FCA Clarifies Law on How Consolidated Actions and Judicial Reviews May Proceed as a Class Action

January 24, 2020

In *Brake v. Canada (Attorney General)* the Federal Court of Appeal simplified how litigants may concurrently pursue applications for judicial review and actions before the Federal Courts,an area previously "fraught with unnecessary procedural complexity and uncertainty." Historically, litigants had to bring actions for damages in the courts of law and proceedings for judicial review in the courts of equity. Because damages are not available in judicial review, applications and certain administrative remedies are not available in actions for damages. Litigants who believed they were wronged by an administrative delegate and wanted to pursue both damages and administrative law remedies faced a problem: did they need to commence two separate proceedings? In addition, what would happen if they wanted to "convert" their action into a class proceeding?

Background

Gerald Brake faced this dilemma. In 2008, Canada and the Federation of Newfoundland Indians signed an agreement acknowledging that the Qalipu Mi'kmaq First Nation Band and its members qualified as "Indians" under the *Indian Act*. Among other things, the agreement set the criteria for membership in the Band. Following the agreement, "an unexpectedly high number" of individuals applied for and satisfied the requirements for membership. This motivated Canada and the Federation of Newfoundland Indians to implement a supplemental agreement in 2013, which rendered the membership requirements more onerous. As a result of the changes, applications for Band membership made by Mr. Brake and many others were unsuccessful. In light of this, Mr. Brake filed an application for judicial review before the Federal Court of all applications that the Federation had rejected, based upon the modified membership criteria.

Shortly thereafter Mr. Brake brought a motion to "convert" his application into an action, since he wanted compensation for the damages he incurred because the Federation had denied his application, in addition to the administrative law remedies. He also brought a motion to certify his proposed action as a class proceeding.

The Federal Court denied both motions. The Court declined to certify the class proceeding because Mr. Brake's proposed class was not ascertainable and a class proceeding was not the preferable procedure to adjudicate the issues he raised. Moreover, the Federal Court refused to "convert" Mr. Brake's application into an action, since the rationale for the "conversion" was to support a class proceeding, which the Court rejected.

Federal Court of Appeal's Reasoning

The Federal Court of Appeal held that a party might simultaneously seek judicial review and bring an action for damages, as this would improve access to justice. While litigants cannot claim damages in a judicial review application and cannot seek administrative remedies (such as quashing a decision and sending it back for redetermination) in an action, Federal courts have the authority to consolidate multiple proceedings. Under this power, multiple proceedings can progress as if they were one proceeding. Moreover, nothing in the Federal Court's Rules expressly prohibited a consolidated judicial review and action for damages from proceeding as a class action.

Ideally, plaintiffs/applicants should either:

- Separately file an application for judicial review and an action, consolidate the two matters under the *Rules* and, if desired, seek certification of the consolidated matter as a class action; or
- File a statement of claim seeking both administrative remedies and damages for losses due to unreasonable or invalid administrative decision-making, thereby consolidating the action and application at the *outset*. The plaintiff/applicant can then seek to have the action proceed to certification as a class action.

The approach that Mr. Brake had taken (starting a judicial review application and seeking to convert it to an action) created practical and conceptual difficulties and the Court recommended against it. Nonetheless, the Court of Appeal found that the lower court had erred in not certifying this proceeding as a class action and made a certification order.

Significance of Brake

Brake's importance lies in its pragmatism. The decision provides a practical guide to litigants on how to consolidate judicial reviews and actions and whether that consolidated proceeding can progress as a class action.

As the Court observed, whether simultaneous judicial reviews and actions can proceed as class actions has generated complex case law in other courts. *Brake*'s detailed reasoning hopefully has the effect of simplifying the law across Canada and in the process, litigants will not be mired in procedural ambiguities when commencing class actions that are based on allegations of administrative wrongdoing.

By

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