Dated: 20021025

2002 SKCA 120 **Docket: 529, 530**

THE COURT OF APPEAL FOR SASKATCHEWAN

CORAM: TALLIS, GERWING & SHERSTOBITOFF JJ.A.

File No. 529

MONSANTO CANADA INC.

(Defendant) APPELLANT

- and -

LARRY HOFFMAN, L.B. HOFFMAN FARMS INC. and DALE BEAUDOIN

(Plaintiffs) RESPONDENTS

- and -

AVENTIS CROPSCIENCE CANADA HOLDINGS INC.

(Defendant) RESPONDENT

File No. 530

AVENTIS CROPSCIENCE CANADA HOLDING INC.

(Defendant) APPELLANT

- and -

LARRY HOFFMAN, L.B. HOFFMAN FARMS INC. and DALE BEAUDOIN

(Plaintiffs) RESPONDENTS

- and -

MONSANTO CANADA INC.

(Defendant) RESPONDENT

COUNSEL:

Gordon J. Kuski, Q.C. and Richard W. Danyliuk for Monsanto
Robert W. Leurer and Jason W. Mohrbutter for Aventis
Terry J. Zakreski for the Respondents Hoffman and Beaudoin

DISPOSITION:

On Appeal From:	QB 67/02, J.C. of Saskatoon
Appeal Heard:	September 25, 2002
Appeal Allowed:	October 25, 2002
Written Reasons:	October 25, 2002
Reasons By:	The Honourable Mr. Justice Tallis
In Concurrence:	The Honourable Madam Justice Gerwing The Honourable Mr. Justice Sherstobitoff

TALLIS J.A.

I

[1] The question in these conjoined appeals is whether each of the appellants (defendants) in this putative class action should be compelled to file a Statement of Defence before the class certification application is heard and determined. The learned chambers judge directed each appellant to file a Statement of Defence to the personal claims of the named respondents before determination of the certification application, but extended the time for filing a Defence to the putative class action claims until after determination of the certification application. The appellants challenge this bifurcated approach to the question.

II

[2] *The Class Actions Act*, S.S. 2001, c. C-12.01, came into effect on January 1, 2002. This present controversy arises in a putative class action brought on January 10, 2002 by the respondents against the appellants Monsanto and Aventis for release of genetically modified canola in Saskatchewan which they claim has destroyed or impaired their ability to grow and sell organic canola. As well, they seek to restrain Monsanto from releasing genetically modified wheat in Saskatchewan. Given the question before the Court, a detailed discussion of cross-pollination arising from airborne pollen from genetically modified crop is unnecessary.

[3] For the purposes of this appeal, we find it convenient to reproduce the following paragraphs from the Claim:

> 1. The Plaintiff, Larry Hoffman, is a certified organic farmer and resides at Spalding, Saskatchewan. Through L.B. Hoffman Farms Inc., Larry Hoffman farms approximately 2400 acres of certified organic farmland in the Rural Municipality of Spalding No. 368, in the Province of Saskatchewan.

1.(a) The Plaintiff, L.B. Hoffman Farms Inc., is a business corporation pursuant to *The Business Corporations Act*, having a registered office and place of business in Humboldt, Saskatchewan.

2. The Plaintiff, Dale Beaudoin, is a certified organic farmer and resides near Maymont, Saskatchewan. Dale Beaudoin farms approximately 600 acres of certified organic farmland in the Rural Municipality of Mayfield No. 406, in the Province of Saskatchewan.

3. The Plaintiffs bring this action on behalf of all organic grain farmers in Saskatchewan who were certified organic farmers at any time between January 1, 1996 and December 31, 2001 pursuant to any of the following certification organizations (collectively referred to as "Organic Certifiers"):

(a) Organic Crop Improvement Association International, Inc. ("OCIA");

(b) Pro-Cert Organic Systems ("Pro-Cert");

(c) Canadian Organic Certification Cooperative Ltd. ("COCC");

(d) International Certification Services - Farm Verified Organics ("ICS-FVO");

(e) Saskatchewan Organic Certification Association ("SOCA"); and

(f) Organic Producers Association of Manitoba Co-op Ltd. ("OPAM")

4. The Plaintiffs reserve the right to amend their Claim, if necessary, to facilitate the opting-in of Canadian certified organic grain farmers residing outside of Saskatchewan.

