

Stopping or Resolving Class Actions Before Trial

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Class proceedings involve high stakes and high costs to all parties to the litigation. An early resolution to a class proceeding is more effective, efficient and economic for the class and is less disruptive to the defendant's business. As such, it is in the best interests of all of the parties to consider mechanisms that may result in a early resolution of a class proceeding. This paper highlights some of the potential mechanisms available to counsel to stop or resolve class actions, including:

- > The use of arbitration agreements;
- > The use of exclusive jurisdiction clauses;
- > The use of mediation in class proceedings;
- > Considerations and concerns with partial settlements; and
- > Other tactics and strategies to stop or resolve a class action.

CAN AN ARBITRATION AGREEMENT STOP A CLASS PROCEEDING?

In some cases, the existence of an arbitration agreement has resulted in a stay of a class proceeding; effectively stopping the class proceeding from moving forward.¹ However, class action defendants wishing to rely on an arbitration agreement to defeat a class proceeding should be aware that the effect of an arbitration agreement on a class proceeding is far from settled law in Canada. Moreover, it is expected that the Supreme Court of Canada will clarify this issue in its upcoming decision in the case of *Seidel v. Telus* (appeal heard and reserved May 12, 2010) ("Telus").²

In order to understand the impact the Supreme Court's decision in *Telus* may have on the ongoing debate in Canada with respect to the effect of arbitration agreements on class proceedings, it is helpful to revisit the cases that lead to this decision.

In 2005, the Ontario Court of Appeal in *Smith v. National Money Mart Co.*,³ abandoned the approach previously taken by Ontario courts⁴ and adopted the approach taken by the B.C. Court of Appeal in the case of *Mackinnon v. National Money Mart*. ("MacKinnon 2004").⁵ In

¹ See for example: *Dell Computer Corp. v. Union des consommateurs and Olivier Dumoulin*, 2007 SCC 34; *Rogers Wireless Inc. v. Muroff*, [2007] S.C.J. No. 35 and *Frey v. Bell Mobility Inc.*, 2008 SKQB 79.

² *Seidel v. Telus Communications Inc.*, [2009] S.C.C.A. No. 191 ["Telus"].

³ (2005), 8 B.L.R. (4th) 159 (S.C.J.), aff'd (2005), 258 D.L.R. (4th) 453 (C.A.), leave to appeal refused (2006), 223 O.A.C. 394 (S.C.C.) ["Smith"].

⁴ See: *Huras v. Primerica Financial Services Ltd.*, [2000] O.J. No. 1474 (S.C.J.), aff'd (2001), 55 O.R. (3d) 449 (C.A.) and *Kanitz v. Rogers Cable Inc.* (2002), 58 O.R. (3d) 299 (S.C.J.). The Ontario Superior Court held that a stay is not available if the arbitration clause is "invalid". This approach focused on whether the arbitration clause was "unconscionable".

⁵ [2004] B.C.J. No. 175, (2004), 50 B.L.R. (3d) 291 (C.A.) ["MacKinnon 2004"].

MacKinnon 2004, the B.C. Court of Appeal held that, if at the certification motion, it is determined that a class proceeding is the preferable procedure, then the arbitration agreement is rendered “inoperable”. Thus, the test in B.C. (and later adopted in Ontario) was whether the arbitration clause is “inoperable” in light of the preferable procedure analysis.

In an attempt to clarify the consequences for consumers in consumer class actions, in 2005 and 2006, the legislators in Ontario and Quebec both weighed in on the ongoing judicial debate with respect to arbitration agreements and class proceedings. Both jurisdictions enacted amendments to their consumer protection legislation, which render mandatory arbitration clauses in consumer agreements inapplicable.⁶

By the summer, 2007, the law in Canada appeared to favour class proceedings over arbitrations. As a result of the newly enacted amendments to consumer protection legislation, arbitrations were not available for consumer disputes in Ontario and Quebec and, in all other cases, an arbitration agreement did not provide the fast and final response that class action defendants had hoped for. Rather, the matter was one of a case-by-case analysis under the preferability test.

Then, on July 13, 2007, the Supreme Court of Canada rendered companion decisions in *Dell Computer Corp. v. Union consommateurs and Olivier Dumoulin* (“Dell”)⁷ and *Rogers Wireless Inc. v. Muroff* (“Rogers”).⁸ Both disputes arose out of Quebec prior to the changes to the consumer protection legislation. They required the Supreme Court to consider the validity and applicability of mandatory arbitration clauses in consumer contracts and the ability of consumers to participate in class proceedings. In both cases, the Supreme Court referred the matter to arbitration and refused to allow either case to proceed as a class action. In coming to this decision, the Supreme Court held that a court must first deal with the motion to refer the matter to arbitration before dealing with the class certification. The issue of certification may only be dealt with where the court first determines that the case should not be sent to arbitration.

