QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2009 SKQB 54**

Date: **2009 01 30**
Docket: Q.B. 956/06
Judicial Centre: Regina

BETWEEN:

FRANK BROOKS

PLAINTIFF
(RESPONDENT)

- and -

HER MAJESTY THE QUEEN, ATTORNEY GENERAL OF CANADA, GOVERNMENT OF CANADA, and the MINISTER OF NATIONAL DEFENCE

DEFENDANTS
(APPLICANTS)

- and -

THE DOW CHEMICAL COMPANY and PHARMACIA CORPORATION

THIRD PARTIES
(APPLICANTS)

Counsel:

E.F. Anthony Merchant, Q.C.
Patrick G. Alberts
Casey Churko — for the plaintiff (respondent)

Mark R. Kindrachuk, Q.C.
Michael Brannen
John C. Spencer
Cynthia Koller
William Knights — for the defendants (applicants)

F. William Johnson, Q.C.
Alan H. Mark

D. Michael Brown	for the third party (Dow Chemical Corporation) (applicant)
Ivan G. Whitehall, Q.C. Peter N. Mantas Peter Bergbusch	for the third party (Pharmacia Corporation) (applicant)

FIAT
January 30, 2009

ZARZECZNY J.

THE APPLICATION

[1] Each of the defendants and third parties (collectively the "Applicants") apply to the court to stay either permanently or on an interim basis, the plaintiff's claim commenced pursuant to *The Class Actions Act*, S.S. 2001, c . C-12.01, as am. (the "Act" or "Sask. Act") now represented by an amended Statement of Claim filed with the court November 7, 2008 ("Claim"). The stay applications, although separately filed and differently worded, seek the same discretionary order of the court pursuant to subsection 37(1) of *The Queen's Bench Act, 1998*, S.S. 1998, c. Q-1.01 and/or Rule 173 of the *Queen's Bench Rules of Court*.

[2] The applicants submit that this action and these proceedings are an abuse of the court's process and that the court has the statutory and inherent jurisdiction to order the action stayed. The applicants argue that substantially similar proceedings claiming similar relief for similar claims have been commenced against the defendants and third parties in the courts of Saskatchewan, Newfoundland and Labrador, British Columbia,

Manitoba, Ontario, Nova Scotia and New Brunswick and previously in the Federal Court of Canada.

BACKGROUND

[3] The plaintiff, Frank Brooks, commenced his class action in Saskatchewan when this court issued his original Claim on June 12, 2006 (the "Sask. Action"). The original defendants commenced a third party claim against The Dow Chemical Company and Pharmacia Corporation by a notice dated June 27, 2008 (respectively "Dow" and "Pharmacia" and collectively the "Third Parties"). The plaintiff filed an amended Claim on November 7, 2008 changing somewhat the description of the defendants and amending the Claim to a "multi-jurisdictional class action on behalf of a class of persons residing in each Canadian province and territory". The plaintiff claims "an order certifying a multi-jurisdictional class action and naming a representative plaintiff for the national opt-out class". The amended Claim appears intended to respond to and take advantage of recent amendments to the Act. In parlance familiar to those involved in class action litigation, Saskatchewan is now a "no costs" jurisdiction providing for the certification of a national (multi-jurisdictional) class action on an "opt-out" basis.

[4] The Sask. Action deals with the claim of the plaintiff, as representative of "a class of persons residing in each Canadian province and territory" who claim damages for injuries that are alleged to have been caused by the testing and application of herbicides (e.g. "agents orange, agents white") at a Canadian Forces base at Gagetown, New Brunswick ("CFB Gagetown"). To date, eleven Statements of Claim have been filed across Canada, nine by Merchant Law Group ("MLG") (one in the Federal Court of

Canada and eight others in each of the provinces of British Columbia, Saskatchewan, Manitoba, Ontario, Quebec, New Brunswick, Nova Scotia and Newfoundland and Labrador). Two other related actions have been filed by a New Brunswick based law firm, the Barry Spalding law firm (the "Spalding Group") in New Brunswick and in Newfoundland and Labrador with whom MLG has subsequently entered into a "cooperation agreement".

