

Q.B.G.
No. 2760

A.D. 2002
J.C. R.

IN THE QUEEN'S BENCH
JUDICIAL CENTRE OF REGINA

BETWEEN:

ERVIN LAMB and MICHAEL COHOLAN

PLAINTIFFS

- and -

BAYER INC.

DEFENDANT

D.R. Birchard, as agent for Klein Lyons
& D. Lennox & D.A. Klein from Klein Lyons

for the plaintiffs

G.J. Kuski, Q.C. & A.M. Quayle

for the defendant

JUDGMENT
October 22, 2003

KYLE J.

[1] The defendant has applied in this proposed class action for a dismissal or stay of the action by reason of the existence of a multiplicity of proceedings in other provinces of Canada including Newfoundland, Manitoba and British Columbia. The

British Columbia action has been certified as a class action. The Manitoba action has not been certified but an application for that purpose is to be heard in January of 2004. The Manitoba action seeks to include as a sub-class residents of Saskatchewan who ingested the product in question, Baycol, and who claim personal injury as a result. The law firm of Klein Lyons is counsel of record acting through a Saskatchewan agent and is similarly involved in the Manitoba action.

[2] The defendant seeks a stay for the very good reason that it wishes to avoid the cost of multiple proceedings and because it anticipates that if the Saskatchewan action were to proceed toward certification, it would be abandoned and the expense incurred lost once certification was achieved in Manitoba. Its underlying objective, of course, is that it does not wish to face the need to defend identical actions in a large number of Canadian jurisdictions, a justifiable concern that class actions legislation is intended to address.

[3] The plaintiff contends that it is not a party to any litigation in any other province and particularly not in Manitoba where the action which seeks to establish a Saskatchewan sub-class has not yet been certified. The defendant, in bringing this motion, is making similar arguments to those advanced in *Pardy et al. v. Bayer Inc.*, 2003 NFSC TD 109; [2003] N.J. No. 182 in the Newfoundland and Labrador Supreme Court - Trial Division. That action, which is substantially identical to the present one, gave rise to a claim by the defendant “that the continuation of multiple proceedings against the defendant by the same counsel seeking to certify overlapping classes in different jurisdictions is an abuse of process”. Mercer J. in dealing with the matter held, however, that the continuation of the current action was not an abuse of process

and rejected a request for a stay pending a determination in the Manitoba case of a decision on class certification.

[4] In this motion, it was asserted by the plaintiff that his action had been commenced before the Manitoba proceedings and that he, a resident of Saskatchewan, had a right to access to his own courts and had a right to proceed under the class action legislation regardless of steps taken by other persons in other provinces who may or may not be represented by the same counsel as those whom he has chosen.

[5] It has also been asserted that *The Consumer Protection Act*, S.S. 1996, c. C-30.1 provides special rights to a Saskatchewan resident which may not be available to plaintiffs in other jurisdictions. I make no finding in that respect.

[6] In the absence of any existing litigation certified as a class action in any other province under which the present plaintiffs and the members of the class which they seek to represent could have their claims adjudicated, I am not prepared to grant the requested stay. By so finding I do not necessarily suggest that such a stay would be available even if the sub-classes of a certified class action in another province were sufficiently broad to include the Saskatchewan claimants. Such a determination should be left to the circumstances which might, at that time, exist.

[7] Motion dismissed.

J.