KING'S BENCH FOR SASKATCHEWAN

Citation: **2023 SKKB 191**

Date: **2023 09 15**
Docket: QBG-SA-00766-2022
Judicial Centre: Saskatoon

BETWEEN:

CAITLIN ERICKSON and COY NOLIN

PLAINTIFFS

- and –

KEITH JOHNSON, JOHN OLUBOBOKUN, KEN SCHULTZ, NATHAN RYSAVY, DUFF FRIESEN, LYNETTE WEILER, JOEL HALL, FRAN THEVENOT, LOU BRUNELLE, JAMES RANDALL, TRACEY JOHNSON, SIMBO OLUBOBOKUN, ELAINE SCHULTZ, CATHERINE RANDALL, KEVIN MACMILLAN, ANNE MACMILLAN, DAWN BEAUDRY, NATHAN SCHULTZ, AARON BENNEWEIS, DEIDRE BENNEWEIS, STEPHANIE CASE, DARCY SCHUSTER, RANDY DONAUER, JOHN THURINGER, MILE TWO CHURCH INC., THE GOVERNMENT OF SASKATCHEWAN, JOHN DOES and JANE DOES

DEFENDANTS

Brought under *The Class Actions Act,* SS 2001, c C-12.01.

Counsel:

Grant J. Scharfstein, K.C. and Samuel W. Edmondson	for the plaintiffs
Gordon J. Kuski, K.C. and Amanda M. Quayle	for Mile Two Church Inc.
James S. Ehmann, K.C.	for John Thuringer
Randall T. Klein, K.C.	for Tracey Johnson
Kaylea M. Dunn, K.C. and Shelby A. Fitzgerald	for Fran Thevenot
Kane R. Fritzler (agent for Jennifer Pereira, K.C.)	for Dawn Beaudry

Daniel N. Tangjerd	for John Olubobokun and Simbo Olubobokun
James W. Langen (agent for Jay D. Watson)	for Nathan Rysavy and Lou Brunelle
Scott R. Spencer	for Aaron Benneweis and Deidre Benneweis
Mark R. Vanstone	for Duff Friesen, Ken Schultz, James Randall and Catherine Randall
Todd G. Parlee	for Darcy Schuster
Brent D. Little	for Nathan Schultz
Adam R. Touet	for Randy Donauer
Kane R. Fritzler (agent for Candice D. Grant)	for Stephanie Case
Jared D. Epp	for Kevin MacMillan and Anne MacMillan
Jared G. Biden and Justin T. Stevenson	for The Government of Saskatchewan

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FIAT BARDAI J.
September 15, 2023

Introduction

[1] The plaintiffs have commenced an action pursuant to *The Class Actions Act*, SS 2001 c C-12.01. The second amended statement of claim is 51 pages in length and is comprised of 82 paragraphs. At paragraph 8 of the plaintiffs' brief, they summarize the claim as follows:

> The Statement of Claim as amended alleges in detail the systematic, persistent, and egregious abuse of students and minor attendants of Legacy Christian Academy (the "School") and Mile Two Church (the "Church") by the Defendants. …

[2] On October 24, 2022, I was assigned as the designated judge to consider certification of the action. That application has not been heard or scheduled as yet.

[3] Two preliminary applications have been brought by the defendants. The first in time is the application of Mile Two Church Inc. [Church]. They request that they not be required to file a statement of defence until after certification is determined. Many of the defendants take the same position as the Church. The position of the Government of Saskatchewan, who supports the Church's application, is that if defences are required pre-certification, that the defendants be allowed to respond to the claim as they see fit, including by way of application to strike the claim.

[4] The second application is brought by the defendant, John Thuringer. He seeks particulars of the allegations against him from the plaintiffs. Many of the remaining defendants indicate that they intend to seek similar relief to that sought by Mr. Thuringer.

Thuringer Application for Particulars

[5] The relief sought in the notice of application by Mr. Thuringer is largely unopposed. The plaintiffs have proposed the following timeline to deal with demands for particulars made by Mr. Thuringer as well as demands for particulars which might be made by other defendants. The plaintiffs suggest that any demands for particulars made by the defendants be dealt with as follows:

1. all defendants shall have until no later than August 31, 2023 to serve any and all requests for particulars on the plaintiffs;

2. the plaintiffs shall have until October 31, 2023 to serve all responses to requests for particulars on all defendants;

3. all defendants shall have until November 30, 2023 to serve any and all applications for better and further particulars on the plaintiffs, including all supporting materials;

4. the plaintiffs shall have until January 15, 2024 to serve the defendants with any material they intend to rely upon for the hearing of any applications for better and further particulars; and

5. the hearing of any and all applications for further and better particulars shall be scheduled on a date set by the Court.

