Editor's Note: A corrigendum was issued by the Court on August 16, 2005; the corrections have been made to the text and the corrigendum is appended to this judgment.

IN THE COURT OF APPEAL OF MANITOBA

B E T W E E N:

MARILYN WALLS and ETHEL NICK	)	***E. W. Olson, Q.C.,***
	)	***P. J. Cavanagh*** *and*
(Plaintiffs) Respondents	)	***S. Mattheos***
	)	*for the Applicant*
	)	
	)	***D. A. Klein*** *and*
	)	***W. P. Forbes***
- and -	)	*for the Respondents*
	)	
	)	*Chambers motion heard:*
	)	***April 14, 2005***
BAYER INC.	)	
	)	*Decision pronounced:*
(Defendant) Applicant	)	***August 10, 2005***

KROFT J.A.

Introduction

1 The applicant, the defendant in this action, has moved for leave to appeal from the order certifying the proceeding as a class action. I would deny leave but, because the class action is a novel proceeding in Manitoba, my reasons will be somewhat longer than is usually the case in a routine leave application.

2 This is a product liability action commenced under *The Class Proceedings Act*, C.C.S.M., c. C130 (the *CPA*), proclaimed to be in force in

Manitoba as of January 1, 2003. In the past in this province and most others, there was a single rule of court to govern what was referred to as the "joinder of causes of action." It was frequently expressed in the same language as Rule 58 of Manitoba King's Bench Rules of 1939, that is:

> Where there are numerous persons having the same interest, one or more may sue or be sued, or may be authorized by the court to defend on behalf of or for the benefit of, all.

3 The old joinder rule offered little help to multiple parties in defining the class, establishing the necessary degree of commonality of fact, describing cause of action or remedy sought, determining the representative of the class, or dealing with additions to or deletions from the class.

4 In modern times and a shrinking world, given the kind of complex litigation arising out of disputes about manufacturers' liability, public health services, environmental issues, public trading in mutual funds and other activity with significant commonality, it became obvious that a consistent and detailed code of procedure was required to define, create and manage class actions on behalf of litigants with common claims and to assist courts in the discharge of their responsibility for fair, expeditious and efficient conduct of class proceedings.

Relevant Statutory Language

5 The Queen's Bench Rules themselves do not meet the need which the *CPA* was intended by legislators to serve. A reading of the *CPA* makes clear that it is designed to be a separate and special code of civil procedure for use in class actions. I will not quote any particular section of the statute but the

certifying judge did cite numerous provisions which illustrate the point I have made.

6 Legislation of this kind has long been in effect in American jurisdictions, but it was not until 1978 in Quebec and until 1993 in Ontario that the first collective proceedings legislation was introduced in Canada. Most of the country has now followed this lead and, as I pointed out, the *CPA* in Manitoba was proclaimed just over two years ago. It is similar in form to class legislation elsewhere.

7 The action before us, which was commenced on February 3, 2003, is one of the first to receive detailed scrutiny by this court. In particular, I do not believe that there have been any actions that have called upon our Court of Appeal to perform an extensive examination of what must be considered when certifying a class action. That process determines if there should be a class action at all; who will be or may become parties to the action; who will be the representative for the class; and what issues (for example. the alleged negligence and causation of damages) will be addressed. The application for certification is the first step in a specific and detailed procedure that imposes upon the certifying judge a specific and ongoing case management responsibility. Within that responsibility lays the adding and deleting of parties, the redefining of issues and the guiding of settlement negotiations.

General Review of Facts and Inferences

8 The situation now before us involves the prescribing to and ingestion by the plaintiffs (two retired citizens living in Manitoba) of a cholesterol-lowering prescription drug named Baycol which was dispensed by the

applicant. The plaintiffs commenced their action against the applicant alleging that they have suffered injury as a result of their use of that product. They have sued on their own behalf and on behalf of persons resident in Manitoba and elsewhere who used Baycol and who claimed personal injuries as a result.

9 Baycol is a prescription medicine in the class of drugs known as "statins." It was marketed in Canada by the applicant from March 1998 to August 2001, with the approval of Health Canada. Statins generally are employed in the treatment of coronary heart disease and arterial sclerosis. The defendant, however, removed Baycol from the other statins being dispensed in August 2001, due to increased reports of serious painful side effects, including Rhabdomyolysis, an acute medical condition that results from the breakdown of muscle cells and can be fatal. There is nothing in this brief summary which is disputed by the applicant, except of course any suggestion that it is legally liable.

