Carriage creativity denied for competing class actions

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Introduction

One of the unique features of class actions is that there can be more than one proceeding in the same province, in which different plaintiffs, represented by different class counsel, seek to represent the same class of people against the same defendant(s) in respect of the same conduct.

In other contexts, parallel proceedings seeking the same relief on behalf of the same groups would be considered an abuse of process. In class actions where there are two or more overlapping proceedings, the prospective class counsel involved will usually participate in a carriage motion to determine which action will proceed and which counsel will advance the interests of the putative class.

In *Harpreet v Cronos Group Inc.*, a plaintiff made a creative attempt to circumvent having to fight a future carriage motion by seeking a pre-emptive "exclusivity order" that would have prevented anyone else from commencing a similar putative class proceeding without leave of the court. The attempt, while certainly enterprising, did not meet with success before the Ontario Superior Court of Justice.

Background

In the context of a claim (both in common law and under the *Securities Act*) for misrepresentation in a public filing, the plaintiff sought what counsel described as an "exclusivity order," which would prevent any other similar putative class actions on the same subject matter from being commenced in Ontario without leave of the court.

Defendants' counsel raised no objections. Plaintiff's counsel argued that granting the "exclusivity order" would further the underlying policy objectives of the class actions regime and would move the matter forward efficiently, effectively and expeditiously.

While plaintiff's counsel was able to point to a single precedent from the Federal Court in which a similar order had been granted without a carriage motion (*Heyder v Canada (Attorney General)*, the court was not convinced. Justice Morgan described the order

granted in *Heyder* as more of an "inclusivity order," given the context in which it was granted and the outcome that it furthered, which was to ensure that all claims advanced in that matter were considered in the ongoing litigation; one claim was not selected over others.

Decision

The plaintiff's request for a unique "exclusivity order" was denied. In the face of clear guidance from the Ontario Court of Appeal in *Mancinelli v Barrick Gold Corporation*, that "rival actions" are to be dealt with by way of a carriage motion, the plaintiff's approach, while not improper, was "a form of end-run around a potential carriage motion." Since there existed no rival actions at the time on which to address questions of carriage, the court determined that there was no order to be made in the circumstances.

Takeaway

It appears that, at least in Ontario, carriage motions will remain a feature of class action litigation. Fortunately, recent amendments to the *Class Proceedings Act, 1992*, will ensure that in future cases:

- Carriage motions are decided more quickly;
- Courts will not only be able to stay competing proceedings, but bar the commencement of competing actions;
- Once 60 days have passed from the time when a carriage motion could be brought, any another plaintiff will require leave of the court to commence a similar proceeding; and
- The cost of such motions will not be borne by class members or defendants.

For more details about the legislative amendments, please refer to BLG's commentary.

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