[5] The federal court action was stayed in May of 2006 after third party claims were made against Dow and Pharmacia in respect of whom the federal court lacked jurisdiction. To date, MLG has filed motions for certification in three of its actions, in the provinces of Manitoba, Newfoundland and Labrador and Saskatchewan. In respect of the Manitoba action, the defendant was unsuccessful in a motion it made to stay that action and an appeal from that decision to the Manitoba Court of Appeal was denied on October 23, 2007. The plaintiff in the Manitoba action has been given leave to apply for certification in Manitoba, however the certification proceedings in that province have not been advanced. An amended certification application has been made in respect of the Sask. Action and it is currently scheduled to be heard by the court on March 10 - 13, 2009.

[6] The case most advanced is the Newfoundland and Labrador class action which, after MLG was awarded carriage of the action against the competing application of the Spalding Group, was certified by the Newfoundland court on August 1, 2007. The defendants appealed. The Newfoundland Court of Appeal granted leave to appeal that certification order, the appeal apparently not yet perfected and not yet scheduled for hearing.

[7] Newfoundland, MLG explains, was attractive as a venue prior to the Sask. Act amendments since it offered an opt-out /opt-in-no costs regime. The plaintiff in the Sask. Action, Frank Brooks, gave written notice of his intention to opt-in to the Newfoundland action. However, to date, this has not been possible since a representative plaintiff for the out of province class in those certification proceedings has not yet come forward. The scope of the claims of the class certified in the Newfoundland action are narrower than applied for by the amended certification application in the Sask. Action. The Newfoundland certification is limited to claims involving "lymphoma". This is far narrower than the range of illnesses which have been claimed for on behalf of the class proposed to be certified in the Sask. Action.

[8] The New Brunswick class action certification application, the carriage of which was allocated to the Spalding Group by the "cooperation agreement" was heard on December 8 - 12, 2008. The decision in respect of that certification application has been reserved. The defendants have consistently advanced the position that because of CFB Gagetown's location, namely the province of New Brunswick, it is New Brunswick that is the most appropriate jurisdiction for the trial of any and all CFB Gagetown related class action claims. This position has not won favor in either Newfoundland or Manitoba. At the time that MLG and the Spalding Group actions were commenced in New Brunswick (July and June/2006 respectively), New Brunswick had intended to but not yet passed its class action legislation, now since passed. (A litigation history of all the outstanding actions and their status "at a glance" is very conveniently outlined and set out in Appendix "A" to the Brief of Fact and Law of the defendant applicants).

[9] The action in New Brunswick is much broader than the proposed Sask. Action. There are significant geographic and other scopes to that New Brunswick action (including a far wider list of damaging "substances", a larger group of defendants and a broader scope of causes of action). While the New Brunswick action relates to claims arising in connection with CFB Gagetown, it is substantially different in character and scope to the proposed Sask. Action.

[10] As has been illustrated by this brief analysis, MLG has been the most active in pursuing the interests of plaintiffs in a multiplicity of class action proceedings commenced throughout Canada in respect of CFB Gagetown claims. This firm's "head office" is in Regina where the bulk of its physical and professional resources are located. That firm has a number of smaller offices or established agencies in other jurisdictions in Canada including British Columbia, Alberta, Manitoba, Ontario (Toronto) and Quebec (Montreal).

[11] It is apparent, as the applicants assert and as is acknowledged by MLG, that MLG has chosen different jurisdictions, at different times, that it considered offered the best and most inclusive opportunities for the representation of plaintiffs' interests in the CFB Gagetown litigation. The multiplicity of actions currently commenced and outstanding in the various jurisdictions already referred to are illustrative of this approach.

[12] As a result of the recent amendment to the Sask. Act providing, as it now does, for the certification of a national (multi-jurisdictional) "opt-out" class with a "no-cost" regime, Saskatchewan now appears to be MLG's decided jurisdictional preference

for the adjudication of the CFB Gagetown claims of those plaintiffs which MLG represents or seeks to represent nationally (estimated to be some 3,000 individuals currently). Saskatchewan, so MLG has concluded, is as favourable a class action jurisdiction to pursue the class action claims related to CFB Gagetown as exists in Canada. It is comparable to the inclusiveness (opt-out) and reduced risk (no cost jurisdiction) available in the only other jurisdiction offering these desirable statutory features - - - Manitoba.

[13] Succinctly and directly put, MLG has proceeded with various stages of the class action proceedings which it has commenced throughout the various jurisdictions in Canada as it has considered to be to the best advantage of the plaintiffs which that firm represents or seeks to represent. Initially Manitoba seemed favored, then subsequently, Newfoundland. Now Saskatchewan is the clear preference. Many of these strategic decisions appear driven by the nature and state of class actions legislation in the various jurisdictions in which claims were commenced.