10 It is for themselves and others like them that the plaintiffs seek to have the action certified and Mrs. Walls designated as the representative plaintiff.

11 The certification judge was obviously aware that he was breaking new ground in Manitoba, which included defining the meaning of "leave to appeal" in the context of the *CPA*. His 38-page judgment carefully sets forth the particular facts of this case and analyzes the initial and ongoing reasons for the requirements stipulated by the legislation.

12 In his order, he concluded that this action ought to be certified and,

amongst other things, ordered that:

> 1. The class in respect of which this Order is made (the "Class") is described as:
>
> (i) All persons resident in Canada, excluding residents of Saskatchewan, Quebec, Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland and Labrador, who were prescribed and ingested Baycol which was purchased in Canada and who claim personal injury as a result; and
>
> (ii) All persons who have a derivative claim on account of a family relationship with such a person described in sub-paragraph 1(i),
>
> provided that, notwithstanding the foregoing, every person who qualifies as a member of a class in an action pending in the Ontario Superior Court of Justice as Court File No. 01-CV-216773 CP (the "*Coleman* Action") or in an action pending in the Supreme Court of British Columbia as Court File No. S014776 Vancouver Registry (the *"Bouchanskaia* Action") in which orders were made certifying each of such actions as a class proceeding for the purpose of giving effect to a settlement and which approved the settlements in each action providing, among other things, for compensatory payments to persons who ingested Baycol and contemporaneously therewith suffered from Rhabdomyolysis, as defined in such settlements, and to persons who, on account of a family relationship to any one or more of such persons, assert a derivative claim for compensation, shall be excluded from the Class in this proceeding

13 As required by the statute, he also designated the representative plaintiff, named the class counsel, described the nature of the claims asserted, named the forms of relief sought, and described the common issues. In so doing, he accepted that the *CPA* contains many procedures that are different from, or in addition to, the Queen's Bench Rules. He showed that for purposes of the *CPA* an order of certification is a procedure quite separate from the determination of liability and remedy.

14 Counsel for the applicant, in both their written brief and their oral arguments, forcefully submitted that this action should not have been certified. They asserted that the judge had erred in either law or principle, thereby leading him to misinterpret or misconstrue the evidentiary burden which is required for certification. Another assertion by the applicant's counsel was that the class and commonality issues had been defined in overly broad terms thereby leading to unwarranted linkages of issues by the judge.

15 Whether one agrees that all of the findings of the judge have been proved is not the key question. As long as he made no conspicuous errors of fact or law, he was bound only to exercise his discretion in a fair and reasonable way. The task of an appellate court in a situation like this is to determine from the *CPA* and the case law whether there is an identifiable issue of sufficient importance and complexity to dismiss certification and to leave it to the individual plaintiffs and others to pursue their claims on their own.

16 That is to say, the purpose of a certification application is not to establish a *prima facie* case or such a degree of certainty that it can be said that the action will likely meet with success after trial. Rather, it is to establish at least some factual basis for each of the certification requirements. Without success in that regard, the gate to a class action will not open.

17 The *CPA* does not create new substantive law or causes of action. As already noted, it is fundamentally a code of civil procedure to regulate the

conduct of proceedings. It provides the rules for defining, certifying, adding or removing parties, settling issues and appealing orders in a class action.

General Principles

18 In addressing the certification application, the certifying judge referred in detail to those provisions of the *CPA* which have already been mentioned in these reasons, and which provide a useful and consistent guide for the determination of any certification application. I will also cite, without much elaboration, three Supreme Court judgments which identify a number of important general principles pertaining to class actions. They were all released in 2001. Later, I will address some pending and relevant actions in Canada which actually involve the applicant and the product Baycol.

19 The Supreme Court cases to which I alluded are *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534, 2001 SCC 46, *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158, 2001 SCC 68, and *Rumley v. British Columbia*, [2001] 3 S.C.R. 184, 2001 SCC 69.

20 *Dutton* was an Alberta case commenced prior to the introduction of that province's class action legislation. Although it took the form of an action for summary judgment and a motion to strike out pleadings, Chief Justice McLachlin made it quite clear that she was addressing the case as if it were a class action proceeding. *Hollick* and *Rumley* emanated from Ontario and British Columbia where the legislation is very similar to that in Manitoba. In both of those cases the judgments of the Supreme Court were also written by McLachlin C.J.C.

