Less is Not Always More: The Court of Appeal Addresses a Consortium Carriage Fight

July 19, 2016

The Ontario Court of Appeal in Mancinelli v. Barrick Gold Corp. reaffirmed the application of the established multi-factor test, and declined to allow an appeal from lower court decisions with respect to a carriage dispute.

The Ontario courts have developed a body of caselaw to address the problem that arises where multiple law firms seek to advance what is essentially the same class proceeding. The resultant "carriage dispute" confirms the simple axiom that two or more certified class actions cannot exist in the same jurisdiction purporting to represent the same class in relation to the same claim.

On July 18, 2016, the Ontario Court of Appeal in *Mancinelli v. Barrick Gold Corp*.[1] reaffirmed the application of the established multi-factor test, and declined to allow an appeal from lower court decisions with respect to a carriage dispute. While placing some emphasis on the question of class counsel fee arrangements, the Court ultimately deferred to the discretionary decision of the motion judge in his evaluation of the claims being advanced by the class counsel, and their respective degrees of preparation.

Background

The underlying proposed class actions pertain to alleged inadequate disclosures by Barrick Gold pertaining to its mining activities in Chile. Chilean authorities closed the mine over environmental concerns, and Barrick's share price plunged. The two consortiums of class counsel (referred to as the "Rochon Group" and "Koskie Group") brought similar proposed class actions on behalf of shareholders, albeit on the basis of pleadings that differed, since the Rochon Group relied on broader allegations. If certified, the proceeding would be one of the largest securities class actions in Canada, seeking damages in the billions of dollars.

On the hearing of the consortiums' respective stay motions at first instance, the motion judge posed the live issue as to which of the competing actions would be more likely to advance the interests of the class. In favouring the Rochon Group, the judge noted that the Rochon claim was broader and also addressed possible limitations defences. The broader pleading also reflected a superior degree of preparation.

Leave to the Divisional Court was granted on the basis of potentially conflicting jurisprudence. The Divisional Court ultimately agreed that the motions judge had properly applied the relevant caselaw, and did not fall into any reversible error in the exercise of his discretion.

On appeal to the Court of Appeal, the appellants argued that the motion judge had erred in several ways, namely by concluding that a broader claim was necessarily advantageous, and in turn assuming that the Rochon Group were better prepared and resourced. Interestingly, the Koskie Group also raised the fact that the motion judge failed to take into account the disciplinary issues surrounding the Merchant Law Group ("MLG"), one of the members of the Rochon Group.

The Appeal Decision

Chief Justice Strathy, writing for the Court, rejected the grounds for appeal advanced by the Koskie Group. The factors to be addressed are non-exhaustive.[2] However the Court noted a particular factor, namely the proposed fee arrangement between class counsel and the proposed representative plaintiff. Reflecting recent jurisprudence on this question, this issue was characterized as one that vitally affects the interests of the class.[3] Strathy C.J.O. reiterated that the factors are to be addressed cumulatively, and with an eye to the policy objectives of the class proceedings legislation.

Both consortiums possessed a standard 30 per cent contingency fee arrangement with the class. Where appropriate, it is also open to the court to require counsel to adduce evidence as to the allocation of responsibilities and fees *within* a consortium (i.e. between the constituent firms). Yet there was no basis to hold that the motion judge erred in the exercise of his discretion in declining to insist on such disclosure. In addition, while the Court cautioned that it may exclude counsel due to prior misconduct, such as "commencing class actions, not pursuing them, and then using them to demand ransom from other counsel in carriage disputes," it could not be said that the motion judge was unaware of the issue, or that he erred in awarding carriage despite MLG's participation in the Rochon Group. The Court has left open the possibility of prior disciplinary problems of consortium members, and arrangements within a consortium, constituting valid issues to be addressed on a carriage motion.

With respect to the criticism that the motion judge erred in favouring a comprehensive, but possibly more complex or allegedly unworkable action, the Court maintained that a merits analysis of competing pleadings should not be entertained on a carriage motion. While a court may compare the breadth of the competing pleadings, it should not ask whether one claim or the other will succeed. The ultimate question is whether the proposed strategy is reasonable and defensible. On the facts of the case, the further claims possessed a strong rationale and were genuinely viable. It remains to be seen if these dicta from the Court will discourage narrower, but perhaps more focused, pleadings.

Second, Strathy C.J.O. found no error in the lower court's finding that the Rochon pleading demonstrated a more informed and sophisticated understanding of the legal issues. Among other things, Rochon had retained local environmental counsel and travelled to Chile extensively to interview witnesses and experts. In short, Rochon had conducted a superior investigation and analysis.

Third, while the appellant had third party funding in place, the Rochon Group litigation plan had stated that on obtaining carriage a funding arrangement would be secured. The Court agreed that this distinction was not a significant differentiating factor. Similarly, no error arose from the motion judge's decision to effectively treat both consortiums as equal in terms of experience.

Lastly, and of some interest to future class action defendants, Strathy C.J.O. endorsed an arrangement whereby the competing plaintiff consortiums had provided an undertaking to the defendant, embodied in a court order, to prevent the continuation or commencement of multiple parallel actions following the resolution of the carriage dispute.

[1] *Mancinelli v. Barrick Gold Corp*., 2016 ONCA 571

[2] Cumming J. in *Vitapharm Canada Ltd. v. F Hoffman-Laroche Ltd*., [2000] O.J. No. 4594 (S.C.J.) noted the following factors to aid in determining a carriage motion: the nature/scope of the causes of action advanced, the respective theories advanced to support the claims, the state of each action, the number and extent of involvement of the proposed representative plaintiffs, the relative priority of commencing the class actions, and the resources and experience of counsel. In *Sharma v. Timminco Inc.* (2009), 99 O.R. (3d) 260 a further factor, the presence of any conflicts of interest, was identified.

[3] The issue of which fee arrangement was most "competitive" from the perspective of the class was raised on the motion. The Court declined to decide whether a "negative auction" through discounted fees would be advantageous from a policy perspective, while expressing some concerns about such an approach.

By

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