

A COMMENT ON CROSS-BORDER EVIDENCE GATHERING:

Vitapharm v. F. Hoffmann-LaRoche Ltd.

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In lawsuits that reach across national borders, the ability to gather timely evidence has become increasingly important to successful outcomes. The ability to facilitate such evidence gathering by way of international comity is vital. The courts (and lawyers) must continue to develop new and existing ways to aid one another. As poignantly stated by Cumming J.:

As a result of the inexorable forces of globalization and expanding international free trade and open markets, there will be an ever-increasing inter-jurisdictional presence of corporate enterprises. This is seen particularly in respect of American and Canadian business activity, given the extent of cross-border trade. If both societies are to maximize the benefits of expanding freer trade and open markets, the legal systems of both countries must recognize and facilitate an expeditious, fair and efficient regime for the resolution of litigation that arises from disputes in either one or both countries.¹

Global price fixing conspiracies, like *Vitapharm v. F. Hoffmann-LaRoche Ltd.*, provide a good example of why mutual cooperation between jurisdictions is necessary. The nature of a price-fixing conspiracy is such that evidence detailing the conspiracy will lie almost exclusively in the hands of the conspirators. Defendant conspirators common to actions in multiple jurisdictions have a natural tendency to keep plaintiffs in other jurisdictions in the dark while attempting to deal with the litigation in what they may consider to be the primary jurisdiction (usually the United States). By compartmentalizing multi-jurisdiction litigation the defendants may gain a strategic advantage by settling early in one jurisdiction and then contesting liability and damages in other jurisdictions, especially those where the law of damages may not be seen by some to present the same exposure to the defendants. In these circumstances plaintiffs must be proactive in their investigations and gathering evidence. Early access to evidence not only assists counsel in better understanding the strengths and weaknesses of their case but in class actions in particular accessing evidence may aid in the certification process, and ultimately, in resolving the action. The need to obtain evidence sufficient to support certification is illustrated by the Supreme Court of Canada in *Hollick v. Metropolitan Toronto (Municipality)*:

¹ *Vitapharm v. F. Hoffmann-LaRoche Ltd.*, [2001] O.J. No. 237 at para. 27.

While the *Class Proceedings Act, 1992* does not require a preliminary merits showing, "the judge must be satisfied of certain basic facts required by s. 5 of the CPA as the basis for a certification order".

....

In my view, the class representative must show some basis in fact for each of the certification requirements set out in s. 5 of the Act, other than the requirement that the pleadings disclose a cause of action.²

Similarly, in *Chadha v. Bayer*³, a case involving allegations of a price-fixing conspiracy, the Ontario Court of Appeal noted that there must be a sufficient evidentiary record to support a decision to certify based on liability as a common issue. The Court of Appeal endorsed the type of evidence filed in a U.S. price fixing case, *In Re: Linerboard Antitrust Litigation*⁴, noting specifically that the expert evidence in that case was supported by charts, studies, company records, industry data and articles from leading trade publications.

In *Samos Investments Inc. v. Pattison*⁵, the British Columbia Supreme Court held that it was necessary for the plaintiff to demonstrate, through evidence, that there is an "air of reality" to the alleged identifiable class and common issues. Although the court stressed that it was not implementing a preliminary merits test (which was rejected by the Supreme Court of Canada in *Hollick*), the reasons of the certification judge indicate that he was underwhelmed by any evidence that the proposed class had suffered the harm alleged. An appeal was dismissed, but the Court of Appeal expressly declined to address the "air of reality" issue since it had upheld the order denying certification on other grounds⁶.

The practical reality demonstrated by these cases and the experience of counsel at certification hearings is that the chances of being certified increase if the certification judge has the sense, through at least a modicum of evidence, that a wrong may have been done.

It is with these principles in mind, that the plaintiffs in *Vitapharm v. F. Hoffmann-LaRoche Ltd.*, a global price-fixing conspiracy for certain vitamins, sought to obtain evidence produced under a protective order in parallel U.S. litigation. As outlined in more detail below, the *Vitapharm*

2 [2001] 3 S.C.R. 158 at para. 24 and 25.

3 (2003), 63 O.R. (3d) (Ont. C.A.).