21 I will not repeat all of the important statements quoted by the Manitoba certification judge from these judgments. I am, however, persuaded that he was correct in applying the principles which were so effectively articulated by the Chief Justice.

22 Further support for the certifying judge's approach can be found in the recent Ontario judgment of *M.C.C. v. Canada (Attorney General)*, [2004] O.J. No. 4924 (QL), a native residential school case. Writing for the court, Goudge J.A. said (at para. 37):

> Speaking for the Court at paras. 14-16, McLachlin C.J.C. made clear that in light of its legislative history, the CPA should be construed generously and that an overly restrictive approach must be avoided in order to realize the benefits of the legislation as foreseen by its drafters, namely serving judicial economy, enhancing access to justice and encouraging behaviour modification by those who cause harm. She underlined the particular importance of keeping this principle in mind at the certification stage.

Standard for Granting Leave to Appeal

23 Against this background of legislation and precedent, the court is obliged to answer the question of whether it can and should grant leave to appeal from the order that the action be certified as a class action under the *CPA*. It is evident from the words of the statute that appeals from routine interlocutory orders were contemplated by the drafters. What is also obvious, however, is that special and separate attention is given in the *CPA* to orders granting or refusing certification. Appeals regarding judgment on identified common issues may be taken without leave (s. 36(1)). With leave, there may be an appeal from any order determining an individual claim or

dismissing an individual claim for monetary relief (s. 36(3)). Finally, under a separate subsection, there is a provision stipulating that with leave, any plaintiff or defendant may appeal an order certifying or refusing to certify a proceeding as a class proceeding (s. 36(4)).

24 I trust that I have made clear my opinion that orders for certification or decertification are a question unto themselves and are not to be treated as if they were ordinary Queen's Bench Rules. I should qualify that statement somewhat by pointing out that the provisions of the *CPA* have a similarity of purpose to Queen's Bench Rule 20A. As with Rule 20A, the *CPA* was designed to provide tools for pre-trial conferences and settlement negotiation.

25 A fair and generous interpretation of the language of the *CPA* itself and the approach of the Supreme Court, leave me convinced that a certification order is not necessarily to be taken as confirmation that the claim is likely to succeed. It is only a reasonable opinion on the part of the certification judge that the suit is appropriately brought as a class action; that is, in a form that offers a means of efficiently and economically resolving the disputes in a manner that is fair to all parties.

26 Even under the Queen's Bench Rules, there are different standards required to succeed on an application for leave to appeal, depending on the circumstances. In the case of orders by statutory boards and tribunals, the specific legislation in issue usually requires a demonstration of an error in law or the commission of a jurisdictional excess. With judicial review we are concerned about issues of reasonableness and correctness. Over and

above these matters, it may be said that where leave to appeal an order is required, an appellant must show that the contemplated application (a) raises issues of sufficient public importance to merit appellate consideration and (b) has a reasonable prospect of success. See, for example, *Fillion v. Manitoba Public Insurance Corp.* (2004), 10 C.C.L.I. (4th) 182, 2004 MBCA 61, *Lejins v. Manitoba Public Insurance Corp*. (2003), 50 C.C.L.I. (3d) 1, 2003 MBCA 95, and *West-Man Culvert & Metal Co. v. Manitoba (Provincial Municipal Assessor)* (1992), 81 Man.R. (2d) 112 (C.A.).

Current Actions Involving Baycol

27 The matter before me now offers an opportunity to examine how courts in similar situations are approaching this question of certification in Canada. There are presently six actions which are or were underway. All involve the applicant, the product Baycol and the illness Rhabdomyolysis.

28 The jurisdictions where these proceedings have been launched are British Columbia: see *Bouchanskaia v. Bayer Inc.*, [2003] B.C.J. No. 1969 (QL), 2003 BCSC 1306; Saskatchewan, Manitoba, Ontario: see: *Coleman v. Bayer Inc.*, [2004] O.J. No. 1974 (QL) (S.C.J.), supplementary reasons [2004] O.J. No. 2775 (QL) (S.C.J.), Quebec and Newfoundland. All are relevant but the Newfoundland proceeding is the most germane to us.