. . .

9. An organic field must be managed without the use of prohibited substances. A field must be free from use of prohibited substances such as herbicides typically for a period of at least three years before it will be permitted to be certified as organic by any of the Organic Certifiers.

10. In order to sell grain within the certified organic grain market, an audit trail is necessary to ensure adherence to the certification standards. Organic grain crops are processed and marketed separately from conventional grain crops. Certified organic products are subject to testing by regulators for the presence of prohibited substances including GMOs. Contamination of organic products by prohibited substances such as GMOs can result in the rejection of shipments and substantial losses to organic farmers.

. . .

22. The Defendants' genetic modifications were incorporated into open-pollinated varieties of canola. Pollen from the open-pollinated varieties of canola marketed and/or

> licensed and/or sold by Monsanto Canada and Aventis Canada can pollinate conventional canola, conferring the genetic modification upon the seed of the formerly conventional canola. Due to this natural process of cross-pollination, conventional canola plants can produce seeds which contain GMOs. These seeds can germinate and produce further generations of canola that contain the genetic material of GM canola, by their own progeny and also by further cross-pollination.
>
> . . .
>
> 27. As a result of widespread contamination by GM canola few, if any, certified organic grain farmers are now growing canola. The crop, as an important tool in the crop rotations of organic farmers, and as an organic grain commodity, has been lost to certified organic farmers in Saskatchewan. It is likely that the domestic and foreign market demand for organic canola will be met primarily by foreign organic growers who can warrant their crops to be free of GMO contamination.
>
> . . .
>
> 31. If introduced on a commercial scale, GM wheat could, by natural means and cultivation, eventually spread in the rural environment of Saskatchewan as extensively as GM canola. If GM wheat is released into the Saskatchewan environment on such an unconfined and commercial basis, organic grain farmers will suffer irreparable harm.
>
> 32. Presently wheat is the most important grain grown by certified organic grain growers, and is their largest export. If wheat becomes contaminated to the extent that canola has, certified organic grain farmers in Saskatchewan will likely lose their ability to farm organically.
>
> . . .
>
> 44. The Plaintiffs each grew certified organic canola but have discontinued this practice because of environmental contamination by GM canola. Their damages, and the damages of the class they represent, derive from loss of revenues caused by:
>
> > (a) loss of canola as a crop to be used within their regular rotations; and/or
> >
> > (b) loss of opportunity to participate in the certified organic canola market.

[4] Following issue and service of this Claim, additional particulars were furnished pursuant to formal demands. This aspect of the pleadings is distilled in para. 3 of the reasons under review:

> [3] The defendants have each demanded extensive particulars relating, inter alia, to the precise standards of certification in relation to "contamination" by grain from genetically modified crops of each of the alleged certification organizations and when these standards came into effect. Extensive replies to these demands have been

> furnished by the plaintiffs, resulting in demands for further and better particulars and further replies. Some of the demands have been refused, and issues remain outstanding as to whether the defendants may seek or be entitled to further particulars. The particulars provided to date, augmented to some extent by research of the defendants, suggests that the six named organic certification organizations have different standards and varying definitions in relation to genetically modified crops and that their respective standards were adopted at different times relative to the six year period covered by the plaintiffs' claim. The replies to the demands for particulars indicate that the original named plaintiffs in this action have been certified as organic farmers by only one of these six certification organizations, although other members of the proposed class of plaintiffs may have been certified by any of the others, at any time in the six year time frame alleged.[1]

[5] The respondents sought the filing of the appellants' Statements of Defence. The appellants took the position that this step was not required until after the certification application was heard and determined.

[6] In order to bring this issue before the Court, the appellants brought application in chambers for an order extending the time for filing a defence until after the certification application has been decided.[2]

[7] Following this application, the learned chambers judge ordered the appellants to file a Defence to the personal claims of the named plaintiffs (respondents) and extended the time for filing a Defence to the allegations in relation to members of the "class" until after determination of the certification application.[3] Leave to appeal this order was granted on June 26, 2002.[4]

III

[8] In *Western Canadian Shopping Centres Inc. v. Dutton,* [2001] 2 S.C.R. 534, the Court held that Alberta Queen's Bench Rule 42 permitted the bringing of class actions.[5] In that case, the Court allowed the class action to proceed and accordingly

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[1] (2002), 220 Sask. R. 95 (Q.B.)

