MULTIJURISDICTIONAL CLASS ACTIONS

TAKE-AWAYS FROM THE 2021 CLASS ACTION BENCH & BAR FIVE-PART DISCUSSION SERIES ON CHALLENGES ARISING FROM MULTIJURISDICTIONAL CLASS ACTIONS

A. Overview

The Canadian constitution places civil litigation within provincial jurisdiction. The Federal Court only has jurisdiction over subject matters assigned to it by Parliament. Until recently, provincial legislation fostered multiple actions in multiple jurisdictions through measures such as opt-in requirements. The absence of a US-style MDL process in Canada means there is no formal, uniform structure to coordinate multiple and multijurisdictional class actions. Judges and class counsel are left to manage multijurisdictional class proceedings through a variety of means with inconsistent results.

Two developments have emerged in the last few years that offer greater potential for coordination:

1. First, several provinces have amended their class action legislation in ways to respond to multijurisdictional class actions, including:

    a. removing opt-in requirements and converting to "opt-out" regimes,

    b. requiring notice of certification motions be provided to the representative plaintiff of any class or proposed class proceeding raising the same or similar subject matter and including some or all of the same putative class members, and conferring standing to such representative plaintiff; and

    c. expressly requiring a court to consider at certification whether it would be preferable for some or all of the claims of some or all of the class members, or some or all of the common issues raised by those claims, to be resolved in the proceeding commenced in another jurisdiction where a class or proposed class proceeding raises the same or similar subject matter and includes some or all of the same putative class members.

2. Second, the CBA Canadian Judicial Protocol for the Management of Multi-Jurisdictional Class Actions was updated in 2018 to address more than settlements (as had been the focus of the 2011 protocol), including the first case management hearing as well as motions for a stay of proceedings and certification. Although each decision on any motion shall remain that of the individual judge, the protocol (among other things) provides a means for when judges of respective multijurisdictional actions may communicate with one another for the purpose of determining the most efficient process for the consideration of any motion.

Even with these developments, it will rest on the parties and the courts to work together in arriving at practical solutions to multiple class proceedings across multiple jurisdictions.

B. Session 1: Carriage of Multijurisdictional Class Actions

Carriage fights are a reality of the Canadian landscape. Whether carriage motions are wasteful depends on the circumstances and reasons underlying competing actions. If the outcome of a carriage motion is a better case for class members, then there was value to the process despite the time and effort. But not all carriage motions are driven by considerations of what is the best way to pursue recourse for class members and fighting over who represents class members simply works to delay having class members' claims addressed.

For a defendant, duplicative litigation provides a level of uncertainty in terms of not knowing which claim will ultimately go forward and requires that additional resources be devoted to monitoring the multiple claims. Defendants are normally a spectator on a carriage motion and typically do not take a position (a possible exception being where one action provides for better coordination on a national basis). As part of the carriage motion, competing plaintiffs firms may challenge how the other firms framed their case – this can be informative for defendants.

On a carriage motion, the Court of that province can only address the presence of two or more class proceedings brought within that province. It cannot stop a proceeding in another province. Nevertheless, in addressing carriage within the province, the courts do consider the interrelationship of class actions in more than one jurisdiction and seek to avoid any unnecessary, multiplicity of proceedings (e.g., *Winder v Marriott International Inc*, 2019 ONSC 5766 in which a national class over a consortium of regional class actions was preferred).

There do exist several tools to deal with interprovincial rationality:

1. Consortium of plaintiffs' counsel self-managing multiple proceedings across more than one province;

2. Early stay motion (especially, in instances of abuse of process). In *Winder v Marriott International Inc.*, 2020 ONSC 7701), following a carriage motion in Ontario, the defendants brought simultaneous motions in British Columbia, Alberta, Ontario, Quebec and Nova Scotia to determine how many national and regional class actions it should be obliged to defend. A multijurisdictional simultaneous hearing was scheduled to be conducted as a remote virtual hearing that involved the participation of five superior courts in four different time zones. By the time the hearing convened, the parties had settled the matter and Orders were obtained staying all the actions on terms except for the Ontario national class action;

3. At certification as part of the court's preferable procedure analysis;

4. Forge ahead and rely on principles and statutes underlying recognition of judgments and issue estoppel. This option is obviously the least palatable for defendants and may hamper settlement discussions down the road.