4 305 F.3d 145 (3d. Circuit, 2002).

5 2001 BCSC 1790; (2001), 22 BLR (3d) 46 at paras. 155-178

6 2003 BCCA 87; [2003] 4 WWR 39; 10 BCLR (4th) 234 at para. 48.

plaintiffs brought a motion in the U.S. pursuant to Rule 24(b) of the U.S. Federal Rules of Civil Procedure to modify the protective order for the limited purpose of obtaining documentary evidence already produced in the U.S. litigation. The defendants sought, in both Canada and in the U.S., to prevent the *Vitapharm* plaintiffs from obtaining access to that documentary evidence. The defendants were unsuccessful in their Canadian quest for an anti-motion injunction.

Before undertaking a more in-depth analysis of the *Vitapharm* case, including implications for future cases, some background on the U.S. rules is necessary.

U.S. Rules – Two Types of Evidence Gathering Assistance

Justice is served by knowledge and disclosure, a fact well recognized in United States jurisprudence where there is a general presumption that pre-trial discovery must take place in the public unless compelling reasons exist for denying public access to the proceedings⁷. As noted by the United States Court of Appeals in *Wilk v. American Medical Ass'n.*:

This presumption should operate with all the more force when litigants seek to use discovery in aid of collateral litigation on similar issues, for in addition to the abstract virtues of sunlight as a disinfectant, access in such cases materially eases the task of courts and litigants and speeds up what may otherwise be a lengthy process.⁸

In almost all cases of cross-border litigation, the U.S. litigation is commenced prior to Canadian litigation, and is supported by liberal discovery rules. As a general rule, discovery is contemplated by the U.S. Federal Rules of Civil Procedure, under what some jurists and commentators refer to as the “sunshine principle”. However, these liberal discovery rules often give rise to concerns about the harm which may result from confidential information becoming publicly available. To combat these concerns, U.S. courts are increasingly being asked to grant, and indeed are granting, orders which qualify a party's obligation to disclose information that would otherwise be discoverable and publicly accessible. These orders, which alter the "sunshine principle" policy enunciated by the courts, are known as protective orders and may be ordered pursuant to Rule 26 of the Federal Rules of Civil Procedure.

⁷ *American Tel. & Tel. co. v. Grady* 594 F.2d. 594 (United States Court of Appeals, 7th Circuit)

⁸ *Wilk v. American Medical Ass'n.* 635 F.2d 1295 (United States Court of Appeals, 7th Circuit).

Protective Orders – Modification of the "Sunshine" Principle

The circumstances in which protective orders are issued are varied but in general, where there exists good cause for limiting or eliminating discovery obligations to avoid harm, a protective order may be issued. As outlined in Rule 26(c):

Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken, may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense⁹.

In 1964, Congress liberalized many of the procedures by which discovery could be obtained in the U.S for use by foreign litigants. Specifically, section 1782 of the United States Code was amended to "facilitate the conduct of litigation in foreign tribunals, improve international cooperation in litigation, and put the United States into the leadership position among world nations in this respect"¹⁰. The determination of the United States to increase the scope of judicial assistance available to foreign litigants is clear from the Senate Report that accompanies 28 U.S.C. 1782:

Until recently, the United States has not engaged itself fully in efforts to improve practices of international cooperation in litigation. The steadily growing involvement of the United States in international intercourse and the resulting increase in litigation with international aspects have demonstrated the necessity for statutory improvements and other devices to facilitate the conduct of such litigation. Enactment of the bill into law will constitute a major step in bringing the United States to the forefront of nations adjusting their procedures to those of sister nations and thereby providing equitable and efficacious procedures for the benefit of tribunals and litigants involved in litigation with international aspects.¹¹

Since the 1964 amendments, section 1782 of the U.S. Code has been used with increasing frequency by foreign litigants seeking to obtain discovery of persons and documents in the United States. Although section 1782 provides a viable method of obtaining assistance in evidence gathering, it is not the only method available to foreign litigants. Where a protective

⁹ The specific circumstances under which a protective order may issue are outlined in Rule 26(c) of the Federal Rules of Civil Procedure.

