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**MULTI-JURISDICTIONAL CLASS ACTIONS IN CANADA:
STRATEGIC CONSIDERATIONS FROM A DEFENDANT'S PERSPECTIVE**

Introduction

It has become increasingly common for a defendant to be confronted with class proceedings in multiple jurisdictions arising out of the same underlying factual circumstances. Often, there may also be parallel class proceedings in the United States, in both the Federal court system and in the State courts. The substantive law that applies to the claims in a given province or state is usually similar, but there may be particular consumer protection legislation in one or more jurisdictions that is not common to all. Although in Canada the statutory provisions concerning certification of proceedings as class actions are similar, there may be perceived differences in the approaches of the Courts to class proceedings generally in different provinces.

Whether or not a product liability issue, for example, gives rise to multiple class proceedings will depend upon many factors including the nature of the claim, whether the first action is brought in an opt-out jurisdiction such as Ontario or Manitoba, and the strategies of counsel representing the plaintiffs and putative class members. It is not uncommon for counsel for plaintiffs to coordinate with each other how class actions in more than one province will proceed, including whether, for example, certification motions will be delayed in one province pending disposition of such a motion in another Province. There may, as well, be strategic reasons for counsel for the Plaintiffs to start class proceedings in more than one province to, perhaps, try to put additional pressure on a defendant. Regardless of the reasons that have led to the commencement of multiple actions, a Defendant whose interest is to avoid multiple proceedings must either reach agreement with Plaintiffs' counsel to coordinate the litigation in a way that accommodates the interests of plaintiffs and defendants or, failing agreement, seek a judicial remedy from one or more of the applicable superior courts.

A defendant confronted with multiple class proceedings must develop a litigation strategy that will enable it to effectively advance its interests in a coordinated manner, having regard to considerations such as whether to separately contest certification in each jurisdiction and whether, following certification in one or more jurisdictions, to continue to defend its interests separately in each jurisdiction, or seek to consolidate the claims into a single “national” class action. The strategic considerations may vary from case to case, and may well depend upon whether the overriding strategy is to negotiate an early and effective settlement or whether it is contemplated that a common issues trial may be held.

This short paper will address the considerations faced by a defendant involved in overlapping class actions in more than one province and, specifically, whether motions to stay the less comprehensive class proceedings in favour a national class action brought in a province with an opt-out regime are likely to succeed and whether certification of actions in one or more province will likely operate to influence the decision of the Court on such a post-certification stay motion.

Pre- Certification Motions to Stay

Where there are multiple class proceedings brought in several Canadian provinces by plaintiffs represented by the same (or different) counsel¹, a defendant must decide whether to respond to these actions by responding concurrently to separate certification motions in each province involving evidence, cross-examinations and briefs involving virtually the same factual and legal issues, or whether to take steps to try to stay the opt-in actions before certification in favour of a single proceeding in a jurisdiction that provides for a national class on an opt-out basis, such as Ontario or Manitoba.

In *Vitapharm Canada Ltd. v. F. Hoffman La-Roche Ltd.*², the Court heard a carriage motion to determine which of several class actions brought in Ontario should proceed and who was to be lead counsel. It was accepted by Mr. Justice Cumming that “there cannot be two class actions which proceed in respect of the same putative class ... asserting the same causes of action”. His Honour relied upon the broad discretion conferred by the court under the CPA to stay any proceeding related to the class proceeding and to make any order that it considers appropriate

¹ There may be additional arguments to support a stay where the named plaintiffs in each action are represented by the same counsel.

² (2000), 4. C.P.C. (5th) 169

respecting the conduct of a class proceeding to ensure its fair and expeditious determination, and made in order staying all of the class actions except one.

The *Vitapharm* case did not involve class proceedings in more than one province and the jurisdictional and constitutional issues in relation to national and multi-jurisdictional class actions did not arise. Nevertheless, the policy considerations that warrant avoidance of multiple class proceedings within a given province would also apply to a multiplicity of class proceedings in more than one province. The difficulty, of course, is that the superior court of a given province does not have jurisdiction to make orders affecting the administration of justice in another province.

Notwithstanding that the Superior Court in one province lacks jurisdiction to bind courts of other provinces, it is open to parties to seek from the court a stay of proceedings in that jurisdiction on the ground that such a stay may be necessary in the interests of justice and to avoid a multiplicity of proceedings.

Attempts have been made to seek such a stay of proceedings, prior to certification, of class proceedings in provinces with an opt in regime in favour of more comprehensive national class proceedings. In *Pardy v. Bayer Inc.*³, the defendant sought a stay of a class proceeding brought in Newfoundland and Labrador because there was a concurrent class action brought in Manitoba on behalf of a putative class that included all members of the putative class in the Newfoundland action. It was argued on behalf of the defendant that for the Newfoundland action to proceed would result in unnecessary and potentially unrecoverable cost to the defendant, a risk of inconsistent judgments because of an unnecessary multiplicity of proceedings and the duplicative expenditure of judicial and administrative resources.