[6] Mr. Thuringer's counsel says his client can live with the timeline proposed, or one which might be set by the Court. Mr. Thuringer, together with the defendant, Tracey Johnson, both however say that a cost award should be made in their favour on account of the fact that they had to each file briefs before the plaintiffs agreed to provide particulars, and proposed a timeline for doing so. The plaintiffs meanwhile suggest that the issue of costs be dealt with at any hearing for better particulars. Of course, if there is no issue with the particulars ultimately provided by the plaintiffs, there will be no hearing for further and better particulars.

[7] On March 16, 2023, the parties appeared before me at which time I set a timeline for dealing with the present applications. At that time, the plaintiffs did not indicate that they would largely be consenting to the relief sought. Had the plaintiffs provided their consent at that time and proposed the timeline now before the Court, Mr. Thuringer and Tracey Johnson would not have been required to prepare briefs. Accordingly, Mr. Thuringer and Tracey Johnson are entitled to an award of costs in their favour. I award Mr. Thuringer costs of $500.00 (as he brought the application) and Tracey Johnson, on whose behalf a brief was filed but who did not bring an application, costs of $300.00. I do not order that these costs be paid forthwith.

[8] The issue of particulars is to be dealt with as follows:

1. all defendants shall have until no later than October 31, 2023 to serve

any and all requests for particulars on the plaintiffs;

2. the plaintiffs shall have until December 31, 2023 to serve all responses to requests for particulars on all defendants;

3. all defendants shall have until February 28, 2024 to serve any and all applications for better and further particulars on the plaintiffs, including all supporting materials;

4. the plaintiffs shall have until April 28, 2024 to serve the defendants with any material they intend to rely upon for the hearing of any applications for better and further particulars;

5. The Local Registrar is to schedule a call with the parties and myself in March 2024 for further case management; and

6. Mr. Thuringer is entitled to costs of $500.00 and Tracey Johnson to costs of $300.00, but neither award is payable forthwith.

Church Application Re: Defences

(a) Defendants' Position

[9] The defendants' position is based on a decision of the Court of Appeal in *Hoffman v Monsanto Canada Inc.,* 2002 SKCA 120, 227 Sask R 63 [*Monsanto*], and the practice of this Court subsequent. In *Monsanto* at paras 25-28, the Court held:

> [25] The respondents contend that the learned chambers judge balanced the competing positions and that fairness dictates the filing of Statements of Defence as directed. Learned counsel contends that such a limited Defence will assist him in advancing the certification action. He also submits that such procedure eliminates the possibility of "blindsiding" on the certification application. With respect, we disagree. The material on file does not disclose any need for such pleading to advance the certification. In this case there is no indication

> that the appellants are abusing the processes of the Court by bringing their application. If the processes of the Court are abused, the Court has the inherent power to control such abuses: See *Castanho v. Brown & Root (UK) Ltd.* [1981] 1 All E.R. 143; [1981] A.C. 557 (H.L.), and *Boychuk v. Jensen* (1994), 116 Sask. R. 54 (C.A.).
>
> [26] The *Act* [SS 2001, c C-12.01] and Rules [*The Queen's Bench Rules*] (including Form 5D) specify the prerequisites for certification of this putative class action as a "class" action. The respondents have carriage of this application – this works to their advantage rather having to face motions to strike which will raise in a rather fragmented way matters that relate to the prerequisites of certification. Further, the appellants having elected to take the position that they have, cannot later raise matters on the certification that are properly a matter of defence to the class action following certification or refusal.
>
> [27] Having regard for the principles articulated by McLachlan C.J.C. in *Dutton* [2001 SCC 46, [2001] 2 SCR 534], we conclude that a proper application of those general principles to this case mandates an extension of the time for a Statement of Defence to both limbs of the action until after the certification application has been heard and determined.
>
> [28] In this case the timely determination of the certification application will advance the litigation without generating unnecessary motions and applications. If one of the purposes of the modern class action is designed to avoid, rather than encourage unnecessary filing of repetitious papers and motions, it is in the interest of all parties to have the "appropriateness of the class action determined at the outset by certification": See *Dutton*, supra at p. 552, paras. 33 and 38.