29 I have mentioned that to us the most relevant of the Bayer proceedings is taking place in Newfoundland. In *Wheadon v. Bayer Inc.* (2004), 46 C.P.C. (5th) 155, 2004 NLSCTD 72, a certification application was heard and an order granted after Barry J., of the trial division, concluded that the plaintiffs had satisfied the necessary certification standards. The facts in

that case were as similar as they could be to ours and the legislation is without material difference.

30 When the application hearing took place in Manitoba, the certification judge was told that "the facts, evidence and issues in this case are virtually identical to those in *Wheadon*" (at para. 13). He was also informed that the Newfoundland certification order was under appeal. Nonetheless, the reasoning of the Newfoundland judge was adopted here in Manitoba, without waiting for a result.

31 I was able to proceed with more certainty than the certification judge because on April 14, 2005, the Newfoundland court dismissed the application for leave (*sub nom. Bayer Inc. v. Pardy*, [2005] N.J. No. 122 (QL), 2005 NLCA 20), and the reasons became available during the course of our hearing.

32 Under the Newfoundland rules of court, an application for leave to appeal the certification by the trial judge was heard by three appellate court judges, rather than by a single chambers judge. Roberts J.A., writing for a unanimous panel, directed that the application for leave to appeal should be dismissed with costs.

33 Because I have attached significance to the reasons of Justice Roberts, I will offer several quotations from what he lists under the heading "considerations" (at paras. 9, 11, 12, 14):

> Regarding leave to appeal from interlocutory orders dealing with procedural matters, the default position is that leave should be granted sparingly. That has been the clear message of this Court for some time

> and was given confirmation in an earlier application for leave to appeal in this same proceeding. ...
>
> Simply put, a certification order is not necessarily final and will be subject to variation, and even to cancellation, if circumstances change. It is fundamentally a matter of case management. ...
>
> A similar reticence to interfere has been expressed by the Ontario Court of Appeal. Carthy J.A. in Anderson v. Wilson (1999), 175 D.L.R. (4th) 409, at para. 12 wrote:
>
> > I am mindful of the deference which is due to the Superior Court judges who have developed expertise in this very sophisticated area of practice. The Act provides for flexibility and adjustment at all stages of the proceeding and any intervention by this court at the certification level should be restricted to matters of general principle.
>
> ... There is no reason to doubt the correctness of the certification order, particularly having regard to s. 11(1) of the Act which allows for variation of the order, and even decertification, as the action progresses. The court does not consider that the appeal involves a matter of such importance that leave should be granted, and while it is correct to say that any appeal of the certification order following judgment will lack practical effect, the intended appellant's interest will be protected throughout, both by s. 11 of the Act and its right to appeal the eventual judgment on the merits. Lastly, there is no overarching interest of justice dictating that leave to appeal should be granted. [1]

34 While that judgment is not one that necessarily binds this court, it is one which has considerable persuasive significance. The same approach was used by the Manitoba Queen's Bench judge in the proper use of his discretion.

Conclusion

[1] Section 11 of the Newfoundland and Labrador *Class Actions Act* corresponds to s. 10 of the *CPA* in Manitoba, although the language is not identical

35 I believe from the principles that I have reviewed and from the commonality of facts and issues, that the certification of a class action is appropriate. There can be little doubt that these proceedings raise issues of public importance and it can safely be said that both on the facts and the history to which I have referred, the plaintiffs have a reasonable prospect of success as regards the issues defined by the certifying judge. It is based on the foregoing comments that I came quite confidently to the conclusion which I presented at the beginning of these reasons.

36 It is ordered that the applicant's application for leave to appeal the certification order is dismissed without costs to any party.

_____ J.A.

IN THE COURT OF APPEAL OF MANITOBA

B E T W E E N:

MARILYN WALLS and ETHEL NICK	)	***E. W. Olson, Q.C.,***
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	)	*Chambers motion heard:*
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BAYER INC.	)	
	)	*Decision pronounced:*
(Defendant) Applicant	)	***August 10, 2005***
	)	
	)	*Corrigendum issued:*
	)	***August 16, 2005***

KROFT J.A.

37 By virtue of s. 37(1) of *The Class Proceedings Act*, C.C.S.M., c. C130, no costs may be awarded against any party with respect to this proceeding. Accordingly, para. 36 is amended to provide that: "It is ordered that the applicant's application for leave to appeal the certification order is dismissed without costs to any party."

_____ J.A.