Further, the majority held that, as a general rule, an arbitrator is competent to resolve any challenge to his jurisdiction, unless the challenge is based solely on a question of law or mixed fact and law requiring only a superficial review of documentary evidence.

Dell and *Rogers* were decided under Quebec law, and it has remained uncertain to what extent they apply to the common law provinces. In 2008 and 2009, the Ontario Superior Court of Justice held that *Dell* and *Rogers* dealt with interpreting Quebec law and therefore do not change the law in Ontario.⁹ Recently, the Ontario Court of Appeal had an opportunity to weigh in on the applicability of *Dell* and *Rogers* in Ontario in the case of *Griffin v. Dell Canada Inc.* (“Griffin”)¹⁰ However, the Court of Appeal found it unnecessary to comment on the application of these cases in Ontario as the arbitration clause before the court could not apply because of Ontario’s *Consumer Protection Act, 2002* (“CPA”).¹¹

In *Griffin*, 70% of the class were “consumers” protected by the CPA’s provisions. Even though 30% of the claims were by “non-consumers”, the court exercised its discretion under

⁶ *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Sch. A., ss. 7 and 8 (proclaimed in force on July 30, 2005) and *Consumer Protection Act*, R.S.Q. c. P-40.1, s. 11.1 (proclaimed in force on December 14, 2006).

⁷ [2007] 2 S.C.R. 801 [Dell].

⁸ [2007] 2 S.C.R. 921 [Rogers].

⁹ *Smith Estate v. National Money Mart Company* (2008), 57 C.P.C. (6th) 99 (S.C.J.), aff’d on other grounds (2008), 92 O.R. (3d) 641 (C.A.), leave to appeal dismissed, March 5, 2009 and *Griffin v. Dell Canada Inc.*, 2009 CanLII 3557 (Ont.S.C.J.).

¹⁰ *Griffin v. Dell Canada Inc.*, 2010 ONCA 29 at paras. 64-64, leave to appeal to S.C.C. refused, [2010] S.C.C.A. No. 75. [“Griffin”].

¹¹ *Supra* note 7.

the *Arbitration Act*, 1991,¹² and declined to stay only the claims of non-consumers, because doing so would lead to inefficiency and a multiplicity of proceedings.¹³

In contrast to the approach taken in Ontario in 2008, the Saskatchewan Court of Queen's Bench in *Frey v. Bell Mobility Inc.*,¹⁴ held that, *Dell* and *Rogers* are “authority for the proposition that a binding arbitration clause removes a dispute from the jurisdiction of a Superior Court and of necessity precludes participation in a class action. In addition, the validity of the arbitration clause must be referred to an arbitrator in first instance.”¹⁵

Similarly, in 2009, the B.C. Court of Appeal in *MacKinnon v. National Money Mart Co.* (“Mackinnon 2009”)¹⁶ and *Seidel v. Telus Communications Inc.* (“Telus 2009”),¹⁷ held that, *Dell* and *Rogers* do change the law in B.C and pre-existing jurisprudence, including the 2004 B.C. Court of Appeal decision in *Mackinnon 2004*, are overruled.¹⁸

The effect of the Supreme Court’s decision in *Telus* has yet to be seen. It may have a limited impact in jurisdictions where consumer protection legislation amendments have been enacted, such as Ontario and Quebec.¹⁹ However, outside of Ontario and Quebec, if it is found that the Supreme Court’s previous decisions of *Rogers* and *Dell* are applicable, we may see an increased willingness on behalf of Canadian courts to stay class proceedings in favour of arbitration. Finally, there continues to be a possibility that Canadian courts adopt a U.S. approach to this issue, finding that arbitrators may be permitted to consolidate a number of arbitrations that raise the same issue enabling class action arbitrations to proceed.²⁰

CAN AN EXCLUSIVE JURISDICTION CLAUSE STOP A CLASS PROCEEDING?