[2] Appeal Book pp. 115a and 119a.

[3] Appeal Book p. 134(a); 2002 SKQB 190.

[4] 2002 SKCA 86.

[5] This rule reads:

42 Where numerous persons have a common interest in the subject of an intended action,

affirmed the decision in the courts below denying the defendants' motion to strike out the class action. The determination of whether the plaintiffs had satisfied the requirements for a class action was decided on a motion to strike a claim made by the plaintiffs to sue in a representative capacity. It would appear that this application under Alberta Rule 129 was made before filing of a Defence.[6]

[9] In *Dutton*, the Court reviewed the historical background of class actions in the Courts of Equity. While as a general rule in equity all persons united in interest should be joined as parties, courts are frequently called upon to proceed with causes in which the number of those interested in the litigation is so great as to make it impracticable or inconvenient to join all such persons as parties. In such cases, Courts of Equity have long recognized the right of one or a few of such persons to sue for themselves and all others similarly situated, and thus represent the entire class or group of interested persons. See for example *Cockburn v. Thompson* (1809), 16 Ves. Jr. 321; 33 Eng. Rep. 1005 (*per* Lord Eldon).

[10] In *Dutton*, McLachlan C.J.C. observed that it would be advantageous to have a legislative framework addressing some of the issues that arise in a class action brought under the equivalent of Saskatchewan Queen's Bench Rule 70.

IV

[11] Saskatchewan enacted *The Class Actions Act* (the "*Act*") which came into force on January 1, 2002. This was followed by the addition to the Queen's Bench Rules of Part XI: Class Actions. For the purposes of this appeal, we reproduce the following provisions in the *Act* and Rules of Court:

> one or more of those persons may sue or be sued or may be authorized by the Court to defend on behalf of or for the benefit of all.

Saskatchewan Queen's Bench Rule 70 reads:

> **70** Where there are numerous persons having the same interest in one cause or matter, including actions for the prevention of waste or otherwise for the protection of property, one or more of such persons may sue or be sued, or may be authorized by the court to defend in such cause or matter, on behalf of or for the benefit of all persons so interested.

[6] The equivalent Saskatchewan Rule reads:

> **173** The Court may at any stage of an action order any pleading or any part thereof to be struck out, with or without leave to amend, on the ground that:
>
> (a) it discloses no reasonable cause of action or defence, as the case may be;
>
> (b) it is immaterial, redundant or unnecessarily prolix;
>
> (c) it is scandalous, frivolous or vexatious;
>
> (d) it may prejudice, embarrass or delay the fair trial of the action;
>
> (e) . . .

The Class Actions Act:

2 In this Act:

"action" means an action as defined in *The Queen's Bench Act, 1998*;

"certification order" means an order certifying an action as a class action;

"class" means two or more persons with common issues respecting a cause of action or a potential cause of action;

"class action" means an action certified as a class action pursuant to Part II;

"common issues" means:

(a) common but not necessarily identical issues of fact; or

(b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts;

"court" means the Court of Queen's Bench;

"defendant" includes a respondent.

[Emphasis Added]

. . .

4(1) One member of a class who resides in Saskatchewan may commence an action in the court on behalf of the members of that class.

(2) The member who commences an action pursuant to subsection (1) shall:

(a) apply to the chief justice of the court for the designation of a judge to consider an application mentioned in clause (b); and

(b) apply to the judge designated pursuant to clause (a) for an order:

(i) certifying the action as a class action; and

(ii) subject to subsection (4), appointing the member as the representative plaintiff for the class action.

(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.

(4) Where it is necessary to do so in order to avoid a substantial injustice to the class, the court may appoint a person who is not a member of the class as the representative plaintiff for the class action.

[Emphasis added]

. . .

6 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.