Mr. Justice Mercer rejected these submissions and held that, prior to certification, the named plaintiffs in the Newfoundland action were not parties to the concurrent Manitoba action. Mr. Justice Mercer noted in particular Rule 7A.04(6) of the Rules of the Supreme Court of Newfoundland and Labrador that, he wrote, recognized the possibility of overlapping class actions. This rule provides as follows:

³ [2003] N.J. No.182

7A.04(6) Where it appears that a class or representative proceeding covering all or a part of the matters to be dealt with in a class proceeding in this province has been certified in another jurisdiction in Canada, the Court in considering whether and to what extent to grant the certification application

(a) may consider whether it would be appropriate to define the class as excluding the class certified in the other jurisdiction or as excluding persons who do not opt out of the other proceeding;

(b) may consider whether the other jurisdiction is a more convenient forum for the matter, and where the interests of the class residents in this province can be adequately represented in the other proceeding by the resident class members opting into that proceeding, stay the application;

(c) may grant the application without reference to the other proceeding; or

(d) make such other disposition as may be desirable.

The Court, relying in part on this rule, held that the defendant was not facing a multiplicity of proceedings respecting the named plaintiffs, and also rejected the alternative request for a temporary stay of proceedings, pending the decision of the Manitoba court on certification.

The *Pardy* decision was followed by the decision of Mr. Justice Kyle of the Court of Queen's Bench of Saskatchewan in *Lamb v. Bayer Inc.*⁴ Mr. Justice Kyle identified the objectives of the defendant as follows:

The defendant seeks a stay for the very good reason that it wishes to avoid the cost of multiple proceedings and because it anticipates that if the Saskatchewan action were to proceed toward certification, it would be abandoned and the expense incurred lost once certification was achieved in Manitoba. Its underlying objective, of course, is that it does not wish to face the need to defend identical actions in a large number of Canadian jurisdictions, a justifiable concern that class actions legislation is intended to address.

The plaintiff asserted that he, a resident of Saskatchewan, had a right to access to his own courts and a right to proceed under the class action legislation regardless of steps taken by other persons in other provinces who may or may not be represented by the same counsel as those whom he

⁴ (2003) SKQB 442, 242 Sask. R. 80

has chosen. Mr. Justice Kyle held that, in the absence of any existing litigation certified as a class action in any other province in which the plaintiffs could have their claims adjudicated, he was not prepared to grant the requested stay. He expressed that his decision did not suggest that such a stay would be available even if the class of claimants in a certified class action in another province were sufficiently broad to include the Saskatchewan claimants.

The *Lamb* decision was considered and followed in *Englund v. Pfizer Canada Inc*⁵, another decision of the Saskatchewan Court of Queen's Bench. In *Englund*, a Defendant sought a stay of the Saskatchewan class action, prior to certification, in favour of a similar class-action brought in Ontario on behalf of a class of Ontario residents and a non-resident subclass. In addition to the factors of convenience, multiplicity of proceedings and fairness, the court also considered the application of the doctrine of *forum non conveniens*.

Again, the Court considered the absence of a certification order in the other province to be significant:

At this juncture, carriage of all claims against BI Canada has not been resolved, and none of the subject Ontario actions have been certified. Therefore, it would be premature to stay the Saskatchewan Action in the hope that Saskatchewan residents might be able to pursue their cause of action elsewhere. A stay order in these circumstances would amount to an abdication of this Court's responsibility to persons within its jurisdiction. That result is not prescribed by the CJPTA or intended by the Legislature. Should an Ontario court certify the Ontario Action with class provisions that protected the interests of claimants contemplated in the Saskatchewan Action, or vice versa, serious consideration then could be given regarding which action should be stayed, or whether a transfer of part of either action would be practical.

The Court concluded that the relevant factors concerning *forum non conveniens*, the applicable jurisprudence, and the duty of the Court to ensure that people within its jurisdiction have reasonable access to justice in Saskatchewan concerning claims based on alleged wrongs committed within its boundaries warranted the stay application being dismissed.

⁵ [2006] S.J. No.9

The decision of the court in *Englund* was the subject of criticism in *McCutcheon v. The Cash Store Inc.*⁶, an Ontario decision of Mr. Justice Cullity, although the criticism was directed more broadly to the suggestion in *Englund* that a decision in a national class action in Ontario would not be effective to bind non-Ontario residents:

Neither in *Hocking* nor in *Englund* was any reference made to the reasoning in the decisions in Ontario, and in British Columbia, that have accepted a more expansive approach to jurisdiction. While the courts in Québec and Saskatchewan may limit the jurisdiction of the court to cases where one or more of the material facts that constitute each class member's cause of action against the defendants occurred in Ontario, the more expansive approach accepts as a sufficiently real and substantial connection a commonality of interest between non-resident class members and those who are resident in the forum and whose causes of action have sufficiently real and substantial connections to it to grant jurisdiction over their claims against the defendants.

