**Divisional Court File No. 256/09**
**Superior Court File No. 04-CV-045435 CP**
**DATE:** 20091207

**ONTARIO**
**SUPERIOR COURT OF JUSTICE**

**BELLAMY J.**

Proceeding under the *Class Proceedings Act, 1992*

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| **B E T W E E N:** | |
| BENNY MIGNACCA and ELAINE MIGNACCA | *Harvey T. Strosberg, Q.C.* and *Bonnie Tough* for the Plaintiffs (Respondents) |
| Plaintiffs (Respondents) | |
| **- and -** | |
| MERCK FROSST CANADA LTD., MERCK FROSST CANADA & CO. and MERCK & CO., INC. | *Neil Finkelstein, Catherine Beagan Flood* and *Karin McCaig* for the Defendants (Moving Parties) |
| Defendants (Moving Parties) | |
| | **HEARD at Toronto:** August 14, 2009 |

**BELLAMY J:**

**Introduction**

[1] This is a motion brought by the defendants ("Merck") for two alternative grounds of relief. The first is for an extension of time to file leave to appeal and, if leave be granted, leave to appeal from my decision dated November 24, 2008. In that decision, I had dismissed Merck's application for leave to appeal from the order of Cullity J.("the certification judge") in which he certified this action as a class proceeding under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6. In the alternative, the defendants request that I reconsider and vary my decision.

**Background**

[2] This case commenced in October 2004. My involvement began in November 2008 when Merck sought leave to appeal a decision of the certification judge who had dismissed Merck's motion to stay this proceeding pending the final disposition of an overlapping class action previously certified in Saskatchewan: *Tiboni v. Merck Frosst Canada Ltd.* (2008), 295 D.L.R. (4th) 32 (S.C.). I granted leave to appeal: *Mignacca v. Merck Frosst Canada Ltd.*, [2008] O.J. No. 4731 (S.C.) ("*Mignacca (2008)*"). The Superior Court of Justice (Divisional Court) dismissed the appeal and refused to stay the Ontario action pending the outcome of the Saskatchewan action: *Mignacca v. Merck Frosst Canada Ltd.*, [2009] O.J. No. 821 (Div. Ct.), leave to appeal to the Court of Appeal refused, M37315 (May 15, 2009), leave to appeal to the Supreme Court of Canada refused, [2009] S.C.C.A. No. 261.

[3] On that same day in November 2008, Merck also sought leave to appeal the certification order of the certification judge. I denied leave to appeal: *Mignacca (2008)*. In the course of my reasons, I said the following:

> [25] Our Court of Appeal has said on more than one occasion that the decisions of judges who manage class proceedings are entitled to considerable deference: *Pearson v. Inco Ltd.*, [2005] O.J. No. 4918 (C.A.) at paragraphs 3 and 43. Absent matters of general principle or errors of law, a certification decision should not be interfered with by an appellate court. Cullity, J. has considerable experience managing class action proceedings and has been doing so for many years. In liberally construing class proceedings legislation, as he is required to do, he applied existing principles of law to the facts of the case facing him, facts which, in essence, were identical or similar to those facing Klebuc, C.J.S. who had no difficulty certifying the class action in Saskatchewan.
>
> [26] In terms of the test for leave to appeal in Rule 62.02(4)(a) and (b), I see no conflicting decision by another judge on the matter involved in the proposed appeal, nor do I see any good reason to doubt the correctness of the decision in question. Further, I am not satisfied that the proposed appeal gives rise to matters of such importance that the granting of leave is warranted. The decision to certify may be important to Merck but, on this procedural and interlocutory motion, there is no issue of general public importance that requires the attention of an appellate court. [Emphasis added.]

[4] At the time of my decision, Klebuc C.J. in Saskatchewan had already certified an apparently similar proceeding as a multi-jurisdictional class action: *Wuttunee v. Merck Frosst Canada Ltd.*, 2008 SKQB 229. Merck successfully appealed that decision to the Saskatchewan Court of Appeal: *Merck Frosst Canada Ltd. v. Wuttunee*, [2009] S.J. No. 179 (C.A.). The plaintiffs sought leave to appeal that decision to the Supreme Court of Canada and that application was dismissed: *Merck Frosst Canada Ltd. v. Wuttunee*, (22 October 2009), 32905 (S.C.C.).

[5] It is due to the underlined sentence in my decision, coupled with the subsequent decision of the Saskatchewan Court of Appeal overturning Klebuc C.J., that Merck seeks leave to appeal and, in the alternative, a reconsideration.