[10] Since the decision of the Court in *Monsanto*, the practice in Saskatchewan has been to allow defences to be filed after certification. It is not in dispute that this has been the practice now for more than 20 years. For example, in *Schroeder v DJO Canada Inc.*, 2009 SKQB 169 at para 40, 334 Sask R 258, the Court notes:

> [40] The defendants have suggested that should this Court not exercise its discretion in favour of its motion to join the McKinley Group as party defendants, they intend to, nonetheless, add them to the action by way of the "third party" procedure set forth in Rule 107. There may be some procedural difficulties in bringing a third party claim at this time because Rule 107A directs that the third party claim shall be served with the defendants' statement of defence. However, in class action proceedings, a statement of defence is not required until after

> certification. See *Monsanto Canada Inc. v. Hoffman*, 2002 SKCA 120, 227 Sask. R. 63.

[11] Similarly, in *Field v GlaxoSmithKline Inc.*, 2013 SKQB 113 at para 45, 416 Sask R 238, the Court states:

> [45] Class proceedings tend to evolve as they work their way through the case management and certification processes. That may be in part because, at least in Saskatchewan, defendants are not required to deliver a statement of defence prior to the certification hearing (see *Hoffman v. Monsanto Canada Inc.*, 2002 SKCA 120, 227 Sask. R. 63 at para. 27; *Schroeder v. DJO Canada Inc.*, 2009 SKQB 169, 334 Sask.R. 258). The result is that a defendant's arguments opposing certification are only disclosed in submissions filed shortly before the certification hearing. In this case, those submissions were filed eight days before the hearing.

[12] Counsel for the Church argues that if I decide that defences are required now, I will be departing from a 20-year-old practice and ruling in a manner that is inconsistent with the binding authority of our Court of Appeal. In fact, counsel for the Church (who was also counsel for one of the defendants in *Monsanto*) went so far as to suggest that should I rule against the defence motion, I may be ostracised by my colleagues on the Court and "find myself sitting by myself at the next *en banc*" (judges' meeting) for having departed from the longstanding practice.

(b) Plaintiffs' Position

[13] The plaintiffs argue that *Monsanto* was limited to the facts of that case and that the decision is not binding on the Court. They say that the Court must examine the interplay between *The Queen's Bench Rules* and *The Class Actions Act*. Section 4(3) of *The Class Actions Act* provides:

> 4(3) An application pursuant to clause (2)(b) must be made:
>
> (a) within 90 days after the later of:

(i) the date on which the statement of defence was delivered; and

(ii) the date on which the time prescribed by *The Queen's Bench Rules* for delivery of the statement of defence expires without it being delivered; or

(b) with leave of the court at any other time.

[14] *The Queen's Bench Rules* meanwhile provide that a defence typically be delivered within 20-40 days from the date of service depending on where the defendant is – Saskatchewan, other provinces in Canada or other countries. Rule 3-15 states:

Statement of defence

3-15(1) If a defendant files a statement of defence, the statement of defence must:

(a) be in Form 3-15A; and

(b) comply with the rules about pleadings in Division 3 of Part 13.

(2) Within the applicable period after service of the statement of claim, the defendant shall serve the statement of defence on the plaintiff and file the statement of defence.

(3) The applicable period is:

(a) 20 days if the defendant is served in Saskatchewan;

(b) 30 days if the defendant is served elsewhere in Canada or in the United States of America;

(c) 40 days if the defendant is served outside Canada and the United States of America.

(4) Notwithstanding subrule (3), a statement of defence may be served and filed at any time before the action is noted for default.

(5) Notwithstanding subrule (2), a defendant who intends to defend the action may, within the time limited for the service and filing of a statement of defence, serve and file a notice of intent to defend in Form 3-15B.

(6) On filing a notice of intent to defend pursuant to subrule (5), the defendant:

> (a) is entitled to have 10 days in addition to the period mentioned in subrule (3) within which to serve and file a statement of defence; and
>
> (b) is deemed to have submitted to the jurisdiction of the Court.

[15] The plaintiffs say that the intention of the legislation was always to have defences filed before certification and this approach is consistent with and best gives effect to the language of *The Class Actions Act* and Rule 3-15.

