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Multi-Jurisdictional Class Actions – Court Clarifies the Doctrine of Abuse of Process

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In *DALI 675 Pension Fund v SNC Lavalin*, 2019 ONSC 6512, the Ontario Superior Court provided guidance about the court's ability to stay a class action at the pre-certification stage. Belobaba J. addressed whether a proposed class action, that arises from the same set of facts as another action commenced in another province, could be stayed on the ground of abuse of process. The court confirmed that parallel proceedings *per se* are not an abuse of process. Parallel proceedings may be an abuse of process where there is compelling evidence that one of the proceedings was duplicative when filed, and was filed for no legitimate purpose.

Background

In the case, two proposed national class actions with different representative plaintiffs were launched in Ontario and Quebec against the same defendant. The pleadings in both actions allege securities misrepresentations and are substantially similar in scope and content. The damages claim is over a billion dollars. At the time the court's reasons were released, neither action was certified as a class proceeding, nor had received leave under the provincial securities law.

At issue was whether the Quebec plaintiffs could succeed on a motion to stay the Ontario action on the ground of abuse of process. The court found no evidence of abuse of process. The court's reasoning focused on three key issues: (1) abuse of process in the context of class actions; (2) the relevance of the rule "first to file" in Ontario; and (3) the appropriate time for assessing the preferability of a class action.

Parallel class action proceedings *per se* are not an abuse of process

The court noted that it is not unusual for class actions to arise from the same facts and proceed in two or more provinces in parallel.

Multi-jurisdictional class actions may be an abuse of process where they are duplicative and serve no legitimate purpose. For example, courts have found an abuse of process when the same plaintiff or the same law firm files an identical or almost identical action in several provinces for no good reason. Simply filing duplicative actions in multiple jurisdictions to improve the chances of a desirable outcome is not a sufficiently good reason.

Granting priority to a class action filed first is not relevant in Ontario

The court clarified that a proposed class action cannot be stayed simply because a parallel action was filed before it. In other words, the "first to file" regime is not relevant in Ontario. In reaching this conclusion, the court found that the "first to file" regime exacerbates "the practice of rushing to commence overlapping actions in as many jurisdictions as possible in order to claim turf and secure carriage for law firms – rather than to advance the interest of a putative class". Granting priority to a class action filed first may result in an arbitrary and unfair order.

The court noted that the initial claim filed in Quebec was "unusually circumscribed for a securities misrepresentation claim", only 17 pages in length, and relatively non-specific. In contrast, the claim filed in Ontario was 73 pages in length and set out a more focused presentation of the alleged misrepresentations and corrections. While the Quebec claim was amended after the filing of the Ontario claim, the court found no evidence that the Ontario claim, when filed, was duplicative of the initial claim in Quebec. On its face, the Ontario action was more comprehensive, more sophisticated and very different than the action initially filed in Quebec.

Preferability of a class action should be decided at the certification stage

Finally, the court stated that the issue of parallel multi-jurisdictional proceedings should be considered at the certification stage. The language of s. 5(1)(d) of the *Class Proceedings Act*[1] requires the court to consider, among other things, whether the proposed class action would be the preferred procedure for the resolution of common issues. Section 12 of the *CPA* allows the court to "make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination". If the Ontario action advances to certification, both the defendant as a party and the Quebec plaintiff as a class member[2] could argue that the Quebec action should be preferred and the Ontario action should be stayed. By arguing this at the certification stage, the court would have the benefit of a more complete record.

Conclusion

The decision in *DALI 675 Pension Fund v SNC Lavalin* shows that a proposed class action cannot be stayed as an abuse of process (at the pre-certification stage) simply because it arises from the same set of facts as another action commenced in another province. It also shows that the first to file regime is not relevant in Ontario with respect to parallel class actions, so care should be taken to draft a comprehensive pleading rather than rushing to file to assert priority over the claim.

[1] *Class Proceedings Act*, *1992*, SO 1992, c 6 [*CPA*].

[2] Section 14 of the *CPA* permits a class member to participate in the Ontario proceeding.

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