BC Court of Appeal: Certification applications need not come first in class proceedings

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In *British Columbia v. The Jean Coutu Group (PJC) Inc*, the British Columbia Court of Appeal weighed in on the issue of sequencing in class actions for the first time, rejecting the idea that there is a "presumption" or "general rule" that the certification application should be the first procedural matter heard and determined in an intended class action. The BC Court of Appeal decision in Jean Coutu reverses a clear trend that has developed in the British Columbia trial court.

The Court of Appeal expressly stated that earlier lower court decisions that referred to any such "presumption" were "wrongly decided and should not be followed." Each pre-certification application must be decided on its own individual merits, the Court said, and each application must be determined in the context of the particular case before the court.

The appeal in *Jean Coutu* concerned a sequencing decision by a case management judge in a putative class proceeding. The plaintiff, the province of British Columbia, started the action on its behalf, as well as that of all federal, provincial and territorial governments and agencies. The province wants to recover opioid-related healthcare costs from 48 defendants who were involved in the manufacturing, marketing, distribution or sale of opioid drugs and products in Canada.

The Supreme Court of British Columbia's case management judge ordered that all preliminary applications, including objections to the Court's jurisdiction; constitutional challenges; motions to strike and for summary judgment; were to be heard "in conjunction with" the certification hearing.

The case management judge concluded that the non-exhaustive list of factors set out in *Shavers v. Mallinckrodt Canada ULC* weighed in favour of dealing with the jurisdictional and certification arguments concurrently. In support of this, he considered that:

a) Jurisdictional applications would not dispose of the entire proceeding;

b) There was a likelihood of delay and increased costs associated with interlocutory appeals; and

c) The outcome would be unlikely to promote settlement.

On appeal, two of the defendants, Pro Doc Limitée (Pro Doc) and The Jean Coutu Group (PJC) Inc. (Jean Coutu) sought to set aside the sequencing order because it required their applications challenging the court's jurisdiction to proceed at the same time as the certification application. The appellants argued that the BC Supreme Court lacks territorial competence over the dispute, and that the case management judge erred by not letting them bring their jurisdiction applications to determine that threshold issue prior to the certification application.

The Court of Appeal set aside the sequencing order to the extent that it required the jurisdiction challenge to be heard alongside the certification application, despite the high degree of deference ordinarily accorded to orders by a case management judge. The Court also ordered the jurisdictional challenge be heard quickly in advance of certification.

In doing so, the BC Court of Appeal rejected the idea that there is a presumption that certification is the first procedural application to be heard in a class proceeding, and confirmed that previous decisions relying on this presumption were wrongly decided and should not be followed.

The Court of Appeal went on to consider the Shaver factors, clarifying that case management judges need not consider every factor in each sequencing application, as some factors may not be relevant to the circumstances of the case. Butler J.A. concluded that the case management judge gave inordinate weight to neutral factors and failed to give adequate weight to the magnitude and complexity of the proceeding – which involves 48 defendants, complex issues and high stakes.

The Court of Appeal also weighed in on the real prejudice a defendant can suffer when required to remain in lengthy and complex litigation without the opportunity to challenge jurisdiction at an early stage, which would be contrary to the interests of judicial economy and the fair and efficient determination of the proceeding. In light of the potential for real prejudice to the appellants, the Court of Appeal allowed that foundational question to be determined at the start.

The Court of Appeal also commented on the interplay of issues between the jurisdictional and certification application, finding that the question to be considered is not whether there is interplay between issues, but how best to use judicial resources such that those issues can be resolved promptly.

The court's ability to consider issues of territorial competence would not be affected by hearing that application in advance of the certification application. In fact, resolving jurisdiction pre-certification could actually assist with the efficient resolution of complex issues.

The impact of the Court of Appeal's decision in this case is still unknown. That being said, sequencing applications are likely to become increasingly more common in proposed class proceedings, with courts in British Columbia being more willing to hear pre-certification applications in complex proceedings.

Reach out to any of the key contacts below if you have further questions about the BC Court of Appeal decision.

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