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Less is Not Always More: Evaluating Causes of Action in Carriage Motions

Barrick Gold Corporation's disclosure, on April 10, 2013, that a Chilean court had issued an interlocutory order suspending the construction of its Pascua-Lama mine led to a substantial drop in its share price. This was further exacerbated the following month, when Chilean environmental regulators found serious environmental violations and shut down the project. Both Rochon Genova LLP ("Rochon") and Koskie Minsky LLP ("Koskie") initiated class proceedings against Barrick Gold Corporation ("Barrick") on behalf of disgruntled shareholders, with billions of dollars of damages claimed.

It is well-known that there cannot more than one certified class action in the same jurisdiction representing the same class in relation to the same claim, and the Ontario Court of Appeal's recent decision in *Mancinelli v Barrick Gold Corporation* confirmed that it was Rochon who would have carriage of this shareholder class action.

The basic test for carriage motions is well-established, and was not disputed by the parties.

In this case, the primary issues were the nature and scope of the causes of action advanced by Rochon and Koskie. Rochon's claims on behalf of class members were broad, alleging misrepresentations in Barrick's environmental compliance, its capital expenditure budget, and its financial statements. It also included claims of conspiracy and fraudulent concealment.

Koskie, on the other hand, opted for a more "streamlined" approach to the pleadings, focusing only on alleged misrepresentations about environmental compliance.

Koskie argued that their streamlined approach ought to be preferred. Putting what the Ontario Court of Appeal called a "novel spin" on the cause of action factor, Koskie submitted that the focus of the factor is "workability", and that it should be given priority over other factors. In general, they argued that "less is more" when it comes to the scope of the action. Time-consuming and unwieldy causes of action should be avoided.

In spite of these submissions, the Ontario Court of Appeal affirmed the lower courts' decisions to grant carriage of the action to Rochon. The Court of Appeal confirmed that the ultimate question before a court in a carriage motion is whether counsel's proposed strategy is reasonable and defensible. Without delving too deeply into the merits of the case, the motions judge concluded that both the conspiracy claim and the fraudulent concealment claim advanced by Rochon had a strong rationale and were genuinely viable. On that basis, the Court of Appeal found it was reasonable for the motions judge to conclude that a more comprehensive litigation strategy was in the best interests of the class.

Importantly, at least for those dealing with these issues at first instance, the Court of Appeal did not close the door to those plaintiffs' counsel who took a similar "less is more" strategy. Rather, referring to the broad discretion of a judge on a carriage motion, the Court underlined merely that "this was a call [the motions judge] was entitled to make". It thus seems that a future motions judge would be entitled to come to the opposite conclusion, in an appropriate case.

With notes from Sarah Bittman