## Analysis

### Leave to Appeal

[6] After the Saskatchewan Court of Appeal released its decision, Merck promptly sought an extension of time to seek leave to appeal my decision refusing leave to appeal the certification order to the Court of Appeal for Ontario. Rouleau J.A. concluded that Merck should decide whether my order was final or interlocutory, and provided guidance with respect to the alternative appeal procedures: *Mignacca v. Merck Frosst Canada Ltd.*, [2009] O.J. No. 1883 (C.A.). In the final analysis, Merck brought a motion before the Divisional Court seeking an extension of time and leave to appeal to the Divisional Court from my order of November 24, 2008. The matter came up before a single judge of the Divisional Court who adjourned the matter to me.

[7] Rule 62.02(1), however, prohibits my hearing this appeal. Rule 62.02(1) is the section in the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 that applies to motions for leave to appeal from the interlocutory order of a judge. That rule provides that "leave to appeal to the Divisional Court under clause 19(1)(b) of the [*Courts of Justice*] Act shall be obtained from a judge other than the judge who made the interlocutory order" (emphasis added). As I am the judge who made the interlocutory order, I have no jurisdiction to hear the motion, and it is dismissed.

### Reconsideration

[8] Recognizing the inherent difficulty of arguing the leave to appeal motion before me, Merck added an alternative motion asking me to reconsider and vary my earlier order. At the hearing, Merck acknowledged that this alternative ground was really the principal one and the argument was focused here.

[9] The motion for reconsideration is brought pursuant to rule 59.06(2)(a) of the *Rules*, which allows a party to "make a motion in the proceeding" to have an order varied on the ground of "facts arising or discovered after it was made." The appropriate test to apply is whether knowledge of the newly discovered facts "might probably" have altered the judgment: *Becker Milk Co. Ltd. v. Consumers' Gas Co.*, (1974), 2 O.R. (2d) 554 (C.A.) at 57.

[10] I have been asked to reconsider my decision to deny leave to appeal the certification order on the basis that my decision might probably have been different had I been in receipt of the decision of the Saskatchewan Court of Appeal in *Wuttunee*, especially in light of my comments saying that the certification judge "applied existing principles of law to the facts of the case facing him, facts which, in essence, were identical or similar to those facing Klebuc C.J.S. who had no difficulty certifying the class action in Saskatchewan." As mentioned above, the Saskatchewan Court of Appeal subsequently overturned that decision and decertified the case.

[11] Without deciding whether a case constitutes a "fact" which would allow me to reconsider my order, I am prepared to exercise the inherent jurisdiction of the court to consider whether the

existence of a case which appears to conflict with the certification order would have affected my decision to deny leave to appeal.

[12] I accept that the existence of this case would have been material to my decision, even more so as the Saskatchewan Court of Appeal explicitly referenced the certification order of Cullity J.: *Wuttunee* at para. 101. I also accept, as my colleague Lax J. did in *Griffin v. Dell Canada Inc.*, [2009] O.J. No. 1592 (S.C.) at para. 29, that "I am not obliged to follow decisions of provincial appellate courts other than the Ontario Court of Appeal and that the decision of the [Saskatchewan Court of Appeal] is not technically binding as a matter of *stare decisis*. Nonetheless, I believe I owe great respect to appellate decisions of other provinces as these decisions are generally regarded as persuasive."

[13] I am now faced with the task of determining whether this appellate decision constitutes a new fact that "might probably" have altered my original decision to deny leave to appeal the certification order.

[14] The test I was required to examine for leave to appeal of the certification order is found in rule 62.02(4) of the *Rules*. Leave to appeal shall not be granted unless there is (a) both a conflicting decision of another court on the matter and it is, in the opinion of the judge hearing the motion, desirable that leave be granted or (b) both good reason to doubt the correctness of the order in question and the appeal involves a matter of such importance that, in the opinion of the judge hearing the motion, leave should be granted. In my decision, I concluded that there were no conflicting decisions, no reason to doubt the correctness of the certification order and the issue was not a matter of such importance that leave to appeal should be granted.