[Emphasis added]

7(1) The court may adjourn the application for certification to permit the parties to amend their materials or pleadings or to permit further evidence to be introduced.

(2) An order certifying an action as a class action is not a determination of the merits of the action.

8(1) Notwithstanding section 6, if a class includes a subclass whose members have claims that raise common issues not shared by all the class members and, in the opinion of the court, the protection of the interests of the subclass members requires that they be separately represented, the court may, in addition to the representative plaintiff for the class, appoint a representative plaintiff for each subclass who:

(a) would fairly and adequately represent the interests of the subclass;

(b) has produced a plan for the action that sets out a workable method of advancing the action on behalf of the subclass and of notifying subclass members of the action; and

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

(2) A class that comprises persons who reside in Saskatchewan and persons who do not reside in Saskatchewan must be divided into resident and non-resident subclasses.

9 The court shall not refuse to certify an action as a class action by reason only of one or more of the following:

(a) the relief claimed includes a claim for damages that would require individual assessment after determination of the common issues;

(b) the relief claimed relates to separate contracts involving different class members;

(c) different remedies are sought for different class members;

(d) the number of class members or the identity of each class member is not ascertained or may not be ascertainable;

(e) the class includes a subclass whose members have claims that raise common issues not shared by all the class members.

10(1) A certification order must:

(a) describe the class with respect to which the order was made by setting out the class's identifying characteristics;

(b) appoint the representative plaintiff for the class;

(c) state the nature of the claims asserted on behalf of the class;

(d) state the relief claimed by the class;

(e) set out the common issues for the class;

(f) state the manner in which, and the time within which, a class member may opt out of the class action;

(g) state the manner in which, and the time within which, a person who is not a resident of Saskatchewan may opt into the class action; and

(h) include any other provisions the court considers appropriate.

(2) If a class includes a subclass whose members have claims that raise common issues not shared by all the class members and, in the opinion of the court, the protection of the interests of the subclass members requires that they be separately

represented, the certification order must include the same information in relation to the subclass that, pursuant to subsection (1), is required in relation to the class.

. . .

12(1) Without limiting subsection 10(3), at any time after a certification order is made pursuant to this Part, the court may amend the certification order, decertify the action or make any other order it considers appropriate if it appears to the court that the conditions mentioned in section 6 or subsection 8(1) are not satisfied with respect to a class action.

(2) If the court makes a decertification order, the court may permit the action to continue as one or more actions between different parties and may make any order mentioned in section 11 in relation to each of those actions.

. . .

14 The court may, at any time, make any order it considers appropriate respecting the conduct of a class action to ensure a fair and expeditious determination and, for that purpose, may impose on one or more of the parties any terms it considers appropriate.

. . .

44 The Queen's Bench Rules apply to class actions to the extent that those rules are not in conflict with this Act.

Rules of Court, XI: Class Actions:

82(1) A Notice of Motion for Certification pursuant to clause 4(2)(b) or section 5 of the Act shall be in Form 5D.

(2) An application for a certification order pursuant to section 4 of the Act must be supported by an affidavit of the proposed representative plaintiff:

(a) deposing to the proposed representative plaintiff's willingness to be appointed;

(b) setting out the basis of the proposed representative plaintiff's personal claim, where applicable, and the reason the proposed representative plaintiff believes that common issues exist for the rest of the members of the class;

(c) setting out objective criteria for determining membership in the proposed class, and providing the proposed representative plaintiff's best information on the number of members in the proposed class;

(d) setting out sufficient information to establish that the proposed representative plaintiff would fairly and adequately represent the interests of the class and is aware of the responsibilities to be undertaken;

> (e) exhibiting a plan for the class action that sets out a workable method of:
>
> > (i) advancing the action on behalf of the class; and
> >
> > (ii) notifying class members of the action; and
>
> (f) setting out sufficient information to establish that the proposed representative plaintiff does not have, on the common issues, an interest that is in conflict with the interests of other class members.
>
> [Emphasis added]

Also see Queen's Bench Form 5D (R. 82).

[12] Before addressing the narrow issue on this appeal, we first consider certain of the requirements in these provisions.