Similar to arbitration agreements, the existence of an exclusive jurisdiction clause in an agreement may stay a class proceeding; effectively stopping the class proceeding from moving forward. While this area of law is far less developed in Canada than that addressing the issue of the effect of an arbitration agreement on a class proceeding, as noted by the B.C. Court of Appeal in *Mackinnon 2009*, there are insightful parallels between clauses that remit jurisdiction to an arbitrator and forum selection clauses.²¹

In the case of *Ezer v. Yorkton Securities Inc.*,²² the B.C. Court of Appeal held that:

“If the exclusive jurisdiction clause is enforceable, Mr. Ezer cannot bring any action against Yorkton in B.C., including a class proceeding, and there is no action to be certified. The issues of whether a class proceeding is the fair and preferable procedure or there are common issues do not arise.”²³

In Ontario, an exclusive jurisdiction clause was at issue in the case of *2038724 Ontario Ltd. v. Quizno's Canada Restaurant*,²⁴ where 347 of the 426 franchisees were subject to

¹² *Arbitration Act*, 1991, S.O. 1991, c. 17, s. 7(5).

¹³ *Supra* note 11 at paras. 45-47.

¹⁴ 2008 SKQB 79 [“Frey”].

¹⁵ *Ibid.*, *Frey* at para. 11. See also: *Seidel v. Telus Communications Inc.*, 2009 BCCA 104 at paras. 14-16 [“Telus 2009”].

¹⁶ 2009 BCCA 103 (C.A.) [“Mackinnon 2009”].

¹⁷ *Supra* note 16, *Telus 2009*.

¹⁸ *Supra* note 16, *Telus 2009* at para. 2.

¹⁹ However, in non-consumer cases, consumer protection legislation does not apply. See for example: *Huras v. Primerica Financial Services Ltd.*, [2000] O.J. No. 1474 (S.C.J.).

²⁰ See discussions in: *Kanitz v. Rogers Cable Inc.*, (2002), 58 O.R. (3d) (S.C.J.) at para. 55 and *Ruddell v. BC Rail Ltd.* (2007), 282 D.L.R. (4th) 664 (C.A.) at para. 39.

²¹ *Mackinnon 2009*, *supra* note 17 at para. 71.

²² [2005] B.C.J. No. 30 (C.A.).

²³ *Ibid.* at para. 19, Leave to appeal to S.C.C. ref'd. See also: *Desjean v. Intermix Media, Inc.*, [2006] F.C.J. No. 1754, aff'd 2007 FCA 365.

²⁴ *2038724 Ontario Ltd. v. Quizno's Canada Restaurant*, [2008] O.J. No. 833 (S.C.J.), rev'd, but not on this point, [2009] O.J. No. 1874 (S.C.J. Div. Ct.).

franchise agreements that contained an exclusive jurisdiction clause in favour of British Columbia. Justice Perell found that there was “strong cause” not to enforce the exclusive jurisdiction clause because doing so would frustrate the goals of judicial economy, access to justice, and behaviour modification afforded by class proceedings legislation.²⁵ However, in reaching this conclusion, Justice Perell relied heavily on case law dealing with arbitration clauses, including *MacKinnon 2004*, which may no longer apply given *Dell, Rogers* and, more recently, *MacKinnon 2009*. The upcoming Supreme Court decision in *Telus* may also clarify the enforceability of exclusive jurisdiction clauses in the class proceedings context.

USE OF MEDIATION AS A MEANS OF RESOLVING CLASS ACTIONS

There are many ways to resolve a class action. In many cases, mediation and alternative dispute resolution (“ADR”) can, and sometimes should be, the preferable procedure in a class proceeding. Mediation and ADR can be employed at different stages of a class action. They can be used as a means of reaching a settlement between the parties, and also as a means of resolving individual claims pursuant to the terms of settlement.²⁶

Means of reaching a settlement

Mediators have helped settle class actions for several years. The use of mediators can be helpful for two reasons: Firstly, a neutral arbiter can assist the parties in obtaining their goals. Secondly, a history of negotiations between the parties, including a history of attempted mediation, may be useful in convincing a court as to the reasonableness of a proposed settlement. A recent example of an effective mediation was in the case of *Verna Doucette v. Eastern Regional Integrated Health Authority*,²⁷ in which former Ontario Superior Court judge, George Adams Q.C., helped prepare a Memorandum of Settlement for the parties. In assessing the reasonableness of the settlement, the court considered Mr. Adams’ participation as a recommendation by a neutral party.²⁸ Mr. Adams also assisted in mediating a settlement in *Speevak v. Canadian Imperial Bank of Commerce*.²⁹ In approving that settlement, Justice Strathy noted: “When a proposed class settlement has been negotiated at arms-length by counsel for the class, there is a presumption that the settlement is fair. In this case, there is a history of negotiation and mediation under the auspices of a very experienced mediator. To rebut the presumption of fairness, I would have to find that the settlement does not fall within a range of reasonable outcomes...”³⁰

Mediators can also be used to resolve particular matters within a class action. In *Kotai v. Queen of the North (The)*,³¹ the parties reached an aggregate settlement through their own negotiations, and then employed a mediator to decide on the formula for individual awards. In *Bilodeau v. Maple Leaf Foods Inc.*,³² a mediation session was held with the Honourable Roger Kerans, formerly of the Alberta Court of Appeal, to help resolve carriage issues among the class counsel, and to settle the claims against Maple Leaf Foods.

