

COURT FILE NO.: 04-CV-45435CP

DATE: 2006/02/02

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

CAROL SETTERINGTON, JACQUELINE
WRIGHT, ERROL WRIGHT, JEANETTE
LEWIS, WAYNE LEWIS, JAMES
VENABLES, MARY JANE MCNICHOLL,
JOSEPH VALIUS, GRACE DI CARO, SAM
SPINA, ROBERT TIBONI, WILLIAM
JAMES RUCK AND VIOLET ALINE
RUCK

Plaintiffs

- and -

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

Defendants

)
)
) Harvey T. Strosberg, Q.C., Michael J.
) Peerless and Paul Miller, for the Plaintiffs

)
)
) Caroline Zayid, for the Defendants

)
) Evatt Merchant, Casey Churko, for the
) Merchant Group
)
)

Proceeding under the *Class Proceedings Act, 1992*

HEARD: January 26, 2006

REASONS FOR DECISIONS

Regional Senior Justice W.K. Winkler

The Nature of the Motion

[1] The plaintiffs in this action (the "Setterington action") bring a motion before this Court to obtain orders in relation to the carriage of eight intended class proceedings commenced in Ontario against Merck Frosst Canada Ltd. and related companies ("Merck"). The subject matter of the lawsuits involves problems alleged to be associated with a painkiller marketed commercially as "Vioxx". Merck is said to have manufactured, marketed, distributed and sold Vioxx in Canada.

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[2] By Order of Hockin J. six of the actions were consolidated into the Settingington action and they go forward as that single action with an amalgamated counsel team. Another action commenced on behalf of a putative class of "third party payors", more specifically various public and private insurers and union and employers' drug benefit plans, has been stayed on consent and will be included as a sub-class in the Settingington action. Counsel in that action have joined the team of counsel prosecuting the Settingington action. These actions are but a fraction of the litigation that has been commenced elsewhere in Canada and in the United States relating to the same subject matter.

[3] The proposed representative plaintiffs in the Settingington action will be seeking certification under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, for a class described in the Fresh as Amended Statement of Claim as "all persons in Canada, including their estates, other than residents of Quebec, who were prescribed and who ingested Vioxx".

[4] Counsel for the representative plaintiffs in the Settingington action have entered into an agreement with other Canadian law firms from across the country to represent and pursue the claims of class members against the defendants. This group is comprised of some nineteen law firms across Canada, including counsel for the third party payor sub-class. A "Steering Committee" of seven counsel has been appointed from this group of firms to direct the conduct of the lawsuit and to appear as counsel in the proceedings.

[5] The orders regarding carriage are necessary because another intended class proceeding has been commenced in Ontario by Daniel Walsh and others against Merck (the "Walsh action"), with the Saskatchewan law firm, the Merchant Law Group as counsel. The proposed class in the Walsh action is an international class of persons who have purchased, been prescribed or ingested Vioxx purchased in Canada. This is substantially similar to the class described in the Settingington action. The essence of the Walsh action is the same as the Settingington action with three exceptions: in Walsh the plaintiffs do not bring suit on behalf of OHIP in the form of a subrogated action; the Walsh action does not contain a claim on behalf of third party payors; and, in Walsh the plaintiffs join as a defendant Her Majesty the Queen as represented by the Minister of Health for Canada and the Attorney General of Canada ("Federal Government").

[6] The plaintiffs in the Settingington action are seeking a stay of the Walsh action, a declaration that no other class action may be commenced in Ontario relating to Vioxx, and costs of this carriage motion. The Walsh plaintiffs respond by saying that both actions ought to be permitted to proceed to certification and the "winner" given carriage after the certification is argued. In the alternative they propose that it be ordered, if the national consortium of law firms is given carriage, that their counsel, the Merchant Law Group, be permitted to participate in the consortium of law firms in the conduct of the proposed national class proceeding.

Factual Background

[7] Vioxx is a Cyclooxygenase-2 (Cox - 2) specific inhibitor in the class of drugs known as non-steroidal anti-inflammatory drugs. By Notice of Compliance dated October 25, 1999, Vioxx was first approved for use in Canada as a Schedule "F" Drug under the *Food and Drugs Act*, R.S.C.

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1985, c. F-27. It was approved for acute and chronic treatment of the signs and symptoms of osteoarthritis, as well as for the relief of pain in adults and for the treatment of primary dysmenorrheal (menstrual) pain.