[14] The applicants have argued that these "tactical" decisions are and do constitute an abuse of the process of the various courts involved, in particular, now Saskatchewan. They argue these actions are duplicitous, duplicative of judicial resources and perhaps, of greatest concern to the applicants, a tremendous and costly expenditure of time and money. Their costly participation in the certification hearings held to date in Newfoundland and New Brunswick are illustrative, not to mention the doubtless cost incurred with respect to the numerous collateral and procedural motions that have been taken in the various jurisdictions (primarily on the initiative of the applicants) including the motion presently before this court.

ISSUE

[15] The following issue is presented for the court's determination, namely:

> Should the Sask. Action be stayed permanently or on an interim basis with or without conditions on the basis of abuse of process?

ANALYSIS

[16] All parties to this application have filed extensive Briefs of Law and Argument including Cases and Authorities in support of their respective positions. In addition to the general authorities applicable to the issue of the court's inherent and statutory jurisdiction to stay actions for abuse of the court's process, the applicants rely heavily upon the Saskatchewan Court of Appeal's recent decision in the case of *Englund et al. v. Pfizer Canada Inc. et al,* 2007 SKCA 62; (2007) 299 Sask. R. 298; (2007) 284 D.L.R. (4th) 94 . In *Englund*, Richards J.A., delivering the judgment of the court, observed at para. 36 as follows:

> **36** We believe the same concerns which motivate the courts to characterize the bringing of multiple actions in a single jurisdiction as an abuse of process can also apply, in appropriate circumstances, where the multiple actions have been brought in two or more jurisdictions. In saying this, we recognize that, in the development of the English case law, there is some overlap between abuse of process terminology and the doctrine of forum non conveniens. ...

After making this observation and thereafter analyzing the circumstances before the court including the degree of similarity between the Sask. Action being considered and the comparable Ontario action, the court concluded at para. 40 of its judgment as follows:

> **40** This is all quite unusual. We would not suggest that it is always or necessarily an abuse of process for a plaintiff to launch claims against the same defendant, and arising out of the same subject matter, in more than one jurisdiction. There will sometimes be entirely valid reasons for such an approach. See: Castel and Walker, *Canadian Conflict of Laws*, vol. 1, 6th Ed. looseleaf (Markham, Ont.: LexisNexis Canada Inc, 2005) at para. 13.6. But where, as here, there is no suggestion that multiple claims serve any legitimate interest of the plaintiffs, the complexion of things changes. In such circumstances, the courts are being used in a manner which serves no proper purpose or which is vexatious or oppressive.

[17] The Court of Appeal in *Englund*, reversing the trial court decision, ordered a conditional stay of the Sask. Action. The resolution of the issue before this court presents circumstances quite different from those which the Court of Appeal dealt with in *Englund*. Since Englund, substantial amendments were made to the Sask. Act - - - amendments which fundamentally change the considerations which were before the Court of Appeal in *Englund*.

[18] The 2007 amendments to the Sask. Act specifically address multi-jurisdictional class actions. They introduced a new definition in s.2 defining a "multi-jurisdictional class action" to mean;

> "an action that is brought on behalf of a class of persons that includes persons who reside in Saskatchewan and persons who do not reside in Saskatchewan".

Subsection 4(2)(c) was amended to add a notice provision requiring notice of any application for certification to be given;

> "to the representative plaintiff in any multi-jurisdictional class action, or any proposed multi-jurisdictional class action, commenced elsewhere in Canada that involves the same or similar subject-matter".

A new and extensive s.6 was added to the Act setting out the special objectives and relevant factors mandated for the court's consideration with respect to the certification of a multi-jurisdictional class action. The amendments to s.6 now provide the core considerations that the parties and the court must address in multi-jurisdictional class action certification proceedings. It addresses many, if not all, of the concerns that are raised by the applicants in support of their present stay applications.