[13] The first requirement of s. 4(1) and s. 6 is that there must be a class, that is, a definable group with common characteristics. See s. 2 above. Secondly, the named plaintiffs must be members of the putative class and at least one of them must reside in this province: See s. 4(1).

[14] Section 6 prescribes five separate and distinct prerequisites all of which must be satisfied on the certification application. If the class representatives are able to satisfy all of these prerequisites, the Court must consider whether sub-class certification is required in the circumstances of this case.

[15] The application for certification is not a merits hearing. This is made clear in s. 7(2). While it is not proper to determine the merits of the case on the certification application, this provision does not limit the Court's examination of the factors necessary to determine whether the plaintiffs have established the necessary prerequisites to a class action. The focus of the certification hearing must be whether the action satisfies the requirements of the *Act* for maintenance of a class action.

[16] The *Act* and rules governing class actions deal with procedure; they do not create substantive rights. A person has no inherent or constitutional right to bring a class action, since apart from the person's individual cause of action, the recovery would be for the benefit of other persons. When a plaintiff sues on behalf of a class he assumes a fiduciary obligation to members of the class, surrendering any right to compromise a group action for his individual gain or advantage. Even if a named plaintiff receives all of the benefits that he seeks in the claim, such success does not relieve him of the duty to continue the action for the benefit of others similarly situated. The procedure for bringing the application for certification is outlined in Rule

82(1) and (2). This Rule which addresses the evidentiary requirements of s. 6 demonstrates the significant interrelationship between the basis for the plaintiff's personal claim and the common issues that exist with respect to other members of the putative class.

[17] The primary purpose of a provision authorizing class actions is to overcome the impracticalities of cumbersome joinder requirements. One of the basic considerations behind the class action is that it will avoid a multiplicity of actions and enable the Court to deal with the rights of numerous claimants in one action.

[18] The pragmatic objective of the class action procedure include economies of time, effort and expense, as well as uniformity of decision for persons similarly situated. The modern class action is designed to avoid, rather than encourage, the unnecessary filing of repetitious papers and motions.

[19] In her reasons for decision, the learned chambers judge considered the approach taken by courts in Ontario and British Columbia with respect to the timing of the certification application.

[20] In *Mangan v. Inco Ltd.* (1996), 30 O.R. (3d) 90 (Ont. Gen. Div.), the Court made an order under s. 12 of the *Class Proceedings Act, 1992*, S.O. 1992, c.6, delaying the filing of the defence until after the certification hearing.[7] The Court found that depending on the outcome of the certification hearing, the Statement of Defence might have to be entirely reformulated. Winkler J. stated at p. 95:

> I emphasize, however, that in the preponderance of cases the statement of defence will not be required for determination of the certification motion. A motion for leave to defer filing the statement of defence, if necessary, should be brought pursuant to s. 12 of the *Class Proceedings Act, 1992*.

Also see: *Moyes v. Fortune Financial Corp.* (2001), 13 C.P.C. (5th) 147.

[21] A contrary view was adopted in *Scott v. TD Waterhouse Investor Services (Canada) Inc.* (2001), 83 B.C.L.R. (3d) 365 (B.C.S.C.) in which the Court required the defendants to file a statement of defence in advance of the certification application. The Court stated that a defence could assist in formulating the common issues.

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[7] Section 14 of the Saskatchewan Act is the equivalent provision in this jurisdiction.

[22] After considering these authorities, the learned chambers judge made the bifurcated order which is challenged on this appeal. We refer to paras. 29 and 30 of her reasons:

> [29] In the instant case, it is clear from the material before me that the proposed class action, if certified, will raise broader issues than the originating action considered simply as a claim asserted by the named plaintiffs, because of the differing standards applied over different time periods by the various organic certification organizations. It is unreasonable to require the defendants to plead to all of these varying standards, when only one will be relevant if the action is not certified and proceeds merely as an ordinary action. On the other hand, the plaintiffs are in this case entitled to know, prior to the certification application, the general nature of the defences that will be raised. This requirement is in my view best served, in this case, by requiring the defendants to file a statement of defence to the claims of the named plaintiffs, reserving their defence to the allegations in relation to the proposed class of plaintiffs set out in paragraph 3 of the statement of claim until after determination of the certification application. In effect, the defendants can thereby plead to organic certification standards which the replies to the demands for particulars allege apply to Larry Hoffman, L.B. Hoffman Farms Inc. and Dale Beaudoin and delay pleading in relation to any other standards that may become relevant if the action is certified as a class action.
>
> [30] With this qualification the applications for an order that the defendants not be required to file a statement of defence until after the adjudication of the certification application is denied.