¹⁰ *In re: Application (Appeal of Bayer AG)*, No. 97-5047 at pg. 4 (United States Court of Appeals, 3rd Circuit, 1998).

¹¹ *In re: Application (Appeal of Bayer AG)*, No. 97-5047 at pg. 4 (United States Court of Appeals, 3rd Circuit, 1998), quoting from S.Rep. No. 88-1580, at 2 (1964), reprinted in 1964 U.S.C.C.A.N. 3783.

order is in place, and a litigant seeks access to documents produced under that protective order, Rule 24(b) of the Federal Rules of Civil Procedure, coupled with a motion to modify the protective order, may provide an alternate method for obtaining evidence.

Although, there are notable differences between the assistance which may be obtained under Rule 24(b) of the Federal Rules of Civil Procedure and that which may be obtained under section 1782 of the United States Code, both provide a viable method for obtaining the assistance of U.S. courts. For example, section 1782 permits assistance to a foreign tribunal independent of whether an action is ongoing in the U.S. In contrast, Rule 24(b) provides assistance only through ongoing U.S. litigation. At least in the manner used to date, Rule 24(b) provides for a passive form of assistance and involvement whereas 1782 provides for active assistance such as ordering the examination, by a foreign litigant, of a non-party located in the U.S.

28 U.S.C. 1782 Assistance

U.S. Code, Title 28, Section 1782 enables the U.S. courts to provide assistance to foreign and international tribunals and to foreign litigants before such tribunals. Section 1782 states that:

The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given or the document or other thing be produced, before a person appointed by the court.

An application under section 1782 requires a prima facie showing that the application is made: 1) "by a foreign or international tribunal" or "interested person"; 2) that it be "for use in a proceeding in a foreign or international tribunal"; and 3) that the person or entity from whom the discovery is sought be a resident of or be found in the district in which the application is filed¹². As held by the United States Court of Appeals for the Third Circuit, *In re Application (Appeal of Bayer AG)* section 1782 does not require that the documents or discovery sought be discoverable in the foreign jurisdiction¹³.

¹² *In re: Baycol Products Litigation* MDL No. 1431, Pretrial Order No. 77 (U.S. District Court, District of Minnesota, 2003) at pg. 5.

¹³ *In re: Baycol Products Litigation* MDL No. 1431, Pretrial Order No. 77 (U.S. District Court, District of Minnesota, 2003) at pg. 5.

Section 1782 has been used on many occasions by foreign litigants seeking assistance of the U.S. courts. For example, in *South Carolina Insurance Co. v. Assurantie Maatschappij de Zeven Provinciën NV*.¹⁴, the defendants, prior to filing a statement of defence in England, brought a petition in the U.S., pursuant to section 1782 of the United States Code, seeking among other things, an order for pre-trial discovery of documents. The plaintiffs sought injunctive relief in England to restrain the defendants from proceeding in the U.S. An injunction was issued by the British court. The injunction was upheld by the Court of Appeal but set aside in the House of Lords. The House of Lords rejected the Court of Appeal's reasoning that the English court must retain control of its own process, finding instead that the defendants' conduct in starting U.S. proceedings with a view to using their pre-trial discovery procedure did not amount to unconscionable conduct. The House of Lords refused to restrain the defendants from lawful evidence gathering, finding that the defendants had neither invaded or threatened to invade the respondents' legal or equitable rights, or behaved in an unconscionable manner. The House of Lords noted that in civil proceedings the court did not, in general, exercise any control over the manner in which a party obtained evidence:

I cannot see that the defendants, by seeking to exercise a right potentially available to them under the Federal law of the United States, have in any way departed from, or interfered with, the procedure of the English court. All they have done is what any party preparing his case in the High Court here is entitled to do, namely to try to obtain in a foreign country, by means lawful in that country, documentary evidence which they believe that they need in order to prepare and present their case.¹⁵

Typically, section 1782 of the U.S. Code has been used by Canadian litigants seeking the assistance of U.S. courts to obtain discovery of a person who, although discoverable in Canadian litigation, is not willing or available to attend. For example, in *Penty v. Law Society of British Columbia*¹⁶ the Law Society sought, pursuant to section 1782, to take testimony from a U.S. resident, Craig Clymore, who filed a complaint against the plaintiff. Mr. Clymore was incarcerated in a penitentiary in Oklahoma at the time and the plaintiff sought to prevent the Law Society from taking his testimony arguing that the Law Society had no jurisdiction to conduct discipline hearings outside provincial boundaries. The British Columbia Court of Appeal found in favour of the Law Society holding that:

14 [1987] 1 App. Cas. 24, [1986] 3 All E.R. 487 (H.L.)