C. Session 2: Settlement of Multijurisdictional Class Actions

Where there are multijurisdictional proceedings, there are three general approaches to settlement approval. First, the "road show" approach involves successive settlement approval hearings across

the country obtaining serial orders. The second involves a concurrent, multijurisdictional hearing with judges from the different jurisdictions coordinating making use of the CBA protocol (virtually or in person). The last approach is to focus settlement approval in one or two jurisdictions with the greatest connecting factors and then to rely on recognition of foreign judgments means to enforce those settlements in other jurisdictions as the need may arise.

From a defendant's perspective, clients are looking for assurances of finality and timely resolution and will have views on which approach is to be followed as part of the settlement negotiations. Factors that may impact which approach is followed include whether the various class counsel are cooperating, whether there is one jurisdiction that is truly the "lead" jurisdiction with the clearest connecting factors, and the size of the settlement.

Proceeding to get approval in all jurisdictions comes with costs, delays, and the risk of potentially differing views of later judges requiring the process to start again. One can mitigate the risk of differing views by the initial court approving the settlement issuing robust settlement approval reasons, even where there are no objections, and making use of the CBA protocol to allow for some level of communication amongst the judges.

Parties have taken different, and at times creative, approaches to balance getting finality with concerns about delays, costs, and risk of inconsistent rulings. Focusing on those jurisdictions that have had class proceedings commenced and actively pursued is one approach and/or relying on recognition orders as opposed to settlement approval orders. In the case of recognition orders, the role of the other court is to find if justice was done somewhere else, and whether there is a problem with it. The court is not getting into the details of the settlement; it is largely a process issue -- was there jurisdiction, proper notice, and a proper hearing. Where there is cooperation among class counsel, the opportunity exists for an efficient process to have actions discontinued in favour of an approved settlement.

Although the CBA protocol makes simultaneous settlement approval hearings a possibility, its use is not mandatory and adoption between parties and judges varies. Coordinating simultaneous hearings was a barrier in the past to greater use of this option, but the prevalence of video proceedings over the last couple of years has addressed the technological concerns of the past. However, there remains an adoption issue as some judges have preferred to have settlement hearings proceed in person. Even with the broader adoption of video proceedings, there remain complexities associated with differences between jurisdictions on matters such as setting dates, filing requirements and hearing practices. This adds to the time and effort involved in relying on approval among multiple jurisdictions.

Late filed actions following the announcement of a settlement is an occurrence that parties face and is discussed below. Some approaches taken to mitigate this risk have involved making participation at the settlement approval hearing for non-resident class members easier. For example, where a separate Quebec proceeding has not been commenced and there is concern about a later filing, defendants may request settling class counsel to start an action in Quebec for settlement approval purposes. Alternatively, other steps can be taken to ensure that the settlement hearing notice reaches class members in Quebec (e.g., tailored notices to French-speaking and Quebec based class members in Quebec-based media; coordinating with Quebec class members

who plan on attending the hearing on a convenient method for participation whether by video-conference or some other means, and arranging for translation services if the case management judge is not bilingual).

Rules changes and the practice of giving notice of settlement approval hearings (and the opportunity to participate and voice objections) to counsel who have commenced competing class actions provide a stronger basis to have a settlement Order approved and enforced to stay competing class actions. If the core of an action has been resolved, courts will generally dismiss other cases that pop up after the opt out period. However, in some instances, courts may allow further actions to proceed if it is determined that those issues/ peripheral causes of action were not addressed in the initial settlement.

In terms of settlement distributions, having the various judges agree to one court serving as the "point" for distribution issues makes resolving distribution issues as they arise faster. Understanding that courts may be reluctant to give complete control over to another court, reliance on the CBA protocol to allow for communications between judges can alleviate some of those concerns to allow the judges to determine when more than one court's participation may truly be necessary. Alternatively, the distribution may provide that certain matters must be brought before all courts, but others can be resolved by the "point" court. The courts may have views on which matters they wish to remain involved in.

D. Session 3: Late Arriving Multijurisdictional Class Actions

I. What counts as a late arriving class action?

Although whether an action is "late" rests in the "eye of the beholder", generally, we are referring to actions filed long after the "lead" case has been started. Additionally, late arriving class actions may be cases that were dormant that only spring into action where there has been a positive development for the defendants in the lead case. In this situation, the late arriving action is trying to get a "second kick at the can" in another province.

From a class perspective, late actions are not always a negative development. They can arise where a genuinely different approach is taken in terms of class definition and how the case is pleaded or seek to address a perceived gap or problem in how the "lead" case is proceeding. However, actions that are merely started for the purpose of leveraging a fee with no intention of litigating the action are problematic and have been judicially criticized.