Means of resolving individual claims

Mediation and arbitration may be employed as a mechanism to distribute settlement funds to individual class members, and to resolve potential disputes. One example is the settlement

²⁵ *Ibid* at paras. 69-73.

²⁶ David I.W. Hamer, Elizabeth Stewart, *Defending Class Actions in Canada*, 2nd edition (Toronto: CCH Canadian, 2007) at page 264-265 [“Defending Class Actions”].

²⁷ 2010 NLTD 29.

²⁸ *Ibid* at para. 47.

²⁹ 2010 ONSC 1128.

³⁰ *Ibid* at para. 42.

³¹ [2010] B.C.J. No. 1645(B.C.S.C.). See also: James Keller, “Survivors of BC Ferries sinking settle suit”, *The Globe and Mail* (July 22, 2010) online: <<http://www.theglobeandmail.com/news/national/british-columbia/survivors-of-bc-ferries-sinking-settle-suit/article1649105/>>.

³² [2009] O.J. No. 1006 (S.C.J.) at para. 16.

plan for individuals that suffered harm from contaminated water in Walkerton, Ontario. The settlement plan provided up to five stages in the compensation process that included application, evaluation, mediation, arbitration, and, in cases of serious injury or death, assessment of damages by a judge.³³

CONSIDERATIONS AND CONCERNS WITH PARTIAL SETTLEMENTS

Although it may be in the best interests of the parties to a class proceeding to seek and, in some cases, obtain an early resolution of the action, class proceedings are often brought against a variety of defendants with divergent views, interests and strategies. In some cases, certain defendants may wish to settle, while others may wish to continue to defend the action. In such situations, it is still possible for a plaintiff to move towards a settlement with only the defendants interested in settling. These partial settlements, also known as “Pierringer” type agreements, are encouraged as they advance the overriding public interest in encouraging the pre-trial settlement of civil cases.³⁴ Partial settlements in class proceedings generally have the following elements:

- > The partial-settlement is conditional on obtaining a bar order; and
- > The action must be certified against the settling defendants and approved by the court.³⁵

Bar orders

While a court can apportion the degree of fault among numerous defendants, a plaintiff is entitled to obtain satisfaction for an entire judgment from any single defendant. This can create a cause of action among defendants to seek contribution and indemnity from each other. In such situations it would be impossible for any defendant to “buy its peace” through a partial-settlement, as it would remain liable to fellow defendants and could never reduce the upper-end of its risk. In fact, a settlement would be completely disadvantageous, as the settling defendant would no longer be in the action and would be unable to defend themselves and reduce their proportionate share of liability.³⁶

A bar order is a procedural tool that addresses this dilemma by capping the liability of any settling defendants, and provides finality and certainty as to the damages that a defendant is liable to pay.³⁷ The precise form and content of the order may vary, but generally, the plaintiff agrees to convert their joint and several claims to several claims against the non-settling defendants. The non-settling defendants become liable only for their share of the total damages, and consequently are barred from making claims for contribution and indemnity against the settling defendants. Courts have recognized that without such a provision, a defendant would never agree to a partial-settlement.³⁸

Bar orders arose in American jurisprudence as a means of dealing with complex securities and class actions litigation.³⁹ The first reported Canadian case to grant a bar order in a class proceeding was in *Ontario New Home Warranty Program v. Chevron Co.* (“Ontario New Home Warranty”),⁴⁰ which involved a defective exhaust systems that utilized high temperature plastic venting. Settlement discussions led to a mediation conducted by a prominent American

³³ *Defending Class Actions*, *supra* note 27 at page 265; Walkerton Compensation Plan, “Walkerton Class Action Settlement” located online at: <<http://www.walkertoncompensationplan.ca/walk.pdf>>.

³⁴ *J.M. et al. v. W.B. et al.* (2004), 71 O.R. (3d) 171 (C.A.) at paras. 29-67.

³⁵ David A. Klein and Nicola Hartigan, “Partial Settlements of Class Actions: What do you do when you settle some defendants and not others?” (2006), vol. 3, no. 2, *The Canadian Class Action Review*, page 586 [“Partial Settlements”].

