Provincial Safeguards for National Class Actions

For decades, there has been a tension between provinces regarding the scope of proposed national class actions. For example: Is a national class permitted under the existing provincial legislation? If so, is a national class constitutional? What credence should be given to competing putative or certified class proceedings that are ongoing in other jurisdictions? While most of these many issues have now been comfortably resolved, the last question remains pertinent. Absent a federal regime governing national class proceedings, there seems little likelihood that this issue can be put firmly to rest any time soon. However, three recent decisions – one from Quebec, one from Saskatchewan, and one from Ontario - all help to provide some insight on when one court may defer to another in the context of competing class proceedings. The predominate concern expressed in each case is that the interests of the class members resident in one province will be adequately protected in the proceeding in another jurisdiction.

Most recently the Quebec Superior Court agreed with the plaintiffs that a Quebec-only action should be stayed in favour of an Ontario-based proposed national class proceeding. In *Chasles c. Bell Canada Inc*., 2017 QCCS 5200 (CanLII), the same plaintiff's lawyers first started a class proceeding for Quebec residents, and subsequently issued another action in Ontario in which they proposed a national class, but excluding Quebec. Class counsel then proposed that the Quebec proceeding be stayed, and that they would amend the Ontario claim to include Quebec residents, if the stay was granted. In an ironic twist, the defendant, Bell, opposed the stay based upon the procedural law governing class actions in Quebec.

Hamilton J. reviewed the competing terms of Article 3137 CCQ (the stay rule) and Article 577 CCP (multijurisdictional class actions). Article 577 CCP provides that the court may disallow the discontinuance of an application for authorization, or it may authorize another plaintiff to institute a class action involving the same subject matter and the same class, if the court is convinced that the class members' interests would thus be better served than by allowing the stay in favour of a multijurisdictional class action. He rejected the "first to file" rule as having application in the multijurisdictional context. Rather, Hamilton J. concluded that the overarching issue is whether the interests of the Quebec class members will be adequately protected in the multijurisdictional proceeding. He was satisfied that, in this case, they would be.

In reaching this conclusion, Hamilton J. had particular regard to the CBA's new *Canadian Judicial Protocol for the Management of MultiJurisdictional Class Actions and the Provision of Class Action Notice*. This *Protocol* ensures that there is sufficient coordination amongst the courts in the different jurisdictions when competing class actions are extant. It allows the judges in the different jurisdictions to communicate with each other to, among other things, ensure that their concerns about the protection of rights and interests of class members in each jurisdiction are met. While he granted the stay, Hamilton J. remained seized of the putative class action, and has the ongoing oversight of the interests of the Quebec class members, including ensuring that the notices to the Quebec class are adequate in scope and substance to protect their procedural and substantive rights.

Ammazzini v Anglo American PLC, 2016 SKCA 164 (CanLII) was a case of competing class actions, where the defendant agreed to settle multiple provincial class

actions, including an Ontario-based proposed national class action, but on the condition that the proposed national class action commenced in Saskatchewan be permanently stayed. Under Saskatchewan's *Class Proceedings Act*, the representative plaintiff in the Ontario action had a right to appear and make submissions at the certification motion. He moved for a stay of that proceeding, which was granted.

On appeal, the SKCA held that a motion to stay was not within the rights of the Ontario plaintiff. His rights were limited to making submissions. However, motion judge had reached the correct result, nonetheless. Under s. 6.1 of the Act, the certification judge was obliged to consider whether it was preferable that the matters raised in the Saskatchewan proceedings be resolved in one of the other ongoing multi-jurisdictional class actions. To make that determination, the judge was required to take account of precisely the same matters he considered in deciding to grant the stay.

The SKCA found that the Saskatchewan proceeding was duplicative of the Ontario action, which had been commenced much earlier, and now had reached a settlement. It confirmed that the courts discourage a multiplicity of actions when they serve no purpose. Section 6(2) of the Act is intended to "avoid chaotic and unproductive overlap in class action litigation." Therefore, the motion judge was required to consider, as part of the preferable procedure analysis, whether it would be preferable for some or all of the claims or common issues raised in that action to be resolved in a class action commenced elsewhere in Canada.

Like the Quebec court in *Chasles*, the SKCA emphasized the importance of protecting the interests of provincial class members. It noted that the motions judge had

been alert to the question of whether the settlement agreement would protect the interests of the proposed class members in the Saskatchewan action, including those resident in Saskatchewan. It noted that this same question would necessarily be front and centre when the Ontario representative plaintiff applied in Ontario to have the settlement approved. Effectively, the SKCA confirmed its confidence in the Ontario court taking into consideration the interests of all class members, wherever situate, when it approved the settlement. While the SKCA did not expressly aver to the *Multijurisdictional Protocol*, there is no doubt that it was cognizant of the fact that if the courts had any concern about the rights and interests of class members in their home jurisdiction under the settlement, the various provincial courts could and would avail themselves of its benefits.

The third case in which competing national class actions was addressed is, in many ways, the mirror to *Ammazzini* – again involving competing Saskatchewan and Ontario national class actions - but this time from the Ontario perspective. Like in *Ammazzini*, the Ontario plaintiff in *Romeo v. Ford Motor Co*., 2017 ONSC 6674 (CanLII) had made submissions at the Saskatchewan certification motion, as of right. Unlike Saskatchewan, the Ontario Act is silent on the issue of multijurisdictional class actions, and has not terms that allow submissions from competing class proceedings. The Saskatchewan plaintiff therefore brought a motion to intervene in the Ontario action. The motion was denied.

The Saskatchewan plaintiff would not commit to what position it would take on the certification motion, if leave was granted. Morgan J. noted that the Saskatchewan action had yet to be certified, so whatever argument the plaintiff would make, it would of necessity be arguing that the Saskatchewan-based class members should be treated

differently than the other class members, even though it was uncertain whether the Saskatchewan action would ever be certified. In other words, the proposed intervenor would potentially be arguing for the exclusion of some part of the proposed national class from a claim in either jurisdiction. This was not tenable.

Morgan J. concluded by recognizing that if the Saskatchewan-based members of the class, or any other members of the class, wanted to throw in their lot with the Saskatchewan action rather than the Ontario action, they could opt out of the Ontario proceeding. Quoting from *Fairview Donut*, he confirmed that the opt out provision "should not be circumvented by granting intervenor status to putative class members who see matters differently from the proposed representative plaintiffs in a class action. This will not only cause undue delay and expense, but it is antithetical to the procedure contemplated by the legislature under the CPA".

Underlying this decision was, again, concern that class members' interests not be run over roughshod in the jockeying for position between competing actions. This issue is and will remain of paramount importance in resolving competing claims. With the introduction of the broader scope of the new *Multijurisdictional Protocol*, we can anticipate more court to court dialogue, as well as greater assurances that each jurisdiction is fully apprised of the fact and status of competing class proceedings, which will lead (as evidenced is *Chasles*) to greater reassurance among the supervising judges that local interests are being met in other jurisdictions' proceedings. Counsel and the courts are encouraged to embrace these new procedures as a key tool that can help to eliminate or ameliorate the effect of duplicative multijurisdictional class proceedings.

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