Ontario Court of Appeal Confirms that Class Members Lack Standing to Appeal Settlement Approval Decisions

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In its recent decision in *Bancroft-Snell v. Visa Canada Corporation*, the Court of Appeal for Ontario confirmed that individual class members in a certified class proceeding lack standing to appeal a decision of the Superior Court approving a settlement in the proceeding.

The issue arose in the context of a longstanding class action alleging anticompetitive conduct by credit card networks and credit card issuing banks. After Visa, Mastercard, and one of the defendant banks entered settlements with the class members, Wal-Mart and Home Depot — large merchants who are class members but not representative plaintiffs — objected to settlements when they came before Perell J. for approval. The settlements were approved over the merchants' objections. Wal-Mart and Home Depot sought to appeal the approval order. The plaintiffs, Visa, Mastercard, and certain defendant banks moved to quash the appeal on the ground that the merchants, as class members, lacked standing to appeal. A five-judge panel of the Court of Appeal agreed with the moving parties and quashed the appeal.

Writing for a unanimous five-judge Court of Appeal panel, Chief Justice Strathy rejected the merchants' request to revisit a line of jurisprudence holding that class members' rights of appeal are limited to those found in the *Class Proceedings Act, 1992* ("*CPA*") and are not supplemented by the general rights of appeal found in the *Courts of Justice Act* ("*CJA*").

The court's starting point was the principle, established by the Supreme Court of Canada in *Carey v. Ontario* and *R. v. Meltzer*, that "appeal rights are statutory". Canvassing the relevant statutory provisions , the court summarized the available rights of appeal in the following terms:

- Section 30 of the *CPA* divides the routes of appeal in class proceedings between the Court of Appeal and the Divisional Court in relation to matters expressly identified in the statute. The rights of appeal stipulated by s. 30 of the *CPA* *belong to the parties*, and are available as of right or with leave, as set out in the statute.

- Where s. 30 of the *CPA* does not specifically provide a route of appeal, s. 6(1)(b) of the *CJA* determines whether an appeal lies to the Court of Appeal or the Divisional Court. Appeals to the Court of Appeal from final orders on matters not specifically referred to in s. 30 of the *CPA* are available *to parties*.
- Class members who are not representative plaintiffs do not have a direct right of appeal under s. 30 the *CPA*. They have only a limited right to seek leave to appeal under s. 30(5) of the *CPA*, if the representative plaintiff fails to bring, or abandons, an appeal of a judgment on common issues or a determination of aggregate damages provided by ss. 30(3)-(4) of the *CPA*.

The court went on to reject the merchants' argument that a settlement approval order was either a judgment on common issues or a determination of aggregate damages that could engage a class member's limited right to seek leave to appeal under s. 30(5) of the *CPA*.

The court also rejected the merchants' argument that access to justice and the protection of class members render it unreasonable to deny class members a right to appeal — particularly as most class actions are resolved through settlement. The court referred instead to policy reasons that support limiting the right of appeal to representative plaintiffs, including avoiding uncertainty in the negotiation and approval of settlements (which could pose an impediment to settlement), and avoiding abuses experienced in the United States, where class members are permitted to appeal.

Conclusion

Settled law in Canada recognizes that "appeals are creatures of statute". *Bancroft-Snell* supplies yet another example that this principle is as applicable to class actions as it is in any other context. The Divisional Court has reached the same conclusion in *LBP Holdings Ltd. v. Hycroft Gold Corp. et al.*, and on a motion to set aside that decision.

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