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Foreign Discovery in Advance of Certification in a Class Action? Not So Fast, says Divisional Court

Given the expansive discovery rights available under US law, plaintiffs may be tempted to try to use those rights in pursuit of proceedings under Canadian law. In its recent decision in *Mancinelli v RBC*, the Divisional Court placed an important limit on the ability of parties to do so. The Divisional Court upheld an order requiring plaintiffs in a proposed class action to obtain Court approval before taking any steps in furtherance of a subpoena issued by an American court.

The Divisional Court's decision is significant in being the first reported case in Ontario to directly address the interplay between §1782 of Title 28 of the United States Code, which allows an American court to make an order permitting evidence to be obtained in the United States in support of a foreign proceeding), and the *Rules of Civil Procedure* and class action regime in Ontario.

By way of background, the case involves a proposed class action against 16 groups of financial institutions. The plaintiffs alleged that the defendants conspired to fix the foreign exchange market by communicating with each other directly using electronic chatrooms hosted by Bloomberg LP to coordinate their trading strategies and exchange confidential information.

The action was commenced in Ontario in September 2015 pursuant to the *Class Proceedings Act, 1992*. As is customary in class actions in Ontario, the proceeding is being actively case managed. Importantly, it has not yet been certified as a class proceeding.

In September 2016, the plaintiffs brought an *ex parte* application in the United States District Court for the Southern District of New York for discovery against Bloomberg. Bloomberg is not a party to the action in Ontario. The application was supported by a declaration (comparable to an affidavit) from one of the plaintiffs' counsel in Ontario and a memorandum of law (comparable to a factum).

Based on the plaintiffs' materials, the District Court issued a subpoena for the production of transcripts of chatrooms of currency traders held by Bloomberg. The District Court also

required a representative of Bloomberg to attend an examination to give testimony regarding the transcripts.

When the defendants learned of the subpoena, they moved before the case management judge in Ontario for an order directing the plaintiffs to obtain authorization from the Ontario court pursuant to Rules 30.10 and/or 31.10 (which govern the production of documents and examinations of non-parties in Ontario) before taking any steps in furtherance of the subpoena.

The motions judge held that the plaintiffs had improperly circumvented the rules in Ontario governing pre-certification discovery of non-parties in class proceedings and, in particular, for failing to disclose to the District Court that:

- a judge in Ontario was actively case managing the action and had imposed a timetable for certification that did not entail pre-certification discovery of non-parties;
- case management judges in Ontario have broad powers to control the carriage of a proposed class action under the Ontario *Rules of Civil Procedure and Class Proceedings Act, 1992*;
- Canadian class action procedure has substantial differences from American class action procedure;
- generally, the permissible scope of pre-certification discovery in Ontario is limited to matters relevant to the criteria for certification; and
- Ontario's *Rules of Civil Procedure* expressly address the circumstances under which a party is entitled to discover a non-party, which are narrower than the relatively broad entitlement to depose non-parties under the United States Federal Court.

In the result, the motions judge held what the plaintiffs did was not compliant with the *Rules of Civil Procedure*, and that the Superior Court had jurisdiction to remedy that non-compliance by directing the plaintiffs not to take steps in furtherance of the District Court's Order.

The plaintiffs appealed the motion judge's decision, asserting that it improperly interfered with the exercise of an American court's subpoena power and constituted, in substance, a non-suit injunction when no such motion was brought.

The Divisional Court rejected the plaintiffs' appeal and upheld

the order for essentially the same reasons as the motions judge. As the Divisional Court observed, since the class action had not yet been certified and certification does not involve an assessment of the merits of the claim, pre-certification discovery is limited to evidence relating to certification issues only, and subject to the general rules on discovery of non-parties. The Divisional Court held that the plaintiffs could not use §1782 to circumvent the *Rules* and the class proceedings regime in Ontario.

Mancinelli is the first reported case in Ontario to directly address the interplay between §1782 and the *Rules of Civil Procedure* and class actions regime in Ontario. In an era where the test for certification has become increasingly easier for plaintiffs to meet, this sends a strong and important message that the rules of court in foreign jurisdictions cannot be used to circumvent the rules of court in Ontario. Moreover, the decision confirms that the scope for discovery prior to certification remains limited in Ontario, and is not likely to move towards the broader approach to pre-certification discovery taken in the United States.

The plaintiffs have sought leave to appeal the Divisional Court's decision, which means that the Divisional Court's decision may not be the final word on the matter.