³⁶ *Nelson v. Bennett*, 662 F. Supp. 1324 (E.D. Cal. 1987) (U.S. Dist. Ct.) at 1334, cited in *Partial Settlements*, *supra* note 36 at page 586.

³⁷ *Abdulrahim v. Air France*, [2009] O.J. No. 5550 at para. 35, *aff’d* 2010 ONCA 403 [“Abdulrahim”], *Sawatzky v. Societe Chirurgicale Instrumentarium Inc.* [1999] B.C.J. No. 1814 at para. 29 [“Sawatzky”].

³⁸ *Gariépy v. Shell Oil Co.*, [2002] O.J. No. 4022 (Ont. S.C.J.) at para. 49 [“Gariépy”], *Killough v. Canadian Red Cross Society*, 2001 BCSC 1060 at para. 28.

³⁹ *Sawatzky*, *supra* note 38 at para. 30.

⁴⁰ [1999] O.J. No. 2245 (S.C.J.) [“Ontario New Home Warranty”]; see also: *Partial Settlements*, *supra* note 36 at page 587.

mediator, in which all defendants were invited to participate, but the non-settling defendants did not make submissions or attend.⁴¹ The mediation led to a settlement agreement with some of the defendants, which was brought to Winkler J. for approval. The non-settling defendants opposed the bar order, which was reproduced in the judgment:

. . . all claims for contribution, indemnity, subrogation or other claims over shall be barred in accordance with the following terms:

.

d) The plaintiffs shall not make joint and several claims against the Non-Settling Defendants or Joining Defendants but shall restrict their claims to several claims against the Non-Settling Defendants such that the plaintiffs shall be limited to the degree of liability proven against the Non-Settling Defendants at trial, but in no event shall such liability of the Non-Settling Defendants be greater than 35% of the total damages proven at trial as against each Non-Settling Defendant.

e) All claims for contribution, indemnity, subrogation or other claims over, whether asserted or unasserted or asserted in a representative capacity, inclusive of interest, GST and costs, for or in respect of the subject matter of the Class Actions by or against any Non-Settling Defendants or any other person or party are barred by or against the Settling Defendants and Joining Defendants. CLARITY NOTE: The bar order deals only with claims over and is not intended to bar bona fide independent and direct claims and causes of action between settling and non-settling defendants for damages other than those claimed by the Representative Plaintiffs and the Plaintiff Class.

f) Except as otherwise provided herein, nothing in this Judgment shall prejudice or in any way interfere with the rights of the Settlement Class Members to pursue all of their other rights and remedies against persons and/or entities other than Settling Defendants and Joining Defendants.

g) Nothing in this Judgment affects any rights that the Non-Settling Defendants may have to move for leave for discovery and production of documents respecting the Settling Defendants and Joining Defendants pursuant to the Rules of Civil Procedure and, in particular, Rules 31.10 and 30.10.⁴²

Winkler J. determined he had the jurisdiction to grant bar orders through the discretionary powers conferred by ss. 12 and 13 of the CPA.⁴³ He then turned to the arguments by the non-settling defendants, which included that the bar order prejudiced them substantively and procedurally. As to substantive rights, Winkler J. rejected the notion that the bar order would abrogate the rights of the non-settling defendants under the *Negligence Act, 1990*. The bar order could only benefit the non-settling defendants as it prevented the settling defendants from seeking contribution, and limited the plaintiffs to seeking several damages. Furthermore the bar order provided an exposure cap on the liability of non-settling defendants to 35% of

⁴¹ *Ibid* at para. 20.

⁴² *Supra* note 41 at para. 36.

⁴³ *Ontario New Home Warranty* was followed in B.C. in *Sawatzky*, *supra* note 38. In Quebec, the law is less certain. In *Johnson v. Bayer*, 2008 QCCS 4957, a Quebec Superior Court refused to recognize the ability of a Quebec court to issue bar orders (see: Ward K. Branch, *Class Actions in Canada*, loose-leaf (Vancouver: Canada Law Book, 1996-) at 16.90). However, in 2009 QCCS 3020 (S.C.) the court did approve the settlement after certain changes were made. (see: Branch MacMaster LLP Class Action Blog (July 2009) online: <<http://www.branchmacmaster.com/class-actions-blog/2009/7/26/july-2009.html>>).

the total damages. For procedural rights, the non-settling defendants argued that without the settling defendants in the litigation, they would be unable to access evidence through discovery that was necessary to establish a complete defence and attribute fault to the settling defendants. Winkler J. noted the need to balance the public interest in settling complex litigation⁴⁴, and decided that the procedural concern could be addressed without rejecting the settlement agreement. As a compromise, Winkler J. stated he would approve the settlement subject to terms that would allow the non-settling defendants to conduct discovery of the settling defendants.⁴⁵

