Jurisdictional jenga: Understanding the challenges of multi-jurisdictional proceedings

October 06, 2023

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Ontario recently amended its class proceedings legislation to include multi-jurisdictional provisions that are like provisions that already exist in British Columbia, Alberta and Saskatchewan.[1] Few courts have considered these provisions, but the decisions that are available provide insight into the circumstances when a court may, or may not, certify (or stay) a multi-jurisdictional class proceeding before it, and the timing for hearing such an application. To date, this analysis has turned on the relative stage of proceedings and the plan for prosecution of the proceedings, but the courts have been clear that all circumstances should be considered when determining in which jurisdiction some or all the common issues ought to be resolved.

The legislative framework

The multi-jurisdictional provisions require the court, as part of the preferability requirement for certification, to determine whether a multi-jurisdictional proceeding with a similar subject matter has been commenced elsewhere in Canada, and if so, whether some or all of the common issues should be resolved in the proceeding commenced elsewhere. In making that determination, the Court must:

a. be guided by the following objectives:
    i. to ensure that the interests of all parties in each of the relevant jurisdictions are given due consideration;
    ii. to ensure that the ends of justice are served;
    iii. to avoid irreconcilable judgments, if possible;
    iv. to promote judicial economy, and
b. consider relevant factors, including the following:
    i. the alleged basis of liability, including the applicable laws;
    ii. the stage that each of the proceedings has reached;
    iii. the plan for the proposed multi-jurisdictional class proceeding, including the viability of the plan and the capacity and resources for advancing the proceeding on behalf of the proposed class;

iv. the location of class members and representative plaintiffs in each of the proceedings, including the ability of representative plaintiffs to participate in the proceedings and to represent the interests of class members;
v. the location of evidence and witnesses.

Courts are required to consider each of these factors. What weight, if any, is given to these considerations, or to other relevant factors, is for the judge who hears the application to decide.

The British Columbia approach

The B.C. Court of Appeal was recently called upon to determine whether a B.C.-filed action should be certified as a national "opt out" multi-jurisdictional proceeding even though settlements had been reached in other competing actions filed in other jurisdictions (but had not yet received court approval).

In *N&C Transportation Ltd. v Navistar International Corporation*, 2022 BCCA 164, aff'ing, 2021 BCSC 2046 (N&C), the court was faced with six competing actions (and competing consortiums), two of which (the Québec and Alberta actions) had been settled with the defendants subject to court approval. The BC proceeding had previously been certified as a national "opt-in" class action and the application before the court was to certify it as a national "opt-out" multi-jurisdictional class proceeding, that is, class members located outside the Province would be included automatically in the class unless they took active individual steps to opt-out. In reviewing the status of the other similar proceedings, the court noted that the Québec action had been authorized, notices of the proposed settlement had been circulated, and a hearing had been set to consider the proposed settlement. In the Alberta action, while a settlement had also been reached subject to court approval, the representative plaintiff needed to be replaced and there was no scheduled application to appoint one, the action had not been certified, and there was no certification application pending (even if for the purposes of settlement).

Based on these considerations, the court held that the advanced state of the Québec action weighed in favour of carving out Québec residents from the B.C. action, but that the Alberta action was not more advanced than the B.C. action and there was no factor that militated towards the B.C. action being stayed in favour of proceeding in Alberta. On the whole of the analysis, the court determined that the considerable factual overlay between the actions favoured the certification of the BC action as a national "opt-out" multi-jurisdictional class proceeding, except with respect to Québec residents who were expressly excluded. The result was affirmed on appeal.

In support of the lower court's decision, the Court of Appeal noted that the legislation provides that a court can later amend a certification order, on the application of a party or a class member. This procedural option would allow either Québec residents to be added back in (in the event the settlement was not approved) or to exclude additional persons from the certification order (if, for example, a settlement was negotiated and approved in Alberta). The existence of these provisions meant that the amendment application did not need to be adjourned in order to wait for the outcome of the Québec settlement approval motion and a similar approval application in Alberta (if one was to be brought).