[8] On September 30, 2004, Merck announced a worldwide voluntary withdrawal of Vioxx, effective immediately due to concerns of an increased risk of cardiovascular events, including heart attack and strokes from use of the drug. It was following the withdrawal of Vioxx and its removal from the market that the plethora of lawsuits was brought against Merck, including the instant proceedings giving rise to the motion in issue.

Law and Analysis

[9] It is not uncommon to have two or more class proceedings commenced with respect to the same subject matter, seeking certification for similar classes which either overlap significantly or are identical. In these situations, if acceptable to the representative plaintiffs, counsel for different representative plaintiffs often agree to work together thus sharing the burden and cost of the litigation and the remuneration if successful. They also share the risk if unsuccessful. However, as in this case, if an agreement to work together towards a common goal cannot be reached, a proposed representative plaintiff in one action may bring a carriage motion to stay all other class proceedings relating to the same subject matter. In this instance the Settrington plaintiffs bring such a motion.

[10] The CPA confers upon a court a broad discretion to case manage the proceedings before it and in furtherance of this objective, the specific jurisdiction to determine a carriage motion is found in ss. 12 and 13 of the Act:

12. The court, on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate.

13. The court, on its own initiative or on the motion of a party or class member, may stay any proceeding related to the class proceeding before it, on such terms as it considers appropriate.

[11] In addition, s. 138 of the *Courts of Justice Act*, R.S.O. 1990 c. 43, provides that "as far as possible, multiplicity of legal proceedings shall be avoided." This is particularly germane with respect to class actions in that most carriage motions, as is the case here, will involve multiple proceedings by essentially the same class against the same defendant for the same relief. For the purposes of the application of this principle on a practical basis in class proceedings, it is not necessary that the multiple proceedings mirror each other in every respect. Rather, the court will look to the essence of the proceedings and the similarities between them to determine whether permitting two or more to proceed would offend the prohibition against multiplicity.

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[12] It cannot be ignored that in seeking a stay of one class proceeding in favour of another, the proposed representative plaintiff seeking the stay is asking the court to rule that the putative class will be better served if he or she is permitted to prosecute the action. An inherent element in such a request is an affirmation that the counsel chosen by the moving party is similarly better suited to prosecute the action than the counsel of choice in the other action or actions. In fact, in many cases, there may be little difference between the proposed representative plaintiffs and the moving party will be relying upon the skill and experience of his or her chosen counsel and their resources as the distinguishing feature militating in favour of his or her action being permitted to go forward in preference to all other actions.

[13] Cumming J. addressed a number of the issues arising in carriage motions in *Vitapharm Canada Ltd. v. F. Hoffman-LaRoche Ltd.* (2000), 4 C.P.C. 5th 169 (Ont.S.C.J.). He held that a court faced with a carriage motion in respect of multiple class proceedings should consider the best interests of the putative class members, the objectives of the CPA and fairness to the defendants in its determination. (See also *Ricardo v. Air Transat A.T. Inc.* (2002), 21 C.P.C. 5th 297 (Ont. S.C.J.) and *Gorecki v. Canada (Attorney-Genera)* (2004), 47 C.P.C. 5th 151 (Ont.S.C.J.))

[14] On this motion, there is little to choose between the proposed representative plaintiffs. There is no indication that either named group is superior to the other in respect of its ability to represent the putative class. I note, however, that the Walsh action only names two actual representative plaintiffs and leaves the identities of the remainder to the imagination in that they are identified merely as "John Does". This is not a practice that can be reconciled with the requirements of the CPA with respect to representative plaintiffs and, accordingly, for the purposes of this motion I am only considering the attributes of the actual named plaintiffs.

[15] Given the relative similarity between the proposed representative plaintiffs, a determination based on the factors enunciated by Cumming J. in *Vitapharm* must of necessity turn on analysis of the claims advanced and the attributes of the competing counsel.

Nature and Scope of the Causes of Action Advanced

[16] Counsel for both plaintiff groups concede that the claims advanced in the competing actions are in essence product liability claims. The two actions differ, as stated above, in three material respects. Firstly, the Walsh action adds as a defendant the Federal Government. Secondly, *Settingington* includes a subrogated claim on behalf of OHIP. Thirdly, the *Settingington* action contains the claim for third party payors whereas the Walsh action does not.

[17] The Walsh plaintiffs assert that their claim is superior and better serves the interest of the putative class in that they have named the Federal Government as a defendant while at the same time avoiding the "conflict" inherent in the *Settingington* action of an included subrogated OHIP claim. I cannot accede to these arguments.