From a defendants' perspective, any instance where there are multiple actions increases the complexity of defending/resolving the litigation.

II. What are the options for responding to a late arriving action?

Plaintiffs have three choices: (1) fight against the additional action; (2) combine forces; or (3) ignore. Each requires careful consideration.

As a plaintiff, work that otherwise could be devoted to moving the case forward to certification or resolution will be diverted to fighting the additional action(s). If one is going to fight, there are different tools, but each is very situational specific:

1. Carriage motions only available where the competing cases are in the same jurisdiction – Ontario court cannot stay a B.C. action

2. Stay motions – legislation now calls for considerations around which actions go forward and how to be considered as part of the certification process. While defendants will have a preference as to which action proceeds, it is unlikely one will see defendants and one group of plaintiffs bringing a joint motion for a stay because of appearances of collusion. Likewise, defendants' participation will raise questions about whether they are motivated to push a case forward in an inappropriate forum or are seeking some other advantage. However, a defendant's preference for a national class and single case is understandable and does not raise the same perception concerns, although participation will still not be through a joint motion.

3. Remains to be seen how far the CBA Protocol will be used to have a joint hearing to address carriage type issues. Defendants in a small number of class actions have sought to have judges in multiple jurisdictions simultaneously hear and consider coordination of the overlapping issues. The boundaries of the protocol will be tested as parties look to use what tools exist given our legislative and constitutional framework. Although video hearings have become more accepted and video technology has improved, there still are issues to consider around joint hearings including:

    - Varying levels of comfort with use of digital platforms for court materials across judges and jurisdictions;

    - Presence in person of some participants and others by video continues to cause pause for some;

    - Joint hearings do not have the same momentum as exists with successive approval settlement orders and the situation can arise that one participant's perspective/question(s) may come to dominate the hearing; and

    - Need for very clear understanding and terms around communications amongst judges.

In looking at whether to combine forces, several considerations come into play:

1. Are the cases, as pleaded, capable of being integrated?

2. Do you know the counsel bringing the other action and are they a firm you can work with?

3. Will making decisions about the progress of the actions become hampered/difficult either because of counsel or representative plaintiffs?

4. Does counsel have a similar approach to fees (multiplier vs. contingency)?

5. Is there a funder?

6. Is the case of a size and complexity to benefit from multiple counsel?

7. Forum – can counsel agree upon the forum to serve as the primary forum to move the claims forward?

Rather than the distraction and expense of fighting, and where considerations may not favour combining forces, a plaintiff may choose to leave it to the defendants to worry about there being multiple actions, with overlapping claims, and instead focus on forging ahead with one's own case. Courts will consider what is fair and appropriate. If parties have moved a case forward and engaged the case management judge in the matter, a late case is going to be viewed differently than a case that has been stagnant and inactive.

From a defendant's perspective, one might be prepared to wait as there is often no activity on "late" cases and the more the lead case moves forward before any activity happens on the late cases the better positioned one may be to stay those other actions. Defendants also expect that plaintiffs' counsel will eventually attempt to coordinate with counsel for dormant cases in the context of settlement negotiations in order to deliver a national deal. Plaintiffs' counsel may or may not be willing to do so – as the counsel in the late arriving action will invariably be seeking a share of any fee award.

However, where a late case comes after the announcement of a settlement, both plaintiff and defendant are going to actively respond to ensure the late case does not interfere with the settlement. In the settlement context, parties can look to whether the proposed representative plaintiff in the late action has not opted out of the case and is therefore bound by the settlement. Where a proposed representative plaintiff has failed to opt out, it engages issues around enforceability of orders for persons resident outside a province (e.g., did the Ontario court have proper jurisdiction to bind an Alberta resident to an Ontario process) and potential for continuing litigation. Fortunately, the economics often do not make it worthwhile to litigate in most cases.

