Ending a Class Action – Recent Guidance on Consent Discontinuances in Gradja v. Barrick Gold Corp

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In a recent decision, *Gradja v. Barrick Gold Corp*, the Ontario Superior Court of Justice had an opportunity to consider the principles to be applied when asking for dismissal of a proposed class action on consent.

The plaintiff, Mr. Gradja, had commenced a proposed class action against Barrick Gold Corporation (Barrick) claiming damages for alleged misrepresentations relating to Barrick's business operations and an environmental accident that affected the business's finances. The claim for misrepresentation was advanced pursuant to common law principles and pursuant to a statutory provision in the Ontario *Securities Act*. To support the claim, counsel for Mr. Gradja retained local legal counsel in Argentina to assist in obtaining the relevant documents. Unfortunately, local Argentinian counsel were unable to retrieve all of the documents and class counsel formed the view that the remaining documents were unlikely to be recovered. For this reason, Mr. Gradja instructed his counsel to try to dismiss the proposed class action on a without-costs basis.

Following negotiations, the parties agreed that Barrick would consent to the without-costs dismissal of the proposed class action in exchange for a full and final release of Mr. Gradja's claims against Barrick. As the action had yet to be certified, the release did not bind any of the putative class members.

In considering the parties' request for dismissal, Perrel J. noted that section 29 of the *Class Proceedings Act, 1992* required court approval for the discontinuance, abandonment or settlement of a class action. In this case, Perell J. was of the view that the relief sought was equivalent to an "abandonment or discontinuance" and required that the court be satisfied that the putative class members would not be prejudiced.

In reviewing the applicable test, Perell J. noted that motions for discontinuance and/or abandonment would be "carefully scrutinized" and that the court should consider: (1) whether the proceeding was commenced for an improper purpose,(2) whether there would be a viable replacement plaintiff so that putative class members were not prejudiced, and (3) whether the defendant would be prejudiced. The court further noted that the requirement that a court approval of a discontinuance would satisfy policy

objectives, including the deterrence of meritless class proceedings and ensuing that any adverse effect of a discontinuance could be ameliorated. Further policy reasons and a lengthier discussion of the purpose of section 29 of the *CPA* may be found in an earlier decision of Perell J. – *Naylor v. Coloplast Canada Corporation*.

In *Barrick*, Perell J. noted that section 29 of the *CPA* requires a court, in approving a discontinuance, to consider whether notice of discontinuance ought to be given to putative class members. In this case, Perell J. was of the view that notice should be provided. The approved notice advised putative class members that the action was discontinued, that a discontinuance meant that the action would not be continuing, that the applicable limitation period would begin to run again and that legal advice should be sought.

Takeaway

This case assists in laying out a roadmap for counsel who wish to pursue a consent discontinuance or abandonment of a proposed class action. Although civil actions outside of the class actions sphere have additional tools to deal with claims that are not diligently prosecuted (for example, in Ontario an action may be administratively dismissed for delay if not set down for trial within five years), such tools do not exist for proposed or certified class actions.

Counsel who wish to consider a discontinuance or abandonment of a proposed or certified class action will be required to consider what (if any) notice will have to be given to the putative class and what steps may be required to mitigate any potential adverse effects of such an abandonment or discontinuance. Counsel should be prepared for the court to take a hard look at motion materials submitted for the purposes of seeking a discontinuance.

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