

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Miller v. Merck Frosst Canada Ltd.*,
2011 BCSC 741

Date: 20110607
Docket: S110437
Registry: Vancouver

Between:

Michael Miller

Plaintiff

And

**Merck Frosst Canada Ltd., Merck Frosst Canada & Co.
Merck & Co., Inc., Merck Sharpe & Dohme Corp**

Defendants

Brought under the *Class Proceedings Act*, R.S.B.C. 1996, c.50

Before: The Honourable Mr. Justice R. Punnett

Reasons on Scheduling

Counsel for the Plaintiff:

D.A. Klein

Counsel for the Defendants:

J.M. Sullivan

Place and Date of Trial/Hearing:

Vancouver, B.C.
May 17, 2011

Place and Date of Judgment:

Vancouver, B.C.
June 7, 2011

[1] The parties in this action seek a ruling on a certification schedule leading to a certification hearing under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 (the "Act"). The plaintiff has provided a certification schedule that will result in a certification hearing after November 15, 2011. The defendants object to the setting of a certification schedule before the plaintiff has filed his notice of application and affidavits in support. They say they need to know the plaintiff's case in order to address the certification schedule in a meaningful way.

[2] The defendants submit that this action has certain unique characteristics that justify a delay in setting the certification schedule until after they have received the plaintiff's application and evidence in support. Those are:

- a) in most class actions in Canada there is already in existence a class action proceeding outside of Canada hence the Canadian action is the "tail" to an existing proceeding;
- b) this action is the first of its kind and in certain respects is ground breaking with the result that the plaintiff's case will not be known until they provide their application and affidavits;
- c) without that information the defendants cannot contribute to or assist the court in the setting of a realistic certification schedule;
- d) the plaintiff is likely to have lay and expert witnesses and the defendants cannot assess the time they will require to obtain, organize and submit their response.

[3] The plaintiff responds that the statement of claim is detailed and informative and that the defendants have had since the date of service in February 2011 to plan their response. It is not disputed that the defendants were aware of the issues alleged for several years given changes they have made to their product monograph in Europe in 2008 and other jurisdictions thereafter. They assert that the defendants therefore know what the case is about, would likely not have been sitting on their hands and will not be surprised by the contents of the certification application.

Discussion

[4] Section 2(3) of the *Act* requires that an application for certification be made within 90 days of the delivery of the last appearance or statement of defence. The parties acknowledge that this provision is rarely complied with. That however does not mean its intent to have the certification motion heard promptly should be ignored. Winkler J. in *Attis v. Canada (Minister of Health)*, 75 O.R. (3d) 302, 142 A.C.W.S. (3d) 927, at para. 7:

[7] As a matter of principle, the certification motion ought to be the first procedural matter to be heard and determined. This may be inferred from section 2(3) of the Class Proceedings Act, 1992, S.O. 1992, c. 6 (CPA) which provides that a certification motion shall be made within 90 days after the last statement of defence, except with leave of the court. While this time limit is more often observed in the breach in that it is rarely achieved in practice, it does serve to emphasize the rationale for an early determination of certification because of the ramifications of the CPA to the proceeding, not the least of which is the binding effect on the class members of the determination of the common issues in a common issues trial.

(See also *Baxter v. Canada (Attorney General)*, [2005] O.T.C. 391, 139 A.C.W.S. (3d) 627, and *Jones v. Zimmer GMBH*, 2010 BCSC 897).

[5] The defendants' suggestion that the certification schedule be set once the plaintiff files his material has a certain attraction to it. However, there may be further delay in setting the schedule as a hearing of the application to set the certification schedule will necessarily be dependent on the availability of counsel and the court.

[6] In my opinion s. 2(3) is intended to encourage the prompt hearing of the certification application. This is consistent with the object of the *Supreme Court Civil Rules* to "secure the just, speedy and inexpensive determination of every proceeding on its merits": Rule 1-3(1). Setting the certification schedule now is likely to avoid the need for a further hearing to address that schedule. In the event the plaintiff's material creates an unanticipated difficulty making compliance by the defendants with the schedule problematic the defendants are at liberty to apply to vary the schedule.

[7] The plaintiff's suggested schedule proposes delivery of his notice of application and affidavits in support by July 12, 2011, with the defendants to provide their affidavits in response by September 6, 2011, a period of 8 weeks later. The defendants note that the summer time period, aside from potential problems for counsel and staff, poses particular problems with respect to accessing both lay and expert witnesses. The plaintiff does not seriously oppose a longer period for the defendants' response given the period proposed encompasses the summer months.

[8] I therefore set the certification schedule as follows:

ITEM	STEP	DATE
1	Plaintiff delivers notice of application and affidavits in support of certification application	July 12, 2011
2	Defendants deliver affidavit(s) in response to the plaintiff's certification application	October 11, 2011
3	Plaintiff delivers reply affidavit(s) if any and argument in support of certification	November 8, 2011
4	Defendants deliver argument in the certification application	December 6, 2011
5	Plaintiff serves reply certification argument, if any	December 20, 2011
6	Certification application for three days commencing on the first available date that is convenient for the court and counsel	

[9] This schedule will in all probability accommodate the defendants concerns respecting the unique aspects of this action and the summer months. If it does not,

then the defendants have liberty to apply. The defendants also have leave to proceed without filing their statement of defence until after the certification hearing.

“Punnett J.”