[16] Finally, the plaintiffs contend that the law has, in any event, evolved since *Monsanto* and that the practice since *Monsanto* needs to be re-evaluated. Certainly, there is a growing practice in other provinces to require defences to be filed prior to certification. In *Pro-Sys Consultants Ltd. v Microsoft Corporation,* 2015 BCSC 74 at paras 31-34:

> [31] I will conclude with a comment regarding the practice of deferring the filing of a statement of defence until after the action has been certified. This case is an illustration of the difficulties that can create. It is a practice that ought to be revisited. I am not the first judge to make that comment: in *Pennyfeather v. Timminco Ltd.*, 2011 ONSC 4257 and *Labourers' Pension Fund of Central and Eastern Canada (Trustees of) v. Sino-Forest Corp.*, 2012 ONSC 1924, Mr. Justice Perell made the same observation.
>
> [32] There is nothing in the *Class Proceedings Act* [RSBC 1996, c 50] mandating the delay, nor is there anything in the *Supreme Court Civil Rules*. The courts have come to allow the deferral as a matter of course, often simply based on an agreed schedule between the parties who adopt the ingrained practice. Given the financial stakes of class actions and the consequences of a certification ruling, it cannot be justified on the basis of potential cost savings. As Perell J. noted, defence counsel will have to investigate the case and ascertain the facts in order to argue certification. The actual drafting of a defence after that work has been done is a minimal incremental effort and expense in the larger picture.
>
> [33] It is hard to see what legitimate purpose is served by deferring the statement of defence when it, and the plaintiff's reply, if any, crystallise the issues, something that the certification process is supposed to accomplish. This case – commenced 10 years ago – has gone to the Supreme Court of Canada and back down, and we are still

> dealing with pleadings and class period issues, with a trial date some 10 months away.
>
> [34] I do not say that deferring the statement of defence should never be allowed; rather, that there ought to be good reason to do so.

[17] Similarly in *Poundmaker Cree Nation v Her Majesty the Queen,* 2017 FC 447 [*Poundmaker*], the Court found at para. 31:

> [31] Put otherwise, what emerges from the jurisprudence is that the mere fact of the existence of the convention as a usual practice at the Federal Court and in other jurisdictions is, in and of itself, not determinative of whether the filing of a statement of defence is to be deferred until after the hearing of the certification motion. The case management judge must consider the motion with a view to the just, most expeditious and least expensive determination of the proceeding. In making this determination, the extent to which the statement of defence will assist the Court, the complexity of the legal issues, the extent to which the statement of defence may need to be reformulated, the time and expense that preparation of a statement of defence will entail at this stage are all important considerations. The burden is on the defendant to persuade the Court that the delay should be permitted and the absence of an evidentiary basis, while not necessarily determinative, is certainly not helpful to the defendant.

[18] See also: *Gomel v Ticketmaster Canada LLP,* 2019 BCSC 2178; *Service v University of Victoria,* 2019 BCCA 474; *Pennyfeather v Timminco Limited,* 2011 ONSC 4257, 107 OR (3d) 201; *Scott v TD Waterhouse Investor Services (Canada) Inc.* 2000 BCSC 1786, 83 BCLR (3d) 365; *Langevin v Aurora Cannabis Inc.*, 2021 ABQB 887; and *Kang v Sun Life Assurance Company of Canada,* 2013 ONCA 118 at para 25, 19 CCLI (5th) 171.

[19] The crux of the plaintiffs' position is that *Monsanto* is not binding and that the decision to permit defences to be filed after certification is discretionary. They say requiring defences now will aid in the certification process, is now the preferred practice in Canada and that the 20-year-old custom in Saskatchewan needs to be changed.

Analysis

[20] I want to start by dealing first with the argument of the Church's counsel that should I rule in favour of the plaintiffs, I will find myself sitting alone at the next meeting of judges for having changed an established practice that the judges of this Court have been following for the last 20 years.

[21] Let me begin by assuring counsel and the parties that judicial independence is alive and well in Saskatchewan. Even in a very crowded courtroom (as was the case in which the arguments on this matter were heard), the judge sits alone. Members of the Court are comfortable and used to sitting alone. We sit separate from the parties because we are required to be neutral, to remain unbiased and to be unaffected by what is popular. In short, judges do not make decisions based on what is popular but rather, by applying the law to the facts. Sometimes that means making decisions that are unpopular but that is the job. We are unaffected by peer pressure, but we are bound by appellate precedence and we do take into consideration decisions of our colleagues in this province and elsewhere which, while not binding, may help inform the analysis.

