Editor's Note: A corrigendum was issued by the Court; corrections have been made to the text and the corrigendum is appended to the decision.

Date: 20050308
Docket: 04/83
Citation: 2005 NLCA 20

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR COURT OF APPEAL

BETWEEN:

BAYER INC. INTENDED APPELLANT

AND:

JEAN PARDY,
BRUCE McCULLOUGH
and JOHN RYAN INTENDED RESPONDENTS

Coram: Wells, C.J.N.L., Roberts and Welsh, JJ.A.
Court Appealed From: Supreme Court of Newfoundland, Trial Division, 200201T4246CP

Application Heard: March 8, 2005
Decision Rendered: March 8, 2005
Reasons for Decision Filed: April 14, 2005

Reasons for Decision by Roberts J.A.
Concurred in by Wells, C.J.N.L. and Welsh, J.A.

Counsel for the Intended Appellant: Mr. Peter Cavanagh and Ms. Genevieve Dawson

Counsel for the Intended Respondents: Mr. Chesley Crosbie, Q.C. and Mr. David Klein

Roberts J.A.**:**

Bayer Inc. (Bayer), the intended appellant, sought leave to appeal the July 6, 2004 order certifying this proceeding as a class action pursuant to the **Class Actions Act**, SNL 2001, c. C-18.1 (the **Act**). The application for leave, which was heard by a three judge panel of this Court on March 8, 2005, was denied. The Court gave brief oral reasons and undertook to file more complete reasons at a later date. These are those reasons.

Background

This is a product liability class action concerning Baycol, a prescription medicine in the class of drugs call statins. Baycol was promoted and distributed in Canada by Bayer from March 1998 to August 2001 with the regulatory approval of Health Canada. Statins are used, in particular, in the treatment of coronary heart disease and arteriosclerosis. Bayer removed Baycol from the market in August 2001 due to increased reports of serious side effects, including rhabdomyolysis, an acute medical condition that results from the breakdown of muscle cells.

The intended respondents (the representative plaintiffs) have pleaded that Baycol was a defective product which caused serious side effects and that Bayer was negligent. They sought certification of a class to include all persons resident in Newfoundland and Labrador who were prescribed and ingested Baycol and who claim personal injury as a result, and all persons resident in Nova Scotia, New Brunswick and Prince Edward Island who were prescribed and ingested Baycol and claim personal injury as a result and choose to opt in to this proceeding.

In a decision reported at (2004), 238 Nfld. & P.E.I.R. 179, the applications judge held that the criteria for certification of this action as a class proceeding had been satisfied. In particular, he held:

(1) that the evidentiary threshold requiring that the representative plaintiffs show some basis in fact for each of the certification

requirements, other than that the pleadings disclose a cause of action, was met;

(2) that membership in the class could be determined by the application of objective criteria on a basis that was not overly inclusive and thus properly defined; and

(3) that a class action was the preferable procedure to resolve the common issues that were identified[1].

Bayer contended in its submissions before this Court that the applications judge erred in finding as he did and argued that leave to appeal should be granted, in accordance with **rule 57.02(4)**, on the following grounds:

(1) that there was good reason to doubt the correctness of the order;

(2) that the proposed appeal involved matters of such importance that leave to appeal should be granted;

(3) that the nature of the issues raised by the proposed appeal were such that any appeal on these issues following final judgment would be of no practical effect; and

(4) that the interests of justice were such that leave to appeal should be granted.

Bayer further submitted that since this was the first certification of a class action under the **Act** it was desirable that the application of the statutory criteria for certification under the **Act** be reviewed by this Court.

Relevant statutory provisions

Class Actions Act, SNL 2001, c. C-18.1:

When court shall certify class action

[1] Class actions involving Baycol have been certified in British Columbia (**Bouchanskaia v. Bayer Inc.,** [2003] BCSC 1306) and Manitoba (**Walls et al. v. Bayer Inc.,** [2005] M.J. No. 4 (Q.B.)). Also, the Ontario Superior Court of Justice has approved a partial settlement for persons who have suffered rhabdomyolysis, as defined in the settlement, as a result of taking Baycol: see **Coleman v. Bayer Inc.**, [2004] O.J. Nos. 1974 and 2775. The **Coleman** settlement included those so affected in Newfoundland and Labrador, who, in turn, were excluded from the certification in this proceeding.

5. (1) On an application made under section 3 or 4 , the court shall certify an action as a class action where

(a) the pleadings disclose a cause of action;

(b) there is an identifiable class of 2 or more persons;

(c) the claims of the class members raise a common issue, whether or not the common issue is the dominant issue;

(d) a class action is the preferable procedure to resolve the common issues of the class; and

(e) there is a person who

(i) is able to fairly and adequately represent the interests of the class,

(ii) has produced a plan for the action that sets out a workable method of advancing the action on behalf of the class and of notifying class members of the action, and

(iii) does not have, on the common issues, an interest that is in conflict with the interests of the other class members.