15 [1987] 1 App. Cas. 24, [1986] 3 All E.R. 487 at 497 (H.L.)

16 [1999] B.C.J. No. 2447 (B.C.C.A.), leave to appeal to S.C.C. denied.

In the present case, the Law Society has taken advantage of legislation the United States has seen fit to enact to assist foreign and international tribunals and litigants to obtain testimony and documents located in the United States.

In summary, I see no impediment to the Law Society taking advantage of the procedure available to it under section 1782 of the *United States Code* in order to obtain Mr. Clymore's testimony.

Similarly, in *Sternson v. CC Chemicals Limited*¹⁷ the Federal Court of Appeal held that an examination pursuant to section 1782 was permissible. The Federal Court of Appeal set aside an injunction restraining Canadian litigants from pursuing an examination in the U.S. pursuant to an order made under Section 1782 of the U.S. code. In rendering its decision, the court concluded that the examination would be useful to the defendant in preparing its case.

Federal Rules of Civil Procedure - Rule 24(b) Assistance

Whereas section 1782 has routinely been used by foreign litigants, Rule 24(b) of the Federal Rules of Civil Procedure has only recently been invoked by foreign litigants seeking assistance from U.S. courts. Rule 24(b) states that:

Upon timely application anyone may be permitted to intervene in an action: (1) when a state of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

The requirements of Rule 24(b) have been interpreted as: 1) an independent ground for subject matter jurisdiction; 2) a timely motion; and 3) a claim or defense that has a question of law or fact in common with the main action¹⁸. The grant of permissive intervention is a matter of discretion¹⁹. Assuming a right to intervene is granted, a non-party must still show cause why the protective order ought to be modified. To this end, the non-party must show that their collateral litigation is *bona fide*²⁰ and that the discovery sought will obviate the need for that party to

17 [1982] 1 F.C. 350 (QL) (F.C.A.).

18 *Equal Employment Opportunity Commission v. National Children's Center, Inc.* 146 F.3d 1042 at 1046 (D.C. Cir. 1998).

19 *Twelve John does v. District of Columbia*, 117 F.3d 571 at 575 (D.C. Cir. 1997).

20 *Wilks v. American Medical Ass'n.* 635 F.2d 1295 at 1300 (United States Court of Appeals, 7th Circuit).

engage in duplicative discovery²¹. The court must also weigh the "policy considerations of efficient resolution of litigation through the avoidance of duplicative discovery against any prejudice that may result to the substantive rights of the party opposing amendment"²².

Most Circuit courts have held that permissive intervention is the appropriate procedure for a non-party to seek modification of a protective order²³. Until recently, Rule 24(b) has been used by U.S. non-parties and not by foreign litigants. However, in three recent cases, *Vitapharm v. F. Hoffmann-LaRoche et al.*, *Coleman v. Bayer Inc.*, and *La Cie McCormick Canada Corp. v. Stone Container Corp. et al*, Canadian plaintiffs have sought to obtain assistance from the U.S. courts by using Rule 24(b) to modify the respective protective orders issued in parallel U.S. litigation.

Vitapharm v. F. Hoffmann-LaRoche et al.

The Ontario case, *Vitapharm v. F. Hoffmann-LaRoche Ltd.*, relates to global price fixing conspiracies wherein manufacturers of certain vitamins conspired to fix prices and allocate markets including Canada. Price fixing litigation based on the same global conspiracy which is the subject of *Vitapharm*, was ongoing in the U.S. at the time *Vitapharm* was commenced and U.S. discovery was well underway. Criminal price fixing charges were laid in the U.S. and Canada against many vitamin manufacturers.

The global price fixing conspiracies generated litigation in Canada, the United States and elsewhere. Millions of documents have been produced in the U.S. litigation under U.S. rules. The documents are subject to a protective order issued by Hogan J., the judge with carriage of the U.S. proceedings.