[22] In terms of the plaintiffs' argument that the practice in Saskatchewan is, in effect, behind the times given what is occurring elsewhere in Canada, it is acknowledged that in other jurisdictions, courts are charting a different path. However, it should not be forgotten that class proceedings are governed by provincial legislation. There are certainly similarities in the various pieces of legislation from province to province, but they are not all the same. The decisions in this province need to be based on the governing legislation from Saskatchewan.

[23] At the end of the day, it is not necessary for me to determine whether

Monsanto is binding or not, because even if it is not binding, discretion in this case favours delaying the filing of defences until after certification, based on the facts before the Court.

[24] *The Queen's Bench* Foundational Rules are set out in Rule 1-3 which provides:

> **Purpose and intention of these rules**
> **1-3**(1) The purpose of these rules is to provide a means by which claims can be justly resolved in or by a court process in a timely and cost effective way.
>
> (2) In particular, these rules are intended to be used:
>
> (a) to identify the real issues in dispute;
>
> (b) to facilitate the quickest means of resolving a claim at the least expense;
>
> (c) to encourage the parties to resolve the claim themselves, by agreement, with or without assistance, as early in the process as is practicable;
>
> (d) to oblige the parties to communicate honestly, openly and in a timely way; and
>
> (e) to provide an effective, efficient and credible system of remedies and sanctions to enforce these rules and orders and judgments.
>
> (3) To achieve the purpose and intention of these rules, the parties shall, jointly and individually during an action:
>
> (a) identify or make an application to identify the real issues in dispute and facilitate the quickest means of resolving the claim at the least expense;
>
> (b) periodically evaluate dispute resolution process alternatives to a full trial, with or without assistance from the Court;
>
> (c) refrain from filing applications or taking proceedings that do not further the purpose and intention of these rules; and
>
> (d) when using publicly funded Court resources, use them effectively.

> (4) Resolving a claim justly in a timely and cost effective way includes, so far as is practicable, conducting the proceeding in ways that are proportionate to:
>
> (a) the amount involved in the proceeding;
>
> (b) the importance of the issues in dispute; and
>
> (c) the complexity of the proceeding.

[25] Class actions are aimed at giving effect to those Foundational Rules in cases where there may be hundreds or even thousands of claimants who experienced similar conduct and wish to pursue claims in relation to such conduct together. As noted by the Supreme Court of Canada in *Western Canadian Shopping Centres v Dutton*, 2001 SCC 46 at paras 27 and 29, [2001] 2 SCR 534 [*Dutton*], class actions are aimed at:

(a) ensuring judicial economy (preventing duplication and multiple proceedings);

(b) ensuring access to justice (allowing claims to be pursued in a cost effective way); and

(c) efficiency and justice by ensuring wrongdoers modify their behaviour.

[26] A "certification order" is defined as "an order certifying an action as a class action". See s. 2 of *The Class Actions Act*. In the context of a certification application, the merits of the lawsuit are not decided. Certification is a procedural step where the Court is asked to decide whether the claim discloses a cause of action, by an identifiable class, who can be represented by a representative plaintiff, that raises common issues, which are best dealt with by way of a class proceeding. A certified claim allows matters to proceed to trial where the certified common issues can be

decided. See: *Dugal v Manulife Financial,* 2013 ONSC 4083, 44 CPC (7th) 80. At its core, a class action is about ensuring access to justice, for those who have been wronged (if wrongdoing is established) in a manner that is efficient and cost effective.

[27] Certainly, this Court has held time and again that the certification application should generally be the first application heard. In *T.G. v Government of Saskatchewan*, 2017 SKQB 146 at paras 6-8, 10 CPC (8th) 205, Popescul C.J. notes:

> [6] Counsel for the plaintiffs refers to the proposition, adopted by this court on several occasions, that, as a general rule, and as a matter of principle, the first application on a class action should normally be the certification application. See *Alves v MyTravel Canada Holidays Inc.*, 2009 SKQB 77 at para 24, 335 Sask R 164.
>
> [7] The rationale for this statement includes, "... the timely determination of the certification application will advance the litigation without generating unnecessary motions and applications. If one of the purposes of the modern class action is designed to avoid, rather than encourage unnecessary filing of repetitious papers and motions, it is in the interest of all parties to have the 'appropriateness of the class action determined at the outset by certification'". See *Monsanto Canada Inc. v Hoffman*, 2002 SKCA 120 at para 28, 220 DLR (4th) 542, quoting, with approval *Western Canadian Shopping Centres Inc. v Dutton*, 2001 SCC 46 at paras 33 and 38, [2001] 2 SCR 534 at 552.
>
> [8] There are, of course, many exceptions to the general rule and the question of scheduling the order of proceedings must be determined on a case by case basis depending upon the individual circumstances of each case.