Role of the non-settling defendants

In *Nutech Brands Inc. v. Air Canada*,⁴⁶ Justice Leitch opined that, “non-settling defendants of course have the right to make submissions to the court concerning a proposed bar order.” In that case, the non-settling defendants had provided their input for the bar order and obtained the right to seek discovery from the settling defendant, Lufthansa. Consequently, the non-settling defendants did not oppose the bar order. Such cooperation may be desirable, but is not essential to obtaining a partial settlement. This was noted by Justice Strathy in *Ali Holdco Inc. v. Archer Daniels Midland Co.*⁴⁷

“In considering this issue, I repeat that the policy of the courts is to promote the settlement of complex multi-party litigation. The “bar order” typically granted in cases of this kind, to grease the machinery of settlement, is a reflection of this policy. It prevents a non-settling defendant from throwing a wrench in the works to sabotage the settlement. In a case of this kind, the promise of cooperation by the settling defendant can strike fear into the hearts of the non-settling defendants because it may help prove the existence of a secret conspiracy. The court should be sceptical of the objections by non-settling defendants to such settlements: see *Garipey v. Shell Oil Co.* (2002), 26 C.P.C. (5th) 358, [2002] O.J. No. 4022 (S.C.J.)”

In *Garipey v. Shell Oil Co.* (“Garipey”),⁴⁸ a non-settling defendant had attempted to make submissions on the settlement, including its generosity and likely take-up rate. The court held that the non-settling defendant had no standing to make such submissions.

Crafting bar orders

Discovery rights

In *Ontario New Home Warranty*, the court acknowledged that a partial-settlement could create a procedural prejudice because the non-settling defendants would no longer be able to obtain evidence through discovery from the settling defendants. This concern was recently acknowledged again by the Ontario Court of Appeal in *Taylor v. Canada (Minister of Health)*.⁴⁹ The solution offered by Winkler J. in *New Home Warranty*, was to allow the non-settling defendants to bring a motion to obtain documentary and oral discovery. In *Garipey*, the non-settling defendants attempted to modify Winkler J.’s solution by shifting the onus to the settling defendants to provide discovery unless it could convince a court that it had no relevant information. Justice Nordheimer in *Garipey* disagreed and considered it fairer to

⁴⁴ *Ontario New Home Warranty*, *supra* note 41 at paras. 69-71. See also: *Ali Holdco Inc. v. Archer Daniels Midland Co.* [2010] O.J. No. 2511 (S.C.J.) at para. 47 [Archer].

⁴⁵ *Supra* note 41 at para. 76.

⁴⁶ *Nutech Brands Inc. v. Air Canada*, [2009] O.J. No. 709 (S.C.J.) at para. 22.

⁴⁷ *Archer*, *supra* note 44 at para. 47.

⁴⁸ *Garipey*, *supra* note 39 at para. 37-41.

⁴⁹ *Taylor v. Canada (Minister of Health)*, 95 O.R. (3d) 561 (C.A.) at para. 30-32 [“Taylor”].

keep the onus on the non-settling defendants to establish that relevant information was in the possession of the settling defendants and that it ought to be produced.⁵⁰

In *Ontario New Home Warranty* and *Gariepy*, there was a continuing obligation on the settling defendants that prevented them from being completely free of the litigation post-settlement. By contrast, in the recent case of *Abdulrahim v. Air France*,⁵¹ the court accepted a bar order that included an order barring further production and discovery against the settling defendants. Justice Lax noted that there had already been 24 days of discovery in the class action, and that going forward the settling defendant faced only several liability (as opposed to joint and several) related to their own liability. It was thus not clear that the settling defendants had relevant information for discovery. The bar order was affirmed by the Court of Appeal who endorsed the need to balance the interests of the non-settling defendants, the settling defendants and class plaintiffs. Without approval of the bar order the settlement would fail and seriously prejudice the class members, whereas the prejudice to the non-settling defendants from the bar order was remote and negligible.⁵²

Exposure Cap

In *Ontario New Home Warranty Program*, the settling defendants and the plaintiffs agreed that the settling defendants were liable for 65% of the damages, and consequently the non-settling defendants would not be liable beyond 35% of the total damages. In *Gariepy* and *Furlan v. Shell Oil Co.*,⁵³ the non-settling defendants argued that a bar order they faced ought to contain such a cap. Nordheimer J. for the Ontario Superior Court of Justice rejected the argument, noting that in the particular case it might be held that the ultimate liability to some plaintiffs rested solely on one of the non-settling defendants. Brenner C.J.S.C for the B.C. Supreme Court reached a similar conclusion and held that “those who exercise their right not to come to the settlement table should not be entitled to the gratuitous benefits of the likely settlement comprises made by those who do.”⁵⁴