[18] *Settingington* counsel contend that the choice to name defendants in a class action is one that should be left to the proposed representative plaintiffs acting on the advice of experienced

counsel, I agree. When the court is asked to choose between proceedings, the analysis must be qualitative rather than quantitative. The mere inclusion of a multitude of defendants is not sufficient to provide a basis for the preference of one action over another. At this stage of the proceeding, the Settingington plaintiffs assert, based on the advice of their counsel, that there is insufficient information to posit a sustainable claim against the Federal Government. That is a permissible exercise of judgment within the purview of a proposed representative plaintiff. Indeed, as held by the Supreme Court of Canada in *Rumley v. British Columbia*, [2001] 3 S.C.R. 184 (S.C.C.), plaintiffs are entitled to restrict the claims in a class proceeding to make it more amenable to certification. (See *Rumley*, para. 30; See also *Pearson v. Inco*, [2005] O.J. No. 4918 (Ont. C.A.)).

[19] In this case, the Settingington plaintiffs provided a sufficient explanation for their decision not to include the Federal Government as a defendant at this stage of the proceeding. The purpose of a carriage motion is not to parse the action finely or overly analyse it for purposes of comparison but rather to scrutinize each for any glaring deficiencies. Here there are different theories underlying the causes of action in the two competing Statements of Claim and each plaintiff group urge that their approach is to be preferred. However, on a carriage motion it is inappropriate for the Court to embark upon an analysis as to which claim is most likely to succeed unless one is “fanciful or frivolous”, to adopt the words of Rady J. in *Gorecki*. Contrary to the submissions of the Walsh plaintiffs, I see none of these defects in the Settingington action.

[20] Similarly, the alleged “conflict” regarding the inclusion of the subrogated OHIP claim by the Settingington plaintiffs is not a defect at all but rather the proper observance of an obligation imposed on all plaintiffs in Ontario under the *Health Insurance Act*, R.S.O. 1990, c. H.6, s.31(1). Indeed, by its failure to include the subrogated OHIP claim, the Walsh action is defective. In any event, as in most Ontario class proceedings, the plaintiffs’ counsel are retained by OHIP to protect its interests which, as held by the Supreme Court of Canada in *Ledingham v. Ontario (Hospital Services Commission)*, [1975] 1 S.C.R. 332 (S.C.C.), are subordinate in priority to the rights of individual plaintiffs.

[21] The third difference in the two actions, the inclusion of the third party payors as a subclass, enures to the benefit of the Settingington action because of efficiency this brings to the proceeding.

The Counsel Factors

[22] The factors pertinent to the decision regarding choice of counsel, in the context of the *Vitapharm* approach focusing on the interests of the putative class, the objectives of the act and fairness to the defendants, include the degree of preparation in support of advancing the action and the relative experience and resources of counsel. In this regard, if one of the actions was significantly more advanced than the other, it would be construed as an advantage both in the efficiencies that would be lost and potential unfairness to the defendants should the other action be selected. This is not a factor here. Both the Settingington and the Walsh actions were commenced within days of each other. In terms of preparation both counsel groups are roughly

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equal at this stage. They have consulted experts and have established liaison with counsel in similar litigation in the United States.

[23] Turning then to the resources and experience of counsel, the Walsh plaintiffs advanced the argument that the court should consider a Vioxx based class proceeding being conducted by the Merchant Group in Saskatchewan as a prevailing factor in the experience of counsel analysis. The certification motion in that proceeding has been argued and is currently under reserve. The Walsh plaintiffs contend that this gives the Merchant Group a decided advantage that augurs in favour of them taking carriage of the Ontario action. While this means logically that the Merchant Group has argued one more Vioxx specific certification motion than the Settrington counsel group at this stage, to give it greater consideration than that would be to ignore the vast wealth of experience of the Settrington counsel group in class action litigation generally and certification proceedings in particular. The counsel group on the Settrington action is comprised of many pre-eminent class action counsel from across Canada. They have extensive experience at every court level involving certification of class proceedings that is not matched by the Merchant Group, regardless of its experience in general litigation.

[24] Indeed, the public perception of the experience of the Settrington counsel group is also evident in the fact that the Settrington counsel team has been contacted by some 6,600 putative class members. There is no evidence in this respect relating to the Walsh action. It ought not to be ignored as well that the ability to communicate with large numbers of putative class members speaks to the relative resources of counsel. The Settrington counsel team consists of 19 law firms from nine provinces across Canada. Eight of these firms are located in Ontario where this action will be based. Their combined resources, financial and otherwise, and breadth of experience are significant. This is in stark contrast to the Merchant group which has no office in Ontario and has not provided any evidence that the senior counsel of the group, who are not called to the bar in Ontario, are entitled to practice in Ontario under the current Law Society by-laws. This is not intended to detract from the laudable initiatives of the governing bodies of the legal profession to encourage mobility among lawyers with the consequent economies that can be generated for clients. However, there are practical realities to class action litigation that augur in favour of having at least some of the counsel for the plaintiffs based in the jurisdiction where the litigation is to be conducted.