Until further guidance is provided by an appellate court, I intend to follow the decisions of this Court that applied the wider approach to jurisdiction. I do not believe that to do so would be inconsistent with the decision in *Currie* - the one decision of the Court of Appeal in which jurisdictional issues created by the inclusion of non-residents in a class have been considered.

Based upon the jurisprudence that has resulted from pre-certification motions to stay proceedings, it would appear that a defendant confronted with overlapping class proceedings in more than one province will be faced with an uphill battle, particularly prior to a certification order having been granted in any of the actions, to obtain a stay of less comprehensive proceedings in favour of a more comprehensive proceeding. The reasoning of the courts appears to recognize the policy arguments to support such a stay, but also demonstrates a strong judicial reluctance to cede jurisdiction to the Court of another province, particularly before certification.

Post-Certification Coordination

In cases involving multiple class proceedings, the ability of a defendant to avoid the need to separately defend itself in a number of overlapping class proceedings in which the same common issues have been identified is substantially improved. Because the certification stage represents a

⁶ [2006] O.J. No. 1860

pivotal step in most class proceedings, the stakes may be somewhat diminished after certification. After certification in the opt-out jurisdiction, the risk that a claimant resident in a given province may lose the procedural advantage afforded by certification as a result of the decision of the court of another province is virtually eliminated.

In *Walls v. Bayer Inc.*⁷, Mr. Justice MacInnes granted certification of the action as a class proceeding. In his reasons, he commented on the existence of other overlapping class actions in other provinces, as follows:

...I would be prepared to entertain such a motion [for a stay] at this time should either party wish to apply. There is clearly a tension between the interests of the plaintiffs and of the defendant. But the jurisprudence tells us that two of the advantages of a class proceeding are judicial economy and the avoidance of unnecessary duplication of fact-finding or legal analysis. In my view, this applies to a possible multiplicity of proceedings not simply within a province, but throughout the country.

...What is the judicial economy of having proceedings going forward in two provinces and with the accompanying risk of inconsistent findings? ...While recognizing the interests of the plaintiffs, is it fair that the defendant should have to defend essentially the same action in more than one province?

Regrettably, there is no legislation that would take control of a class proceeding for all of Canada. I am told by counsel that there is often informal accommodation achieved between counsel for the various parties. In my view, that is something that certainly should be done here. A stay of this action for a period of time to permit such attempts to be concluded is something that may be considered by the parties or may be sought by the defendant.

Following an unsuccessful appeal of the certification order, an accommodation was reached by the parties with the result that the class in the Manitoba action was expanded to include subclasses of residents of Saskatchewan and of the Atlantic Provinces, and orders were sought and obtained, on consent, staying in concurrent class actions in Saskatchewan and in Newfoundland and Labrador.

⁷ [2005] M.J. No. 4

Although the result in this case was achieved by agreement, subject to court approval, the factors that militate against concurrent and overlapping class proceedings against the same defendant for the same claims would likely influence the courts in opt-in jurisdictions to stay their proceedings in favour of a more comprehensive action in an opt-out jurisdiction such as Ontario or Manitoba.

Where certification is granted first in the more comprehensive opt-out province, the local procedural rules in some provinces would seem to suggest that a stay motion would be regarded more favourably. For example, as noted above, the procedural rules in Newfoundland and Labrador specifically contemplate the situation where a class proceeding covering all or part of the matters to be dealt with in a class proceeding in that province has been certified in another jurisdiction in Canada. In such circumstances, the Court may consider whether and to what extent to grant the certification application, and may make any disposition that it considers desirable.

Unfortunately, the fact that national coordination of class proceedings is very difficult for a defendant to achieve, certainly before certification, may lead to steps being taken by either party to accelerate or to slow down certification proceedings in one jurisdiction or another, to try to influence where certification is decided first. This is another reason to favour early coordination of multi-jurisdictional class proceedings.

Conclusions

It is clear that it is not in the interests of the administration of justice in Canada for there to be multiple class actions involving the same issues, the same defendant and overlapping classes, all leading to separate common issues trials. The duplicative and wasted expenses for the parties, unnecessary taxing of judicial and administrative resources, the obvious risk of inconsistent judgments, and other policy grounds for the avoidance of a multiplicity of proceedings apply to an equivalent extent to proceedings in more than one province as they do to proceedings within a province. The interests of claimants to access to justice in the court of their province of residence should, respectfully, be subordinated to the overriding interest for the system of justice in Canada to operate fairly and efficiently for all parties.

Nevertheless, as has been written elsewhere, the lack of an effective means of coordination of multiple class proceedings operates to limit the options available to the parties who seek to have

claims litigated in a single (opt-out) jurisdiction which is capable of making final determinations that will bind the defendant as well as class members throughout Canada. The most effective solution to the problems raised by multi-jurisdictional class proceedings remains elusive.

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