and common sense. It is not lost on me that the defendants have the ability to marshal considerable resources in their defence of the claim, as they are entitled to do. They have retained three experts to respond to the plaintiff's one. There has already been a Rule 21 motion, an appeal from that decision and a leave application.

[105] I have already concluded that there are certifiable common issues, the determination of which would significantly advance the litigation by answering a foundational question but once, for example whether the defendants owed the plaintiff a duty of care. The risk of inconsistent findings of fact or law is eliminated. I have already concluded that the limitation issue cannot be determined at this procedural stage.

[106] The alternatives raised by the defendants – recourse to private insurance or federal income stabilization programs – do not persuade me that the plaintiff or the class did or were able to seek relief through those avenues. Dr. Mussell acknowledges that private insurance is a relative newcomer to the market and is primarily available in the prairie provinces. The statistical information respecting BRM programming is limited and it is difficult to draw any conclusions about participation rates.

[107] In any event, it is possible that whether those programs were available would be a mitigation issue open to the defendants to raise at the damage stage of the action.

Section 5(1)(e) – Is the plaintiff an appropriate class representative?

[108] The plaintiff submits that it is the appropriate class representative because it has an interest common to other class members. It planted and sold corn after November 18, 2013 and falls within the proposed class definition. Further, it is prepared to step up to prosecute the action as illustrated by its efforts to date. It has retained experienced class action counsel.

[109] During oral argument, the defendants urged otherwise. They suggested that the plaintiff cannot be the representative because it does not share the characteristics of other potential class members. It did not purchase or plant Viptera or Duracade corn seed.

[110] I do not agree. A representative claim need not be the same as or typical of other class members. See *Good supra.* It may well be that the class must be subdivided as the litigation proceeds. This should not be an insurmountable impediment to certification.

Litigation Plan (5)(e)(ii)

[111] A generic plan has been put forward at Exhibit B to Ms. Assini's affidavit, which is sufficient for certification purposes.

[112] It is certainly not detailed nor does it propose timelines for the completion of the procedural steps required in order to ensure that the case moves forward to trial in a timely way. The

plaintiff simply asks the Court to set the litigation schedule. It is my expectation that once the question of certification is finally determined, the parties will propose timelines. It is possible that they may come to an agreement. It does not seem productive to arbitrarily propose or set timelines until after the appeal process that I anticipate is concluded. As Justice Goudge observed in *Cloud supra* at para. 95:

> The litigation plan produced by the appellants is, like all litigation plans, something of a work in progress. It will undoubtedly have to be amended, particularly in light of the issues found to warrant a common trial. Any shortcomings…can be addressed under the supervision of the case management judge once the pleadings are complete. Most importantly, nothing in the litigation plan exposes weaknesses in the case as framed that undermine the conclusion that a class action is the preferable procedure.

Conclusion

[113] Subject to the class definition and Question 5 being amended, the action is certified.

[114] If the parties cannot resolve the issue of costs, I will receive brief written submissions by November 2021 according to a timetable to which the parties agree.

Justice H.A. Rady

Date: September 29, 2021