A comparative exercise

The courts in Alberta and Saskatchewan, where class action legislation contains similar multi-jurisdictional provisions and considerations similar to those in the B.C. legislation, have analyzed multi-jurisdictional issues along the lines of the B.C. approach. Each case will, of course, turn on its own facts and the record before the court.

In *Kohler v Apotex Inc*, 2015 ABQB 610, the comparative exercise between Alberta and Ontario actions resulted in the court finding that most of the factors were "neutral" (neither favouring one proceeding or the other), but that, on the record before the court, the stage of proceedings was determinative. The Alberta action had reached the point of a certification hearing, while the only step taken towards certification in the Ontario action was a meeting to discuss the schedule for a potential certification application (and it was not known whether the meeting had actually occurred).

In both *Ammazzini v Anglo American PLC,* 2016 SKQB 53 aff'd 2016 SKCA 164 (*Ammazzini*) and *Ravvin v Canada Bread Company, Limited*, 2019 ABQB 686 aff'd 2020 ABCA 424 (*Ravvin*), the proceeding before the court was stayed in favour of the multi-jurisdictional proceeding in Ontario that in both cases was determined to be further ahead in its stage (despite certification materials having been delivered in the prairie provinces).

In *Ammazzini*, the court concluded that the B.C.-Ontario consortium had been doing the "heavy lifting" in the case, and that the Saskatchewan action was duplicative in the context. The fact that Saskatchewan had reached a certification hearing faster did not mean the stage of the action was necessarily more advanced. The court held that both the stage of the actions reached and the plan for the proposed actions favoured proceeding in Ontario. The court conditionally stayed the Saskatchewan action subject to the certification of the Ontario action, failing which, the stay could be lifted.

In *Ravvin*, again, the Ontario proceeding was determined to be further ahead, where the matter was proceeding along a schedule to a certification hearing, while in Alberta, although one of the plaintiff firms had delivered certification materials, a carriage dispute between two plaintiff firms remained outstanding. The court could not identify any factor as weighing in favour of a separate, duplicative Alberta action.

Timing: Use of multi-jurisdictional provisions to stay proceedings in the "context of certification"

While the multi-jurisdictional provisions are part of the certification test, the court has the discretion to hear argument on that aspect of the certification test in advance of the other factors for certification. A hearing in advance of the other certification will be appropriate where the case management judge has a sufficient understanding of the nature and particulars of the proposed class proceeding and is not considering the relevant issues in an evidentiary vacuum.

The Courts of Appeal in both *Ammazzini* and in *Ravvin* approved the sequencing of hearing of and deciding the stay applications, which had been brought in response to the certification materials, in advance of the certification hearing.

Key takeaway

The recent cases demonstrate:

- The proceeding where the certification record is delivered first will not necessarily be perceived as the most advanced proceeding in the comparative analysis.
- Stay applications relying only upon the multi-jurisdictional provisions to avoid duplicative actions in multiple jurisdictions may have to wait until the delivery of the plaintiff's materials in support of certification.
- A settlement may assist in the comparative analysis under the multi-jurisdictional provisions, resulting in the carving out of the settlement class from a national class, so long as sufficient and timely steps towards settlement approval are taken.

For defendants facing uncoordinated claims in multiple jurisdictions, the cases discussed above underscore the risk that defendants still face in having to defend multiple proceedings at the same time. These problems are compounded by few tools to efficiently reduce overlap or duplication between competing claims early in the proceedings, despite settlements in some locations.

If you need help navigating multi-jurisdictional proceedings, please reach out to any of the key contacts below.

[1] Ontario *Class Proceedings Act, 1992*, s. 5(6), 5(7); BC *Class Proceedings Act*, ss. 4(3), 4(4), and 4.1; Alberta *Class Proceedings Act*, ss. 5(6) to (8) and 9.1; Saskatchewan *Class Actions Act*, ss. 6(2), 6(3), and 6.1.

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