[25] Another issue arose during the course of the motion that has an impact on its disposition. Counsel for the Settrington plaintiffs brought to the attention of the court a Statement of Claim filed in another intended class proceeding involving Merck as a defendant. In that action, the Merchant Group is acting as counsel for a putative class of plaintiffs that includes employees, shareholders, mutual funds, brokerage firms, venture capital firms, pension funds, insurance companies and the Canada Pension Plan, amongst others, seeking damages for losses in share values allegedly caused by Merck's misrepresentations. The loss claimed is \$26 billion. If this claim were successful in whole or in part it could seriously jeopardize the recovery of the claims of the putative class members in the instant proceedings. In my view this securities lawsuit commenced and prosecuted by the Merchant Group brings them into direct conflict with the interests of the putative class proposed in the Settrington or Walsh actions and would, in itself, be a sufficient basis to preclude the Merchant Group from acting as counsel for that class.

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[26] That the existence of the securities litigation was not brought to the attention of the court causes me additional concern. There has been some confusion generally between the concept of onus of proof and that of disclosure in the context of a carriage motion. It is incumbent on representative plaintiffs and their counsel seeking orders of the nature sought here to make full disclosure to the court of all factors that could logically impact on the determination of the motion. As with most matters conducted under the CPA, the court is required to consider first and foremost the interests of the silent class members. On a carriage motion, much as in the case of a settlement approval hearing, there is a requirement of utmost good faith on the part of counsel to forego reliance on the adversarial system as a fact-finding mechanism and place all material facts which can have any bearing on the issues before the court, whether these may be against their interests or not. It would be to ignore the reality of class proceedings to disregard the fact that counsel granted carriage of a class proceeding stand to reap a substantial fee if successful. Accordingly, there must be a concomitant obligation to ensure full and frank disclosure of all material facts because the protection of the interests of the silent class members, in those circumstances, demands no less. This precept was stated by this Court in *McCarthy v. Canadian Red Cross Society* (2001), 8 C.P.C. (5th) 349 (Ont.S.C.J.) at para. 21 in the context of a settlement approval but it is equally apposite here:

21...a class proceeding by its very nature involves the issuance of orders or judgments that affect persons who are not before the Court. These absent class members are dependent on the Court to protect their interests. In order to do so, the Court must have all of the available information that has some bearing on the issues, whether favourable or unfavourable to the moving party. It is the obligation of counsel to provide that information in a manner that is consonant with the duty to make full and frank disclosure. Moreover, that information must be provided in a manner that is not misleading or even potentially misleading. In most class proceedings, voluminous records develop as a consequence of the complexity of the litigation. The Court is not equipped, nor should it be required, to engage in a forensic investigation into the material or to mine the record to inform itself. Counsel must direct the Court to all relevant information that would impact on the Court's determination.

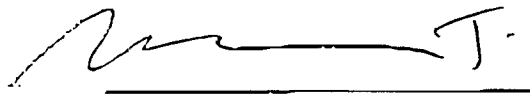
[27] I cannot accede to the alternative submission of the Walsh plaintiffs that an order should go mandating that their counsel be included in the Settrington counsel group. Apart from the conflict issue identified above, there is clear animosity between the two counsel groups, precipitated no doubt by the inclusion of "scandalous" statements in the Walsh plaintiffs' materials relating to various members of the Settrington counsel team. Although these passages were withdrawn at the beginning of the hearing of this matter, the lingering effects are such that it would not be in the best interests of the class going forward to order the groups to work together.

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Conclusion and Disposition

[28] For the foregoing reasons I am of the view that it would be more advantageous for the class to have the Settingington action proceed with its counsel group prosecuting that action. This would be consistent with the goals of the CPA and, in consideration of the progress of the proceedings, does not in any way present any unfairness to the defendants.

[28] An order will go granting carriage to the Settingington counsel group, staying the Walsh action and precluding commencement of any other class proceedings relating to this claim. In all of the circumstances I am not inclined to make any order as to costs which is the usual course in carriage motions.



WARREN K. WINKLER RSJ

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