See also: *Monsanto* and *Piett v Global Learning Group Inc.,* 2018 SKQB 144 at para 10, 28 CPC (8th) 417.

[28] The present application is somewhat unique. Often it is the defendants who are applying to strike a claim pre-certification or to have the matter determined by summary judgment before certification. The trend in Saskatchewan has been to require that the certification application be determined first. See for example: *Bemrose v Manz*

(12 June 2023) Regina, QBG-RG-00713-2022 (Sask KB).

[29] In Saskatchewan, certification is governed by s. 6 of *The Class Actions Act*, which states:

> **Class certification**
> **6**(1) Subject to subsections (2) and (3), the court shall certify an action as a class action on an application pursuant to section 4 or 5 if the court is satisfied that:
>
> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class;
>
> (c) the claims of the class members raise common issues, whether or not the common issues predominate over other issues affecting individual members;
>
> (d) a class action would be the preferable procedure for the resolution of the common issues; and
>
> (e) there is a person willing to be appointed as a representative plaintiff who:
>
> (i) would fairly and adequately represent the interests of the class;
>
> (ii) has produced a plan for the class 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 other class members.
>
> ...

[30] When we examine the criteria set out at s. 6(1) of the legislation and consider the facts of this case, it is evident that requiring defences now will do little to assist in the question of certification.

(a) Reasonable Cause of Action

[31] When assessing whether a pleading discloses a reasonable cause of

action, the question to be asked is whether the statement of claim has a reasonable prospect of success, assuming the facts set out in the claim to be true. A plaintiff has the obligation to plead sufficient facts to establish the legal elements of the cause of action being advanced. Assuming the plaintiff's allegations as true allows the Court to consider the plaintiff's case at its highest. The jurisdiction to strike some or all of a claim should only be exercised in cases where it is plain and obvious and beyond doubt that the claim cannot succeed. The claim should be read as generously as possible with a view to accommodating any inadequacies in drafting and allowing novel claims to proceed.

[32] See, for example: *R v Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 SCR 45; *Merchant Law Group LLP v Slusar*, 2022 SKCA 75; *Saskatchewan Power Corporation v Swift Current (City)*, 2007 SKCA 27, [2007] 5 WWR 387; Warren K. Winkler, Paul M. Perell, Jasminka Kalajdzic & Alison Warner, *The Law of Class Actions in Canada* (Toronto: Thomson Reuters Canada Limited, 2014) at 73.

[33] What is evident is that the focus of the inquiry at this stage is the plaintiffs' statement of claim as opposed to any of the defences that may be filed.

[34] One of the problems with requiring defences pre-certification is that a claim in a class action is often amended pre-certification and even at the certification stage. Indeed, the plaintiffs' claim in this case has already been twice amended. While I appreciate that the plaintiffs have tried to ensure that their claim will not require further amendments pre-certification, there is no guarantee that further amendments will not be needed. Amendments may be required even at certification. This was noted at para. 83 of the Court of Appeal's recent decision in *MacInnis v Bayer Inc.,* 2023 SKCA 37, where the Court held:

> [83] We do, however, conclude that the reasoning of the Chambers

> judge in relation to proposed common issue #1 reflects error. That is so in two respects. First, to the extent that this defect in proposed common issue #1 results from the use of the word *unreasonable* in the pleadings, the Chambers judge – as is the case with the phrase *other side effects* – should have ordered an amendment to cure the defect, either of his own accord or following further submissions by the parties.
>
> [Emphasis in original]

[35] Asking the defendants to file a defence upon being served with a claim seeking certification, then file a defence each time the claim is amended could result in multiple defences and multiple amended defences being required. That is just not an efficient way of proceeding.

[36] The plaintiffs further argue that their causes of action may change after defences are filed and that only then can the causes of action be fully ascertained. I do not accept this contention. The question of whether a cause of action has been pled is decided by looking at the plaintiffs' statement of claim, including particulars and documents referenced in the claim upon which the plaintiffs must rely. It is not predicated on what is contained in any statement of defence.