[15] To apply the "might probably" test for reconsideration, it is necessary to compare the Saskatchewan and Ontario actions. The Saskatchewan Court of Appeal quashed the order certifying the *Wuttunee* action because it decided that Klebuc C.J. had erred in finding that the plaintiffs had established an identifiable class, in defining the common issues, and in concluding that a class action would be the preferable procedure. If the Ontario action has the same defects as the Saskatchewan action, it might well have been that I might probably have found the Saskatchewan Court of Appeal decision to be a conflicting one or it may have given me good reason to doubt the correctness of the certification order. If, however, the two actions are fundamentally different, then the appellate decision in Saskatchewan would have had little bearing on whether the Ontario certification should be overturned, and the test for reconsideration would not be satisfied.

[16] At first blush, the decision in *Wuttunee* would appear to be an especially relevant conflicting decision which might also provide good reason to doubt the correctness of the Ontario certification decision. After all, it deals with the same or overlapping plaintiffs, the same defendants, the same drug (Vioxx), between two competing class action cases wending their ways through the courts of two different provinces at the same time. On closer examination, however, it is evident that it is not a conflicting decision at all. The Saskatchewan Court of Appeal searched for an identifiable class and found none. It searched for common issues and found them wanting, tainted as they were by the lack of an identifiable class. The court determined that the action vastly over-reached what was reasonably manageable in a class action

and concluded at para. 46 that there was "no analysis of what [the plaintiffs] would have to prove in order to establish liability." None of its analysis in these areas applies to the Ontario case.

[17] I will examine each of these in turn. When the matter was before the certification judge, the first named plaintiff was Robert Tiboni; when it came before me, the first named plaintiff was now Benny Mignacca. For the sake of simplicity, then, I will refer to the Ontario case as *Mignacca*.

**1. Definition of the Class**

[18] The requirements for establishing an identifiable class under s. 5(1)(b) of the *Class Proceedings Act* were described in *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 and *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158. The plaintiffs must establish that (1) the class is defined by objective criteria, (2) the class is not unlimited, (3) whether a person is a member of the class does not depend on the outcome of the litigation, and (4) there is a rational connection between the class and the common issues. The third requirement is also referred to as a prohibition against "merits-based" class definitions. The intent of the last – the "rational relationship" requirement – is to establish a class that is not unnecessarily broad: see *Hollick* at para. 21. However, the class must also not be established too narrowly, so as to exclude potential claimants. Class definition, though, is critical.

[19] The Saskatchewan Court of Appeal took particular issue with how the class in *Wuttunee* was defined. Approximately half of the reasons are devoted to the issue of class definition. The court was particularly concerned by the use of subclasses as an attempt to avoid a class that was unnecessarily broad. It rejected this approach, finding that division into subclasses at the certification stage would only be appropriate in very limited circumstances. Further, the class definition in *Wuttunee* violated the prohibition against merits-based claims. Neither of these issues was a concern in *Mignacca*. In fact, there are significant differences between the class definitions in *Wuttunee* and *Mignacca*.

[20] In *Wuttunee*, the primary class was defined as "every person who purchased or ingested 'Vioxx'" and who then fell within any of eight subclasses. In *Mignacca*, by contrast, the primary class is defined as "all persons in Canada...who were prescribed and ingested Vioxx." The *Wuttunee* definition is much more complex: claimants must have either purchased *or* ingested Vioxx *and* fall within the listed subclasses. Different claims were advanced in the action depending on whether the claimants were purchasers or ingestors. As the Court of Appeal noted at para. 60, this deliberate "subdivision of claimants is complicated more than it is clarified by the description in the certification order of the claims asserted."

[21] The Saskatchewan Court of Appeal contrasted this division of claimants into ingestors and purchasers with the simpler approach taken in Ontario in *Mignacca*. The Ontario plaintiffs submit before me that the court was implying that the simpler Ontario approach might have been preferable in *Wuttunee*.

[22] The court then went on to find significant difficulties with the first two subclasses. On its own initiative, it analyzed whether it would be possible to create a class description that would be less restrictive and less complex. It posited a simpler description: "all those who purchased or

ingested Vioxx." This simple description is almost identical to the Ontario description. The Saskatchewan Court of Appeal noted at para. 118 that Klebuc C.J. had rejected this simpler approach, a decision it now found "puzzling."

[23] After considerable effort to try to determine whether the simpler definition might work, the Saskatchewan Court of Appeal concluded at para. 131 that the many other difficulties with the claim – difficulties which I note do not exist in the Ontario claim – "combine[d] to make it difficult, if not impossible, for this Court to determine with any certainty whether the defects in the definitions of the subclasses ... could be resolved by amending the class definition, or, indeed, whether or to what extent elimination of those subclasses would substantially change the nature of the case that has been certified."