[23] In support of their challenge, the appellants rely on the principles articulated by McLachlan C.J.C. in *Dutton* with particular emphasis on the following paragraphs:

> [23] The courts of equity applied a liberal and flexible approach to whether a class action could proceed. They "continually sought a proper balance between the interests of fairness and efficiency": Kazanjian, *supra*, ["Class Actions in Canada" (1973), 11 *Osgoode Hall L.J.* 397] at p. 411. As stated in *Wallworth v. Holt* (1841), 4 My. & Cr. 619, 41 E.R. 238, at p. 244, "it [is] the duty of this Court to adapt its practice and course of proceeding to the existing state of society, and not by too strict an adherence to forms and rules, established under different circumstances, to decline to administer justice, and to enforce rights for which there is no other remedy".
>
> . . .
>
> [32] Alberta's Rule 42 does not specify what is meant by "numerous" or by "common interest". It does not say when discovery may be made of class members other than the representative. Nor does it specify how notice of the suit should be conveyed to potential class members, or how a court should deal with the possibility that some potential class members may desire to "opt out" of the class. And it does not

provide for costs, or for the distribution of the fund should an action for money damages be successful.

[33] Clearly, it would be advantageous if there existed a legislative framework addressing these issues. The absence of comprehensive legislation means that courts are forced to rely heavily on individual case management to structure class proceedings. This taxes judicial resources and denies the parties *ex ante* certainty as to their procedural rights. One of the main weaknesses of the current Alberta regime is the absence of a threshold "certification" provision. In British Columbia, Ontario, and Quebec, a class action may proceed only after the court certifies that the class and representative meet certain requirements. In Alberta, by contrast, courts effectively certify *ex post*, only after the opposing party files a motion to strike. It would be preferable if the appropriateness of the class action could be determined at the outset by certification.

[Emphasis added]

. . .

[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, *supra*, 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.

. . .

[44] Where the conditions for a class action are met, the court should exercise its discretion to disallow it for negative reasons in a liberal and flexible manner, like the courts of equity of old. The court should take into account the benefits the class action offers in the circumstances of the case as well as any unfairness that class proceedings may cause. In the end, the court must strike a balance between efficiency and fairness.

. . .

[51] The diversity of class actions makes it difficult to anticipate all of the procedural complexities that may arise. In the absence of comprehensive class-action legislation, courts must address procedural complexities on a case-by-case basis. Courts should approach these issues as they do the question of whether a class action should be

> allowed: in a flexible and liberal manner, seeking a balance between efficiency and fairness.

[24] Appellants' counsel correctly point out that *Scott* was decided without the benefit of *Dutton, supra*, *Rumley v. British Columbia* (2001), 205 D.L.R. (4th) 39 (S.C.C.) and *Hollick v. Toronto (City)* (2001), 205 D.L.R. (4th) 19 (S.C.C.). In *Kimpton v. Canada (Attorney General)* (2002), 97 B.C.L.R. (3d) 119 (B.C.S.C), which was decided after *Dutton*, the Court adopted a more flexible approach to the issue.

[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* and 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*, 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.

[29] In this way, motions to strike or similar proceedings will be unnecessary since the Court can address such issues on the certification application. Once the certification application has been determined, the Court of Queen's Bench may make appropriate orders with respect to conduct of the litigation.

[30] In the result, we allow the appeal and extend the time for filing a Statement of Defence by each appellant until after the certification application has been heard and determined.

[31] There will be no order as to costs on this appeal or the application for leave.

DATED at the City of Regina, in the Province of Saskatchewan, this 25th day of October, A.D. 2002.

TALLIS J.A.

I concur.

GERWING J.A.

I concur.

SHERSTOBITOFF J.A.