To better understand the strengths and weakness of their case, and to assist in certification and ultimately in trial, the *Vitapharm* plaintiffs sought to gather evidence available in the U.S. vitamin litigation. Essentially, the plaintiffs sought to obtain access to depositions and documents on the same terms as parties to the litigation. In an unprecedented move for foreign litigants, the plaintiffs moved to intervene in the U.S. litigation under Rule 24 of the Federal Rules of Civil

21 *Cohabaco Cigar Co. v. United States Tobacco. Co.*, 1999 U.S. Dist. Lexis at *12.

22 *In re: Baycol Products Litigation* MDL No. 1431, Pretrial Order No. 77 (U.S. District Court, District of Minnesota, 2003) at pg. 10.

23 *Equal Employment Opportunity Commission v. National Children's Center, Inc.* 146 F.3d 1042 at 1046 (D.C. Cir. 1998).

Procedure for modification of the protective order. But for the protective order issued in the U.S., the evidence sought by the *Vitapharm* plaintiffs would have been in the public domain.

Some of the *Vitapharm* defendants brought a motion in Ontario to enjoin the plaintiffs from pursuing their U.S. motion (an anti-motion injunction). The defendants took the position that the plaintiffs were attempting to obtain discovery before they were entitled to it pursuant to the Ontario *Rules of Civil Procedure*. The defendants argued that the plaintiffs were not entitled to gather information in a foreign jurisdiction until they were entitled to actively conduct compelled discovery under the Ontario *Rules of Civil Procedure*. In making this argument, the defendants failed to recognize that what is the product of discovery in the U.S. is simply evidence in the Ontario action. The plaintiffs neither sought to compel production of documents or to compel oral examinations: they simply sought access to evidence already available in the U.S. litigation.

The plaintiffs took the position, both in the first instance and later on appeal, that there is a distinction between evidence gathering and active, compellable discovery as contemplated by the Ontario *Rules of Civil Procedure*. Like most jurisdictions in Canada, discovery as defined in the Ontario *Rules of Civil Procedure*²⁴:

- Includes active steps such as the mutual exchange of documents and oral examinations under oath;
- Is limited to parties to the action without leave of the court; and
- Provides for benefits and sanctions when a party fails to take the active steps required in relation to the discovery process.

The plaintiffs argued that what they sought was evidence, not discovery in the nature contemplated by the Ontario *Rules of Civil Procedure*.

Cumming J., the case management judge in Ontario, dismissed the defendants' motion in the first instance holding that the plaintiffs were seeking access to discovery evidence and not discovery itself, a pursuit which was neither offensive to the Ontario *Rules of Civil Procedure* or the *Class Proceedings Act, 1992*. Given the novel application of Rule 24(b) to foreign litigants, Cumming J. considered section 1782 of the U.S. Code and in doing so noted that: "[a] Canadian

²⁴ Ontario, *Rules of Civil Procedure*, r. 30 and 31.

Court generally will be reluctant to prevent someone from gathering evidence extraterritorially, as its ultimate admissibility in a Canadian proceeding will be determined by the Canadian courts²⁵. Cumming J. considered and rejected the defendants' position that permitting the plaintiffs to access the fruits of U.S. discovery would infringe on the defendants' privacy rights. He held that "the plaintiffs' U.S. motion prima facie has the purpose of saving considerable time and money in the Canadian proceedings" and that the plaintiffs' U.S. request was not oppressive or unfair to the defendants in the Canadian proceedings²⁶. As stated by Cumming J.:

The plaintiffs' request for access to discovery evidence which they believe necessary to prepare their case in Canada, a request made through means lawful in the United States, does not violate the rules and procedure of this court. There is no consequential unfairness to the defendants in the Canadian class proceedings.²⁷