(b) There is an Identifiable Class

[37] In *Dutton* at para 38, the purpose and requirement for an identifiable class is described as follows:

> 38 While there are differences between the tests, four conditions emerge as necessary to a class action. First, the class must be capable of clear definition. Class definition is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment. It is essential, therefore, that the class be defined clearly at the outset of the litigation. The definition should state objective criteria by which members of the class can be identified. While the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation. It is not necessary that every class member be named or known. It is necessary, however, that any

> particular person's claim to membership in the class be determinable by stated, objective criteria: see Branch [Branch, Ward K. *Class Actions in Canada.* Vancouver: Western Legal Publications, 1998] at paras. 4.190-4.207; Friedenthal, Kane and Miller, *Civil Procedure* (2nd ed. 1993), at pp. 726-27; *Bywater v. Toronto Transit Commission* (1998), 27 C.P.C. (4th) 172 (Ont. Ct. (Gen. Div.)), at paras. 10-11.

[38] See also: *Hollick v Toronto (City)*, 2001 SCC 68 at paras 20 and 21, [2001] 3 SCR 158 [*Hollick*].

[39] Again, at this stage, the focus is on the class proposed by the plaintiffs as opposed to anything that may be raised by way of defence.

(c) The Claims of the Class Members Raise Common Issues

[40] In *The Law of Class Actions in Canada* at 109, the authors provide the following helpful description of the purpose behind the common issues requirement:

> The underlying critical ingredient of a common issue is whether the resolution of the common issue will avoid duplication of fact-finding or legal analysis. It is not necessary that all or even a majority of the questions of law or fact of the class members be identical, similar or related. What is required is that the claims of the members raise some questions of law or fact that are sufficiently similar or sufficiently related that their resolution will advance the interests of the class, leaving individual issues to be litigated later in separate trials, if necessary. It is generally appropriate to include possible defences among the common issues only when they rise to the level of making a subclass necessary.

[41] As can be gleaned from the legislation, the focus is on whether the claims of the class members raise common issues. I acknowledge that there may be times when the filing of a defence may assist in identifying a common issue. That said, the question becomes whether requiring defences to be filed pre-certification will be helpful to the certification process or simply delay it. Frankly, by the time parties get to certification, whether defences have been filed or not, there is no great secret in what the defence(s)

will be. The plaintiffs argue that there is the potential to be surprised at certification and at paragraph 42 of their brief state: "… it is difficult to understand how the certification hearing can be run efficiently and effectively given that the true issues between the parties are not entirely clear at this time."

[42] This argument is no different than the argument made in *Monsanto* that the plaintiffs would be "blindsided" if defences were not filed pre-certification. The argument was rejected in *Monsanto* at para 25. I reach a similar conclusion given the material before me. Many claims in Saskatchewan have gone through the certification process without defences being filed first. Those certification hearings have been run effectively and efficiently notwithstanding the absence of defences having been filed.

[43] As for the argument that the plaintiffs may be "blindsided" at certification, this can be addressed through appropriate case management by ensuring plenty of time between the date when affidavits and briefs are exchanged and argument. If there is a "surprise" at certification, the matter can be dealt with through an adjournment and/or a sanction of costs.

(d) A Class Proceeding Would be the Preferable Procedure

[44] In *Hollick* at para 28 the Court notes:

> 28 The report of the Attorney General's Advisory Committee makes clear that "preferable" was meant to be construed broadly. The term was meant to capture two ideas: first the question of "whether or not the class proceeding [would be] a fair, efficient and manageable method of advancing the claim", and second, the question of whether a class proceeding would be preferable "in the sense of preferable to other procedures such as joinder, test cases, consolidation and so on": *Report of the Attorney General's Advisory Committee on Class Action Reform* [Ontario. Attorney General's Advisory Committee on Class Action Reform. *Report of the Attorney General's Advisory Committee on Class Action Reform*. Toronto: The Committee, 1990] at p. 32. In my view, it would be impossible to determine whether the class action is preferable in the sense of being a "fair, efficient and

> manageable method of advancing the claim" without looking at the common issues in their context.

[45] Again, the focus is on the common issues raised in the claim, whether using the class actions process is a fair, efficient way of deciding those common issues raised by class members, and whether it is preferable to the alternate procedures available. The filing of defences, in this particular case, is unlikely to further that assessment.

(e) A Willing Representative Plaintiff

[46] As can be seen by the criteria for assessing the willing representative plaintiff in s. 6(1)(e)(i-iii), a statement of defence is unlikely to assist in this analysis.

[47] The plaintiffs suggest the adoption of the criteria used by the Federal Court in *Poundmaker* at para 41, namely:

> 41. With respect to the first *Poundmaker* factor, the Plaintiffs submit that statements of defence from the Defendants will assist the Court in advance of certification. This speaks to the matter of "crystallizing" the issues before the Court.