Attempts to arrive at a financial arrangement with the counsel for late filing actions following the announcement of a settlement have received judicial attention, with the Ontario Court of Appeal upholding a decision preventing payment of counsel of a late filed action (see *Bancroft-Snell v Visa Canada Corporation*, 2016 ONCA 896).[1] Will courts take a more receptive view where the

[1] Multiple actions were filed across Canada by Branch MacMaster LLP; Camp Fiorante Matthews Mogerman LLP; and Consumer Law Group (the "consortium") relating to credit card fees. After settlements were achieved in parallel, U.S. litigation, Merchant Law Group commenced actions in Alberta and British Columbia. The consortium commenced actions in those jurisdictions to cause a carriage dispute. At the suggestion of Associate Chief Justice Rooke, who was case managing the Alberta proceedings, the consortium and the Merchant Law Group attended a Judicial Dispute Resolution Conference, presided over by a justice of the Alberta Court of Queen's Bench. As a result of that process, the carriage dispute was resolved by way of a fee sharing agreement. The fee sharing agreement provided that the Merchant Law Group would stay its rival class actions in Alberta and Saskatchewan in exchange for receiving up to $800,000 out of the fees recovered by the consortium, plus disbursements. As a result, the consortium obtained carriage of the credit card class actions on a national basis.

financial arrangement comes out of what would otherwise be paid for counsel fees? It is difficult to predict, but there would certainly need to be complete transparency with the court when seeking fee approval.

III. Are there proactive measures to mitigate against late arriving actions?

Pushing ahead with the action will assist in guarding against late filings, but will not stop them – especially the most problematic examples which have arisen following the announcements of settlements.

Another option is starting actions in more than one jurisdiction as part of the strategy of "protective filings". However, there are costs associated with doing so (especially where there are multiple, global defendants needing to be served) and this lays those actions open to "abuse" arguments where there is no intention to actively litigate those actions.

E. Session Four: Contested Certification in Multijurisdictional Class Actions

I. The challenges presented by certification motions in multiple jurisdictions

The test for certification in Ontario and Western provinces expressly requires the court to consider the existence of overlapping class actions in other jurisdictions. This supports courts having greater latitude to grant stays within certification decisions.

However, Quebec courts will be particularly focused on protecting the rights and interests of the class members of Quebec. The Quebec Court of Appeal decision in *Hazan c Micron Technology Inc.* 2020 QCCA 1104 illustrates this point. The defendants in *Hazan* brought a motion to stay the Quebec proceeding on the basis that there was a proceeding before the Federal Court that was more appropriate for a national class. The Court of Appeal declined to stay the Quebec proceeding. However, at the time of the motion, the certification motion in the Federal Court had not yet been certified (or even scheduled) and it remained unknown whether Quebec residents would be included in any class certified by the Federal Court. Generally, a court will not stay a certification motion in Quebec if no certification decision exists in another province.

Parallel certification motions appeared to work well in the *Lithium Ion Batteries* series of cases, and demonstrated how cooperation and coordination between counsel and courts ultimately helped to further the litigation. Initially, the Ontario action was certified on behalf of a national class that excluded umbrella purchasers (purchasers of the price-fixed product from a non-defendant).[2] While certification of the Ontario action (and failure to certify umbrella damages) was being appealed, the Quebec action was certified on behalf of a class that included umbrella purchasers and leave to appeal was denied.[3] Ultimately, the Ontario action was certified on behalf of a class

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The motions judge reduced the consortium's fees by 10% and ordered that no payments be made to the Merchant Law Group out of the fees approved or the settlement funds. These findings were upheld on appeal. However, the Court of Appeal held that the motion judge erred in ordering that the fee sharing agreement was otherwise unenforceable as between consortium and the Merchant Law Group and in prohibiting consortium from making any payments pursuant to it from any other source whatsoever, without giving notice to the Merchant Law Group that he was considering doing so and without giving them the opportunity to make submissions on the issue.

[2] *Shah v LG Chem, Ltd.*, 2015 ONSC 6148

[3] *Option Consommateurs c LG Chem Ltd.*, 2017 QCCS 3569, leave to appeal denied 2017 QCCA 1442.

that included umbrella purchasers and the Ontario class was amended to carve out Quebec class members.[4] At the time of resolution against the final group of defendants, the parties were in discussions on how to coordinate discovery in the Ontario and Quebec actions.

Also, the *Lithium Ion Batteries* case provides an example where a late arriving action was beneficial. In that case, the originally filed Quebec action was not being actively pursued. Belleau Lapointe brought a competing action and was awarded carriage. (*Cohen v LG Chem Ltd.*, 2015 QCCS 6463).

II. Is CBA Protocol for Class Actions (2018) helping to streamline the certification process for multijurisdictional class actions?

Besides cooperation afforded by the CBA Protocol, the protocol can be used to facilitate the use of simultaneous certification hearings where evidence and submissions are presented together, and independent decisions are rendered by the respective courts.