Attribution

In *Abdulrahim*, the non-settling defendants argued that a determination in a settlement could prejudice their substantive rights. The settlement parties had determined that Air France’s liability was limited to “Convention Damages”, which excluded psychological injury, and that the non-settling defendant NavCan was liable for its share of “Extra-Convention Damages”. NavCan protested that this settlement would prevent a trial court from allocating fault to Air France for Extra-Convention Damages. This was rejected by Lax J. who noted that while the settling parties had agreed to a standard for liability, they were not imposing this standard on NavCan.⁵⁵ The Court of Appeal agreed and held that NavCan’s liability would be judicially determined at trial, not by the bar order and settlement.⁵⁶

Scope of the bar order

In *Gariepy*, the non-settling defendants argued that a bar order was overbroad because it could apply to claims that did not originate in proceedings governed by the settlement. Norheimer J. accepted this concern, but attributed it to imperfect wording, and stated;

“[t]he intention of the bar order is to preclude claims arising from the subject matter of the action. In other words, it is to be restricted to

⁵⁰ *Gariepy*, *supra* note 39 at para. 55.

⁵¹ *Abdulrahim*, *supra* note 38 at paras. 46-47.

⁵² *Abdulrahim*, 2010 ONCA 403 at paras. 12-16.

⁵³ *Gariepy*, *supra* note 39 at paras. 53-54, *Furlan v. Shell Oil Co.*, 2002 BCSC 1577 at paras. 20-21 [*Furlan*].

⁵⁴ *Ibid*, *Furlan* at para. 21.

⁵⁵ *Abdulrahim*, *supra* note 38 at paras. 40-42.

⁵⁶ *Abdulrahim v. Air France*, 2010 ONCA 403 at para. 8-11. See also: the discussion by the Court of Appeal in *Taylor*, *supra* note 48 at paras. 23-29 (finding that in an appropriate case the court can apportion fault against a person who is not a party to the action).

matters that are, or could have been, raised as part of that action. The bar order is not intended to, nor should it, go beyond those matters. Further, it should be made clear that the bar order does not operate with respect to any claims by anyone who opts out of the settlement, that is, the bar order applies only to the claims of the settlement class members.”⁵⁷

An overbroad bar order was also an issue of concern in *Ledyit v. Bristol-Myers Squibb Canada Inc.*,⁵⁸ in which Justice Cullity resisted proposed bar orders that would have affected the rights of certain parties that were not part of the proceedings.

In *Lau v. Bayview Landmark*,⁵⁹ the court declined to approve a partial settlement because it left the non-settling defendants jointly and severally liable for all the plaintiff's damages without a corresponding right of contribution from the settling defendants. This made the partial-settlement objectionable and the court required an appropriate bar order to be inserted.

Blow-up provision

In *Gariepy v. Shell Oil Co.* (“*Gariepy 2003*”),⁶⁰ Nordheimer J. addressed a “blow up” provision contained in a partial-settlement:

“If the total number of Settlement Class members who elect to opt out of the Settlement is, in Shell's sole opinion, excessive, Shell shall have the right to withdraw from this Agreement by giving written notice to class counsel within 30 days after receipt from class counsel of the report on opt outs.”⁶¹

Counsel submitted that this provision was necessary to protect the defendant if a large number of class members opted out of the settlement. The provision caused concern for Nordheimer J. because it permitted Shell to unilaterally set aside the court's approval of the settlement. However, given that it was not the role of the court to modify the settlement, Nordheimer J. found that the “blow up” provision was not a sufficient reason to reject the settlement outright.⁶²

Certification of partial settlements

Once a partial-settlement agreement is reached, it is necessary to bind the class members to the agreement through certification. The settlement certification does not certify the action as against the non-settling defendants, and to continue the action, the plaintiffs will have to bring a subsequent motion for certification for litigation purposes.⁶³ In a settlement certification the defendants will generally consent to the certification on condition that the settlement is approved.⁶⁴ In *Gariepy*, the court held that the certification test in a settlement context was the same, but that the application of the test need not be as rigorous.⁶⁵ In *Gariepy*, the court certified the case for settlement purposes even though it had previously denied certification against two of the settling defendants.