On appeal, the Divisional Court upheld Cumming J.'s decision²⁸. Matlow J. writing for the majority upheld Cumming J.'s reasons on the narrow finding that the plaintiffs' were seeking access to discovery evidence, rather than discovery itself. Farley J., writing his own reasons, also dismissed the motion. In doing so, he noted a distinction between accessing discovery evidence in the passive sense of merely looking at that which has already been produced, and discovery in the active sense of asking questions and participating in U.S. discovery. Farley J. held that the plaintiffs' actions were passive in nature and therefore, not contrary to the *Rules of Civil Procedure*. Although, the majority noted a distinction between access to discovery evidence and discovery itself, and the minority noted a distinction between access to discovery evidence in the passive sense and the pursuit of discovery in the active sense, both sets of reasons held that the respondents were seeking access to evidence, not discovery, a pursuit which both held does not offend the *Rules of Civil Procedure*. The defendants took issue with the distinction between active and passive discovery, arguing it is an artificial distinction that focuses not on the impact of accessing discovery evidence but on the manner in which it is obtained²⁹. The defendants sought, and were granted leave to appeal to the Court of Appeal.

25 *Vitapharm v. F. Hoffmann-LaRoche Ltd.*, [2001] O.J. No. 237 at para. 45.

26 *Vitapharm v. F. Hoffmann-LaRoche Ltd.*, [2001] O.J. No. 237 at para. 48.

27 *Vitapharm v. F. Hoffmann-LaRoche Ltd.*, [2001] O.J. No. 237 at para. 49.

28 *Vitapharm v. F. Hoffmann-LaRoche Ltd.* (2002), 212 D.L.R. (4th) 563.

29 A Case Comment on #771/99 Glen Ford v. F. Hoffman-LaRoche Ltd. et al and #99-GD-46719 Vitapharm Canada Ltd. et al v. F. Hoffman-LaRoche Ltd. et al.

In very brief reasons, the Court of Appeal unanimously upheld the order of the Divisional Court dismissing the appeal from the order of Cumming J. In doing so, the Court of Appeal held that: “the facts and circumstances of this case do not give rise to comity concern, nor are there any overriding policy or fairness issues that would warrant the injunctive or declaratory relief sought by the appellants”³⁰. Like Cumming J. and the Divisional Court, the Court of Appeal noted that: “[p]roperly characterized, the respondents are attempting to gather evidence in a foreign jurisdiction in accordance with the rules of that jurisdiction”³¹.

The defendants motion for leave to appeal to the Supreme Court of Canada was denied³².

Prior to the conclusion of the defendants' Ontario motion, Justice Hogan rendered a decision on the plaintiffs' U.S. motion for intervention and modification of the protective order³³. By order of Hogan J. in the U. S., the plaintiffs were granted the right to intervene in the U.S. litigation for the limited purpose of asking the court to modify its protective order. Although Hogan J. granted the plaintiffs intervener status, he declined to rule on the portion of the motion seeking modification of the protective order until the appeals in Ontario had run their course. The appeals process has now run its course in Ontario, and having granted intervener status to Canadian litigants, Hogan J. must now decide whether to modify the protective order thereby granting access to evidence for Canadian litigants.

Coleman. v. Bayer Inc.

Following the U.S. *Vitapharm* motion, plaintiffs in Canadian Baycol litigation, *Coleman. v. Bayer Inc.*, sought both to obtain discovery under section 1782 and to intervene in parallel U.S. litigation (*In re: Baycol Products Litigation*) pursuant to Rule 24(b), for the purpose of modifying the protective order. In considering the *Baycol* plaintiffs' motion, the U.S. court held that "allowing the Canadian Plaintiffs access to discovery materials already produced will not offend the Canadian tribunal, nor will it prejudice Defendants by further intruding into their privacy or subjecting them to further questioning or document production"³⁴. Although the court rejected the plaintiffs' bid to actively conduct depositions pursuant to section 1782, it granted their motion to intervene to the extent they sought access to documents already produced. After granting the

30 *Vitapharm v. F. Hoffmann-LaRoche Ltd.* (2003), 223 D.L.R. (4th) 445 at para. 3.

31 *Vitapharm v. F. Hoffmann-LaRoche Ltd.* (2003), 223 D.L.R. (4th) 445 at para. 4.

32 *Vitapharm v. F. Hoffmann-LaRoche Ltd.*, [2003] S.C.C.A. No. 245.