There remain mixed views on the topic among members of the judiciary. Issues of judicial independence and rights to a hearing are considerations judges must consider when coordinating and communicating about parallel proceedings and considering simultaneous hearings. At the same time, experiences to date by some judges making use of the protocol has been positive and certain judges believe it is possible to use the protocol to collaborate with other judges while maintaining independence of the judiciary in various jurisdictions.

The chance of differing decisions is always a possibility when having simultaneous hearings, but that possibility has not yet materialized – and such chance would still exist (or would perhaps be even more likely) if hearings are not coordinated. As well, there are also inefficiencies and complexities associated with coordinating a simultaneous hearing and meeting the procedural and filing requirements of different jurisdictions. The more aggressive use and granting of stays to streamline actions offers an alternative means to streamline multijurisdictional class actions and the certification process. The certification tests in Ontario and Western provinces expressly require courts to consider the existence of overlapping class actions in other jurisdictions, supporting the argument that courts have more latitude to grant stays.

As a final note, as one panelist commented, it is ironic that certification motions were designed to avoid a multiplicity of proceedings but have led to a multiplicity of proceedings.

F. Session Five: Case Management of Multijurisdictional Class Actions

I. Differing Case Management Approaches

Case management approaches can vary between provinces. For example, Quebec case management judges will adopt a more hands-on approach on the scheduling of authorization motions and working backwards with a timetable. Ontario case management judges tend to take a less formal and more conversational approach to addressing issues at the case management stage. By contrast, B.C. case management judges expect a level of formality at the case management

[4] *Shah v LG Chem Ltd.*, 2018 ONCA 819

stage with counsel making submissions on issues. Any attempt at a joint case conference with different courts should consider these differences.

II. Deciding in which jurisdiction the action will proceed

In most cases, defendants will prefer to defend only one case. The exception to this view is in circumstances where the law is divergent in different jurisdictions, and it would be difficult to defend the action in one jurisdiction. Class counsel are also aware of the risks posed from proceedings in multiple jurisdictions if the actions are not coordinated. *Winder v Marriott International Inc.*, 2020 ONSC 7701 shows the potential for simultaneous hearings heard remotely to address which proceedings should be permitted to proceed.

III. Coordination of Discovery

Differing discovery rules (such as scope of documentary production) can complicate efforts to coordinate discoveries across multijurisdictional actions. However, it is possible that the parties may agree to some form of coordination. For example, the parties may agree on a single set of documentary production and/or coordinated examinations for discovery.

IV. Organizing a Common Issues Trial

If in managing multijurisdictional actions, the approach taken is to have one common issue trial in one jurisdiction, and having that judgment enforced in other jurisdictions as needed, the court hearing the proceeding must have jurisdiction simpliciter.

In *Endean v British Columbia*, 2016 SCC 42, the Supreme Court of Canada held that a judge has the discretion to hold a hearing outside his or her territory in conjunction with other judges managing related class actions, provided that the judge will not have to resort to the court's coercive powers in order to convene or conduct the hearing and the hearing is not contrary to the law of the place in which it will be held. The Supreme Court's decision, however, was made in the context of a motion to approve a protocol for a pan-national settlement.

There is precedent for simultaneous trials among courts in different jurisdictions in *Companies' Creditors Arrangement Act* proceedings (e.g., Nortel).

G. Concluding Observations

A number of common themes have emerged from the five roundtable discussions. These include:

- Legislative changes have mandated a greater degree of notice to be given to plaintiffs' counsel in similar actions in other provinces. Significantly, plaintiffs' counsel from out of province now have standing to make submissions. This approach will allow for greater opportunity for coordination in multijurisdictional class actions.

- The updates to the CBA Protocol for the Management of Multijurisdictional Class Actions have increased opportunities to coordinate simultaneous hearings, beyond settlement hearings. The extent to which the CBA Protocol will be used and embraced by different courts remains to be seen, but there are signs that parties are adopting it (e.g. *Winder*).

- Especially in the last two years, the explosion of videoconferencing has greatly reduced technological barriers to coordinating hearings across jurisdictions. This promotes efficient use of court resources and facilitates greater certainty for participating parties. However, there are still many challenges remaining in conducting simultaneous hearings.

- Both bench and bar members agreed that collaborative effort between all counsel and the courts is necessary to find a way to achieve efficiencies, minimize unnecessary proceedings, and reduce costs when managing multijurisdictional class actions. Moreover, there is a greater acceptance of amongst counsel and judges that more communication amongst judges on procedural matters is better to efficiently manage multijurisdictional class actions.