(2) In determining whether a class action would be the preferable procedure for the fair and efficient resolution of the common issues, the court may consider all relevant matters including whether

(a) questions of fact or law common to the members of the class predominate over questions affecting only individual members;

(b) a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;

(c) the class action would involve claims that are or have been the subject of another action;

(d) other means of resolving the claims are less practical or less efficient; and

(e) the administration of the class action would create greater difficulties than those likely to be experienced if relief were sought by other means.

…..

Decertification or amendment where conditions no longer satisfied

11. (1) The court may amend a certification order, decertify an action or make another order it considers appropriate where it appears to the court that the conditions in section 5 or subsection 7 (1) are not satisfied with respect to a class action.

…..

Appeals

36. (3) A party may, with leave of a judge of the Court of Appeal, appeal to the Court of Appeal from

(a) an order certifying or refusing to certify an action as a class action; or

(b) an order decertifying an action.

Rules of the Supreme Court, 1986:

Leave to Appeal

57.02. (1) Leave to appeal shall be obtained by application to the Court where

(a) during the course of a proceeding or prior to a final order, a party seeks to appeal from an interlocutory order, or …

…..

(4) Leave to appeal an interlocutory order may be granted where

(a) there is a conflicting decision by another judge or court upon a question involved in the proposed appeal and, in the opinion of the Court, it is desirable that leave to appeal be granted,

(b) the Court doubts the correctness of the order in question,

(c) the Court considers that the appeal involves matters of such importance that leave to appeal should be granted,

(d) the Court considers that the nature of the issue is such that any appeal on that issue following final judgment would be of no practical effect, or

(e) the Court is of the view that the interests of justice require that leave be granted.

Considerations

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. Wells C.J.N.L., in **Pardy v. Bayer Inc.,** [2003] N.J. No. 253[2], wrote at para. 5:

> This Court has always been reluctant, absent a compelling reason, to permit appeals of interlocutory orders, especially where such appeals will interfere with trial management procedures and practices engaged by the Trial Division during the course of a trial. (See United Food and Commercial Workers, Local 1252 v. Cashin et al. (1994), 124 Nfld. & P.E.I.R. 201 (N.L.C.A.), paragraphs 36 and 37.) The circumstances in which this Court will consider granting such leave are now specified in Rule 57.02(4) of the Rules of the Supreme Court, 1986. …

Furthermore, because s. 11 of the **Act** allows the court to "amend a certification order, decertify an action or make another order it considers appropriate …", the threshold for leave to appeal from such order, it seems to me, should be even higher.

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. Thus, in **Griffith v. Winter**, [2003] B.C.J. No. 1551 (BCCA), Mackenzie J.A., speaking for the panel, concluded at para. 22:

> Absent an error of law or principle the decision of a certification judge is discretionary. Under the Class Proceedings Act the certification judge is the case management judge who is seized with all aspects of management of a class proceedings at least up to trial. The familiarity with the case thereby acquired is a reason to give greater deference to decisions of the case management judge on certification and procedural issues generally. In my view, the issues complained of by the Province on this appeal are largely matters within the discretion of the chambers judge, and I do not think that any error of law or principle has been demonstrated that would permit us to interfere with his decision.

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:

[2] Bayer's earlier application for leave to appeal was from an interlocutory order dismissing its application to dismiss or permanently stay the within action.

> … 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.

The above statement of Carthy J.A. in **Anderson** was given further approval by the Ontario Court of Appeal in **Carom v. Bre-X Minerals Ltd.** (2000), 51 O.R. (3d) 236, at para. 36.

Returning to **Rule 57**, it is important to note, as was done by Wells C.J.N.L. in the earlier application for leave, that the granting of leave is, in the final analysis, discretionary, even if one or more of the criteria listed in **rule 57.02(4)** has been established. In the present case, there is no conflicting decision to resolve. The applications judge's decision to certify this action as a class action was based on established class action jurisprudence developed in other jurisdictions, where the relevant legislation is similar to that in this province. 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.

For all of the above reasons, the application for leave to appeal is denied.

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D.M. Roberts, J.A.

I concur: _____

C.K.Wells, C.J.N.L.

I concur: _____

B.G. Welsh, J.A.

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C O R R I G E N D U M

Roberts, J.A.

In the Reasons for Decision in this matter filed on April 14, 2005, costs were unwittingly awarded to the intended respondents. I say unwittingly because s. 37 of the **Class Actions Act**, SNL 2001, c. C-18.1 prohibits the awarding of costs to a party at any stage of an application thereunder. Counsel for both parties have requested the Court to make the required correction and I do so pursuant to the authority of rule 15.07. Therefore, the Reasons for Decision filed on April 14, 2005 are amended by deleting from para. 15 the words "with costs to the intended respondents".

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D.M. Roberts, J.A.

I concur: _____
C.K. Wells, C.J.N.L.

I concur: _____
B.G. Welsh, J.A.