33 *In re: Vitamins Antitrust Litigation* MDL No. 1285, Memorandum Opinion Re: Canadian Plaintiffs' Motion to Intervene, March 19, 2001.

34 *In re: Baycol Products Litigation* MDL No. 1431, Pretrial Order No. 77 (U.S. District Court, District of Minnesota, 2003) at pg. 9.

right of intervention, Davis J. considered the plaintiffs' motion to modify the protective order. In granting the plaintiffs' access to non-confidential documents already produced, Davis J. held that "[w]here the party seeking modification is a "bona fide" litigant, and shows that the two actions are virtually identical, it follows that the discovery produced in the first action is relevant to the second action"³⁵.

La Cie McCormick Canada Co. v. Stone Container Corp. et al.

Following the decisions in *Vitapharm* and *Baycol*, the plaintiffs in *McCormick* sought to obtain documentary evidence produced in U.S. litigation titled *In Re Linerboard Antitrust Litigation*. Like *Vitapharm*, the plaintiff sought to intervene pursuant to Rule 24 in order to modify the protective order. However, unlike the *Vitapharm* case, *In Re Linerboard Antitrust Litigation* had been resolved in its entirety shortly before the Canadian plaintiff brought its motion. Despite this fact, citing the both the U.S. and Canadian court's decisions in *Vitapharm*, the U.S. District Court for the Eastern District of Pennsylvania granted the plaintiff's motion. In doing so, the court held that:

In addition, like the lower court in *Vitapharm*, this Court concludes defendants will suffer no prejudice from granting movant access to materials that have already been produced to plaintiffs in MDL 1261.

Finally, the Court notes that although McCormick has not moved pursuant to Section 1782, one of the goals of that legislation is to provide "efficient means of assistance to participants in international litigation in our federal courts and encourage foreign countries by example to provide similar means of assistance to our courts.." [cite omitted] The court concludes that granting McCormick's motion promotes that end. As the Seventh Circuit explained in *Wilk*:

access in such cases materially eases the tasks of courts and litigants and speeds up what may otherwise be a lengthy process. Particularly in litigation of this magnitude, we ...are impressed with the wastefulness of requiring the [collateral litigant] to duplicate discovery already made.

Having managed the discovery process in the instant case, this Court is similarly "impressed with the wastefulness to all parties including defendants of requiring the [movant] to duplicate discovery already made."

The U.S. *Vitapharm* motion remains to be decided. However, like the *Baycol* and *McCormick* cases, there is little question in the *Vitapharm* case that the plaintiffs are *bona fide* litigants and

³⁵ *In re: Baycol Products Litigation* MDL No. 1431, Pretrial Order No. 77 (U.S. District Court, District of Minnesota, 2003) at pg. 10.

that "disclosure of discovery materials produced that are not marked confidential would avoid duplicative discovery while causing no undue delay or prejudice to the defendants"³⁶. The granting of access to evidence in the *Vitapharm* case is consistent with U.S. objectives and law.

Future Implications of the *Vitapharm*, *Coleman* and *McCormick* Cases

The willingness of U.S. courts to aid Canadian litigants in their search for evidence has significant implications for Canadian plaintiffs. The ability to obtain substantive evidence in the early stages of an action, particularly one where the nature of the tort is secretive, will take away some of the strategic advantages enjoyed by defendants, such as the ability to compartmentalize extra-jurisdictional litigation thereby allowing them to deal with different jurisdictions at what the defendants perceive to be the most advantageous time. With variation of the protective order, Canadian plaintiffs' counsel are at liberty to discuss their case in a meaningful way with U.S. plaintiffs' counsel. Early access to evidence reinforces the "sunshine principle" It not only assists counsel in better understanding the strengths and weaknesses of their case but in class actions in particular accessing evidence is valuable in the certification process, and ultimately, in resolving the case.

Generally, there is a significant time lag between the commencement of a class action and the certification hearing. If there may be some helpful evidence in a case pending in the U.S., counsel would be well advised to use the time available to access that evidence. The procedural tools discussed in this paper have the potential to deliver substantial benefits to class members.

³⁶ *In re: Baycol Products Litigation* MDL No. 1431, Pretrial Order No. 77 (U.S. District Court, District of Minnesota, 2003) at pg. 10