[19] Most notably subsection 6(2) and (3) are new sections and they are directly relevant to the determination of the stay applications before the court. They provide as follows:

> 6(2) If a multi-jurisdictional class action, or a proposed multi-jurisdictional class action, has been commenced elsewhere in Canada that involves subject-matter that is the same as or similar to that of the action being considered pursuant to this section, the court shall determine whether it would be preferable for some or all of the claims or common issues raised by those claims of the proposed class members to be resolved in that class action.
>
> (3) For the purposes of making a determination pursuant to subsection (2), the court shall:
>
> (a) be guided by the following objectives:
>
> (i) ensuring that the interests of all of the parties in each of the relevant

> jurisdictions are given due consideration;
>
> (ii) ensuring that the ends of justice are served;
>
> (iii) avoiding, where possible, the risk of irreconcilable judgments;
>
> (iv) promoting judicial economy; and
>
> (b) consider all relevant factors, including the following:
>
> (i) the alleged basis of liability, including the applicable laws;
>
> (ii) the stage each of the actions has reached;
>
> (iii) the plan for the proposed multi-jurisdictional class action, including the viability of the plan and the capacity and resources for advancing the action on behalf of the proposed class;
>
> (iv) the location of the representative plaintiffs and class members in the various actions, including the ability of representative plaintiffs to participate in the actions and to represent the interests of the class members;
>
> (v) the location of evidence and witnesses.

[20] New s.6.1 was added by the 2007 amendments to the Act and it provides as follows:

> **6.1**(1) The court may make any order it considers appropriate in an application to certify a multi-jurisdictional class action, including the following:
>
> > (a) an order certifying the action as a multi-jurisdictional class action if:
> >
> > > (i) the criteria set out in subsection 6(1) have been satisfied; and
> > >
> > > (ii) having regard to subsections 6(2) and (3), the court determines that Saskatchewan is the appropriate venue for the multi-jurisdictional class action;
> >
> > (b) an order refusing to certify the action if the court determines that if should proceed as a multi-jurisdictional class action in another jurisdiction;
> >
> > (c) an order refusing to certify a portion of a proposed class if the members of that portion of the class contains members who may be included in a pending or proposed class action in another jurisdiction.
>
> (2) If the court certifies a multi-jurisdictional class action, the court may:
>
> > (a) divide the class into resident and non-resident subclasses;
> >
> > (b) appoint a separate representative plaintiff for each subclass; and
> >
> > (c) specify the manner in which, and the time within which, members of each subclass may opt out of the action.

[21] The court has concluded that virtually all, if not all of the concerns raised by the applicants in support of their stay applications are intended to be, and for that matter, mandated to be considered by the court during the certification application of this class action. "Traffic control" as between the nine or ten existing class actions commenced in

the other provincial jurisdictions previously noted is the responsibility of this court upon certification as now required by subsections 6(2) and (3) of the Act. The "objectives" and "relevant factors" by which the court is to be guided and which it must consider involve the very considerations upon which the applicants base their stay applications. They include avoiding, where possible, the risk of irreconcilable judgments, the promotion of judicial economy, the consideration of the laws applicable, the stage each action has reached, the plan for the proposed multi-jurisdictional class action and the location of the representative plaintiffs, class members, evidence and witnesses.

[22] The discretion granted by the legislature to the court with respect to any certification orders it may issue as outlined in s.6.1of the Act is very broad. That discretion must be exercised having regard to the criterion set out in subsection 6(2) of the Act. That may prompt a conclusion that deference should be given to an existing class action commenced in another jurisdiction. The discretion of the court is further circumscribed by the objectives and relevant factors set out in subsection s.6(3).

[23] The court has concluded that when this new multi-jurisdictional class action framework, especially s.6, is considered as a whole, it is clear that the concerns raised by the applicants in support of their stay application (being some of the same concerns as were addressed by the Court of Appeal in *Englund)*, have been eclipsed. They are now specifically and legislatively required to be addressed by the court at the certification stage and after a certification hearing has been conducted. It is at that time when the full and further information which the court may require and which it is mandated to consider by s.6 of the Act will be fully before the court and the court can consider the imposition of any conditions, limitations or otherwise to any certification order which it may

consider to be appropriate in the whole of the circumstances. Inviting the court, as the applicants in the present case have done, to consider these issues in a preliminary application is premature and an unnecessary duplication of resources and expense.

[24] That is not to say that there might not arise some circumstances where an application to stay a multi-jurisdictional class action for abuse of the court's process might be appropriate, however, the court has concluded that this is not one of them.