⁵⁷ *Gariepy*, *supra* note 39 at para. 51.

⁵⁸ *Ledyit v. Bristol-Myers Squibb Canada Inc.*, [2008] O.J. No. 119, at paras. 6-10, *aff'd* 2008 ONCA 372.

⁵⁹ *Lau v. Bayview Landmark Inc.*, [2006] O.J. No. 600 (Ont. S.C.J.), at paras. 13-21, see also: *Osmun v. Cadbury Adams Canada Inc.*, [2010] O.J. No. 1877 (Ont. S.C.J.) at para. 58.

⁶⁰ [2003] O.J. No. 5820 (Ont. S.C.J.) [*Gariepy 2003*].

⁶¹ *Ibid* at para. 27.

⁶² *Supra* note 61 at para. 32.

⁶³ *Partial Settlements*, *supra* note 36 at page 596.

⁶⁴ *Ibid* at page 597.

⁶⁵ *Gariepy*, *supra* note 39 at para. 27. See also: *Archer*, *supra* note 45 at para. 48, and *Partial Settlements*, *supra* note 36 at pages 596-599.

OTHER TACTICS AND STRATEGIES TO STOP A CLASS ACTION

Preliminary motions

Defendants have met with some measure of success in striking out, or at least reducing the scope of, a proposed class through resort to preliminary motions.⁶⁶ The discretionary power conferred by s.12 of the CPA⁶⁷ enables a court to hear a variety of motions, in addition to motions to strike, prior to certification. These may include:

- > Motions for particulars;
- > Motions requesting security for costs;
- > Motions to strike pleadings as containing no reasonable cause of action;
- > Motions for summary judgment; and
- > Jurisdiction challenges.⁶⁸

While such motions may have the practical effect of postponing the certification hearing, preliminary motions are certainly a litigation tactic within a class action defendant's arsenal and there is nothing inherently improper in making use of this particular weapon.

Alternative compensation schemes

It is possible for a defendant to implement an alternative resolution mechanism prior to certification as a means of defeating the certification motion.⁶⁹ For example, in *Hollick v. Toronto (City)*,⁷⁰ the Supreme Court found that a class action was not the preferable procedure for a claim in which the defendant had established a Small Claims Trust Fund. McLaughlin C.J. stated,

“[t]he central problem with the appellant's argument is that, if it is in fact true that the claims are so small as to engage access to justice concerns, it would seem that the Small Claims Trust Fund would provide an ideal avenue of redress. Indeed, since the Small Claims Trust Fund establishes a no-fault scheme, it is likely to provide redress far more quickly than would the judicial system. ... Of course, the existence of a compensatory scheme under which class members can pursue relief is not in itself grounds for denying a class action... [it], however, provides one consideration that must be taken into account when assessing the seriousness of access-to-justice concerns.”⁷¹

However, utilization of such a tactic has had limited success.⁷² In *Smith v. National Money Mart Co.*,⁷³ the defendant expressed to the court that it was willing to “mediate or arbitrate claims by individuals, at no cost to claimants; that is, Money Mart would pay for the mediator or arbitrator.”⁷⁴ The court rejected this offer, noting that it was not practical given that individuals would still incur costs to mediate or arbitrate that would make such a procedure unfeasible.

⁶⁶ See for example: *Sauer v. Canada (Attorney General)*, 2006 CarswellOnt 20 (S.C.J.).

⁶⁷ “The court, on a motion of a party or class member, may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate.” *Class Proceedings Act*, 1992, S.O. 1992, c. 6, s. 12.

⁶⁸ Ian F. Leach “Strategies to avoid or mitigate class action litigation” (2010) Vol.6, no. 1, *The Canadian Class Action Review*, at page 108-110 [“Strategies”]; Sylvie M.T. Rodrigue, Michael Kotrly, “Strategic Considerations in Defending Class Actions” *The 2009 OBA Class Action Colloquium* (December 2009).

⁶⁹ *Defending Class Actions*, *supra* note 27 at page 264, *Strategies*, *supra* note 69 at pages 114-117.

⁷⁰ [2001] 3 S.C.R. 158.

⁷¹ *Ibid* at para. 33.

⁷² *Defending Class Actions*, *supra* note 27 at page 264.

⁷³ [2007] O.J. No. 46 (Ont. S.C.J.).

⁷⁴ *Ibid* at paras. 128-132.

CONCLUSION

In light of the high stakes nature of class proceedings, all parties to a class proceeding will want to consider the mechanisms outlined in this paper, which may stop or result in a early resolution of the action, and the anticipated decision of the Supreme Court of Canada in *Telus*.

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