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Pre-certification motions in class actions: are courts setting the bar too high for early and efficient disposition?

As I have observed before, class actions are expensive for defendants and resource-intensive for the justice system. In order to try and minimize that expense, defendants typically want to dispose of class actions they face as early as possible. This has given rise to a body of case law that addresses the question of when defendants will be allowed to bring pre-certificate motions. As the recent decision of the Ontario Superior Court of Justice in *Austin v Bell Canada* shows, defendants face a high threshold in persuading the court to allow such motions to precede certification.

By way of background, *Austin v Bell Canada* is a proposed class proceeding commenced in January 2018. The plaintiff claims that Bell Canada improperly calculated the rate of indexation of its pension plan, thereby allegedly depriving employees of their pension entitlements.

In advance of certification, Bell Canada's lawyers wrote to the Office for the Superintendent of Financial Institutions ("OSFI"), alerting OSFI to the allegations and suggesting that OSFI would be best positioned would be to resolve the matter. OSFI wrote back indicating that it would be prepared to review the matter, if requested.

The defendants then sought to bring a motion to stay the class proceeding in favour of a determination by OSFI. The defendants argued that such a motion should be heard and disposed of prior to certification. By contrast, the plaintiff took the position that this issue should be determined by the court as part of the argument on the certification.

The matter ultimately came before Justice Glustein for a determination as to when the defendants' motion to stay the class proceeding should be heard. Justice Glustein directed that the defendants' stay motion should be heard as part of the certification motion, rather than in advance.

Justice Glustein noted that sections 12 and 13 of the *Class Proceedings Act* gave him broad discretion to determine the appropriate procedure for the adjudication of the matter. In

relying on an earlier decision of Justice Strathy (as he then was) in *Cannon v Funds for Canada Foundation* (2010 ONSC 146), Justice Glustein identified six factors for determining whether the court should exercise its discretion to hear a pre-certification motion:

(a) whether the motion will dispose of the entire proceeding or will substantially narrow the issues to be determined;

(b) the likelihood of delays and costs associated with the motion;

(c) whether the outcome of the motion will promote settlement;

(d) whether the motion could give rise to interlocutory appeals and delays that would affect certification;

(e) the interests of economy and judicial efficiency; and

(f) generally, whether scheduling the motion in advance of certification would promote the 'fair and efficient determination' of the proceeding.

Applying these factors in this case, Justice Glustein held that it would not be reasonable for the stay motion to be heard in advance of certification. He noted that both parties accepted that both OSFI and the Superior Court had concurrent jurisdiction to interpret Bell Canada's pension plan. As such, the defendants' proposed stay motion was essentially akin to an argument that the class action would not be the preferable procedure for resolving the common issues. The Court also noted that even if the stay motion were granted, it would not resolve the entirely of the proceeding. Finally, the Court noted that it could delay the expeditious resolution of the proceeding. Consequently, the court declined to allow the defendants to bring a motion in advance of certification.

The Court's decision in *Austin v Bell Canada* signals that courts will generally be reluctant to parse out the various issues before certification in separate motions. Courts will generally only allow such pre-certification motions to be brought where it is more efficient to do so, such as where such motions will be dispositive of the matter.

These principles do not preclude defendants from bringing pre-certification motions to challenge the court's jurisdiction entirely. However, they signal the need for caution before bringing such a motion. In this particular case, the decision signals that where a regulator has concurrent jurisdiction, courts are likely to consider the argument that the regulator should address the issues in the proceeding at the time of certification, rather than during a pre-certification motion. This may be a reasonable outcome, but it is unfortunate for defendants seeking to dispose of a class proceeding without

going through the full expense associated with a certification motion.