[25] This court recognizes that the approach, both legislative and judicial, to the certification and adjudication of multi-jurisdictional class actions is in a dynamic phase of development in Canada and among its various jurisdictions. These issues present new and likely numerous challenges both for parties involved in them and the courts. New approaches and likely court-to-court communications and protocols will need to be developed. Issues of forum non conveniens, jurisdiction, the scope of comity and recognition of extra provincial orders issued in multi-jurisdictional class action suits illustrate only some of the challenges to be addressed.

[26] Many of these issues and proposals for a functional, pragmatic and rational approach to the recognition of multi-jurisdictional class action judgments is discussed by Professor Janet Walker of the Osgood Hall Law School, York University in her article "Recognizing Multi-Jurisdiction Class Action Judgments Within Canada: Key Questions - Suggested Answers", (2008), Vol. 46 Canadian Business Law Journal p.450, (Canada Law Book). As this author observes at page 463 commenting upon these challenges and the new amendments to the Sask. Act:

> The considerations described above are reasons for recognizing class action judgments from other courts, but they can also provide guidance in the processes of defining the class, measuring the adequacy of representation and the litigation plan, resolving contested carriage motions, and assessing the adequacy of the proposed relief in the settlement hearing.
>
> In some cases, these considerations would be enough to determine where a multi-jurisdiction class action would best be decided, but in other cases, these requirements might be met in more than one jurisdiction. To assist in addressing these situations, s.6 of the Saskatchewan Class Actions Act now provides guidance to courts in determining when to certify a multi jurisdiction class action in circumstances in which there is a competing multi-jurisdiction class action ---

[27] This court acknowledges the continuing challenges that are raised with respect to the judicial management and handling of multi-jurisdictional class actions (see for example *Wuttunee v. Merck Frosst Canada Ltd.*, 2008 SKQB 229; 312 Sask. R. 265, *Tiboni v. Merck Frosst Canada Ltd.* (2008), 295 D.L.R. (4th) 32 at paras. 21, 33 - 41). As observed by *Richards* in Englund at para. 31:

> **31** We appreciate that the phenomenon of overlapping and parallel class actions commenced in different jurisdictions has become increasingly significant. There is now an active national debate as to how the difficulties posed by such proceedings might best be addressed. See, for example: *Report of the Uniform Law Conference of Canada's Committee on the National Class and Related Interjurisdictional Issues: Background, Analysis, and Recommendations*, Vancouver, B.C. March 9, 2005. However, this appeal does not require us to engage in an exploration of the general approach which Saskatchewan courts should take in the face of typical overlapping multi-jurisdictional class proceedings, i.e. proceedings where different proposed representative plaintiffs, acting in separate jurisdictions, have commenced similar claims. ...

[28] What Richards J. observed in para. 31 the court not being required to consider in *Englund*, this court is now required to consider illuminated by the light of the 2007 multi-jurisdictional class action amendments to the Sask. Act. As I have concluded,

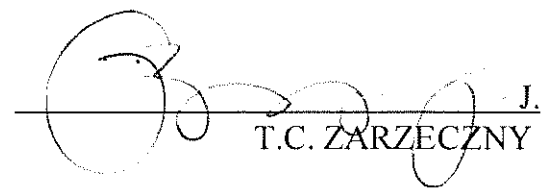
these amendments directly and conclusively answer the question as to when the various and important considerations raised by the stay applications presented to this court should appropriately be considered - - - namely, at the certification application stage.

[29] This court should parenthetically observe that even if the *Englund* case criteria were to be applied to the consideration of the stay applications presently before the court, the court would be inclined, in any event, to dismiss this stay application in the facts and circumstances of this case. As already observed, there are many differences between the proposed Saskatchewan class to be certified, its inclusiveness and exclusiveness, the nature of the injuries claimed for, the substances alleged to have caused those injuries and the enumerated defendants or third parties in the actions commenced in each of the other jurisdictions (especially those in Newfoundland and New Brunswick). That alone, without the assistance of s.6 and the other amending provisions of the Sask. Act, distinguish this case from those criteria which the Court of Appeal applied in *Englund* to reach the conclusion that that action should appropriately (but conditionally) be stayed.

CONCLUSION

[30] For the reasons outlined, the applications to stay, on either an interim or permanent basis, the Sask. Action are dismissed. As is usual in such circumstances, the plaintiff is awarded his costs of the application. Because of the similarity of the three

applications made, the plaintiff is awarded one set of costs only to be shared by the applicants equally and paid, as is usual, within 30 days. If not agreed upon, the same are directed for assessment by the Local Registrar.



J.
T.C. ZARZECZNY