[48] Frankly, even using this criteria, I reach the conclusion that the filing of defences should be delayed in this instance. In a case such as this, given the nature of the allegations advanced, the filing of defences are unlikely to assist the Court. It is unlikely, for example, that common admissions will be made by the more than two dozen defendants in their statements of defence that will help narrow the focus of the inquiry. The case involves complex issues, and it is not clear at this stage which (if any) common issues might be certified or if any claims might be struck at the first stage of the certification analysis. Requiring defences to be filed in relation to issues that do not wind up proceeding is simply inefficient. If defences had been required when the claim was initially filed, the defendants would already have had to twice amend their defences

with the potential of more amendments to come.

[49] I also note that the plaintiffs do not appear to have considered the fact that defendants do not need to respond to a claim by way of statement of defence. They have other options. Rule 3-13 of *The Queen's Bench Rules* provides:

> **Defendant's options**
> **3-13** A defendant who is served with a statement of claim may do one or more of the following:
>
> (a) serve and file a statement of defence, notice of intent to defend or demand for notice;
>
> (b) apply to the Court to set aside service in accordance with rule 12-1;
>
> (c) apply to the Court for an order pursuant to rule 7-9;
>
> (d) apply to the Court for an order pursuant to rule 1-6;
>
> (e) apply to the Court for an order pursuant to rule 3-14.

[50] The Court cannot require defences and at the same time eliminate the other options that would be available to the defendants until after certification. In my view, to require defences now could lead (and some of the defendants have already indicated that this would be their preferred route) to numerous applications to strike pursuant to Rule 7-9.

[51] A further complicating factor is that in a case such as this, there may be multiple third party claims and cross-claims among the various defendants and each of the defendants to those cross-claims and third party claims would be entitled to respond with any of the options set out in Rule 3-13.

[52] Judicial economy in my view favours delaying defences until after certification is decided. This ensures that the matter can proceed in a cost-effective way

for both the plaintiffs and the defendants. Frankly, the issue of certification needs to be decided as promptly and cost effectively as is reasonably possible.

Summary and Conclusion

[53] In my view, it does not matter whether *Monsanto* is binding or whether the decision to delay defences is discretionary, as the result is the same. I find that the defendants in this case should not be required to file their defences until a reasonable time after certification is heard for the following reasons:

(a) The focus of a certification hearing is on the plaintiffs' claim, whether it discloses a cause or causes of action, involving an identifiable class, that raises common issues, which are best pursued by a representative plaintiff using a class action. This analysis may on occasion benefit from having defences but the analysis remains focused on the plaintiffs' claim rather than on defences which may be advanced;

(b) The reason for hearing certification first is because it will advance the litigation without generating unnecessary applications. If the defendants are required to file defences pre-certification in this case, then in my view, they must also be allowed to avail themselves of the options set out in Rule 3-13, which could result to multiple rounds of motions and third party claims which will derail the certification process and could delay it for a year. Moving to certification avoids the delay that will be occasioned by motions to strike, third party claims and cross-claims;

(c) When there are more than two dozen defendants, it is unlikely all will agree and admit to the same facts which might help narrow the

inquiry at certification;

(d) The claim has already been twice amended and there may be other amendments at the certification stage. Defendants should not have to file multiple rounds of defences, each time responding to a new amended claim pre-certification; and

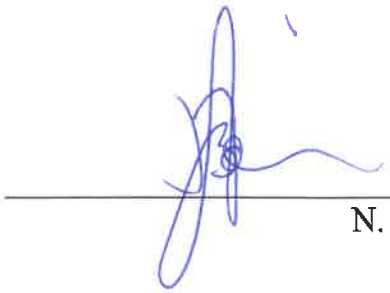
(e) The concern of being "blindsided" can be addressed through case management, adjournments and cost sanctions.

[54] In light of the foregoing, the defendants' application to delay the filing of defences, given the facts of this case, is granted.

[55] The Local Registrar is to schedule a call with the parties in March 2024 for the purpose of fixing a date to hear applications for better particulars or setting a timeline for the conduct of the certification application.

Costs

[56] Although the defendants were successful in their application, all counsel provided well reasoned briefs and contributed valuable insight to the argument which was of great assistance to the Court. No larger good is served by awarding costs on this application and so costs shall be in the cause.



J.
N. BARDAI