[24] As is clear, the decision to divide the class into subclasses in *Wuttunee* was problematic in and of itself. The manner in which the subclasses themselves were defined was also an issue, as they were found to be merits-based. The Ontario *Mignacca* claim is quite straightforward and exhibits none of the problems identified in the *Wuttunee* class definition.

[25] The class that was certified in Ontario includes many members who were not injured as a result of ingesting Vioxx. The Saskatchewan Court of Appeal acknowledged at para. 102 that it was "not necessary to decide, in this case, whether this liberal view of the rational connection test should be adopted in Saskatchewan" but went on to express some doubt as to whether uninjured members of a class could be said to have a potential or colourable claim to recover damages for personal injury. I make two observations on this point. First, this statement is *obiter dicta* and is not sufficient to establish that the *Wuttunee* decision is a conflicting decision that might probably have led me to allow leave to appeal the certification order (see *A v. B.* (2008), 233 O.A.C. 329 (Div. Ct.) at para. 9). Second, the statement must be read in its context. While the Saskatchewan Court of Appeal expressed some doubt as to the Ontario certification judge's interpretation of the rational connection test, it also cited numerous authorities from Ontario that clearly support his view.

[26] In the end, the Saskatchewan Court of Appeal summed up several principles at para. 103 that should be applied in defining a class. These are the very principles that the certification judge considered in *Mignacca*. The division of the class into subclasses in *Wuttunee* appeared to be fatal to the overall claim, or at least intractably linked to the problems with the rest of the claim. It is an error that is not shared by the *Mignacca* claim. On my reading, the two decisions do not conflict on this issue.

**2. Definition of the Common Issues**

[27] The Saskatchewan Court of Appeal decided that the problematic class definition had ramifications for the entire claim, and created difficulties for establishing the common issues:

> [160] It is my conclusion that the fragmentation of the class into subclasses, together with the range and diversity of claims asserted by members of the subclasses against the appellant, have together posed an insurmountable challenge to the quest for commonality in relation to the proposed common issues. The result is that each of the first five proposed common issues necessarily

encompasses a significant number of sub-issues, none of which is common across the class, and the combination of which renders each of the common issues and its proposed resolution unacceptably complex.

[28] Merck has pointed to one common issue – the fitness issue – that is nearly identical between the *Wuttunee* and *Mignacca* claims. This is only one of twelve common issues in the *Mignacca* claim that mirrors a common issue in the *Wuttunee* claim. Aside from that one issue, the common issues articulated in each claim are substantially different. Further, the Saskatchewan Court of Appeal rejected the fitness issue in relation to the defects it found in the class definition discussed above. In part, it did so because of the myriad of distinct allegations found in the *Wuttunee* subclasses. This problem is avoided in the *Mignacca* claim, as it does not share the same breadth of allegations. This does not present a conflicting decision on this issue.

**3. Determination that a Class Action would be the Preferable Procedure**

[29] The Saskatchewan Court of Appeal devoted only five paragraphs to this issue, stating at para. 65 "that this action vastly over-reaches what is reasonably manageable in a class action in a fair and efficient way." The court's finding on this point was premised on its rejection of the approach taken in *Wuttunee* to defining the class and the common issues. Given the significant differences between *Wuttunee* and *Mignacca* on these points, this is not a conflicting decision, and I see no reason to interfere with my earlier decision.

**Conclusion**

[30] The motion for leave to extend the time for leave to appeal is granted; leave to appeal my interlocutory order is dismissed.

[31] The motion to reconsider my decision is granted, but the motion is dismissed. First, the decision of the Saskatchewan Court of Appeal is not a conflicting decision. Second, even if the case had conflicted with the decision of the certification judge, I still might probably have not altered my original decision to deny leave. That is because my closer analysis of the class definition and the common issues in the two cases shows that they are so radically different that it would not have been desirable to grant leave. There is nothing else in my earlier decision that I might probably have changed.

**Costs**

[32] As both parties agree that there should be no costs on the issue of reconsideration, there will be no costs.

Bellamy J.

**Released:** December 7, 2009

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**SUPERIOR COURT OF JUSTICE**

**B E T W E E N:**

BENNY MIGNACCA and ELAINE MIGNACCA

Plaintiffs (Respondents)

- and –

MERCK FROSST CANADA LTD., MERCK FROSST CANADA & CO. and MERCK & CO., INC.

Defendants (Moving Parties)

Bellamy J.

Released: December 7, 2009