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Navigating Duplicate Proceedings: What Happens When Courts Certify Parallel Pharmaceutical National Class Actions?

It is not uncommon in the Canadian class action landscape for competing class actions to be commenced in multiple jurisdictions, each procedurally vying in the horse race of who will be named the nation's choice as national class action. Competitors who lose that race are stopped in their tracks, having to sit along the side lines as the blue-ribbon action proceeds to trial.

As my colleague Kelly Hayden previously canvassed, disputes over which action proceeds and which is stayed can be raised prior to certification. In *Kirsh v Bristol-Myers Squibb*, Justice Morgan recently addressed this issue in the context of a motion to certify a class action in Ontario where Quebec had already authorized a similar class action.

In Ontario, a class action was brought in June of 2016 claiming negligence, failure to warn, and conspiracy regarding side effects of the antipsychotic medications Abilify and Abilify Maintena. The plaintiff sought compensatory and punitive damages on behalf of two classes based on the oral and injectable form of drug. The side effects alleged included compulsive behaviours and impulse control disorders, namely compulsive gambling, compulsive shopping, hypersexuality and binge-eating. These potential side effects were eventually included in the product monographs.

Approximately six months after the claim was issued in Ontario, a Quebec claim was launched as a parallel national class action on the basis of negligence only.

As both actions proceeded toward a motion for certification, the Ontario action was mired in more local competition with a carriage motion being fought and a competing Alberta action being stayed in favour of the Ontario action proceeding.

In January of 2019, the Ontario action's motion for certification was scheduled to proceed and ultimately was heard by Justice Morgan on March 4-6, 2020. The motion was opposed by the defendants and resulted in significant records including expert reports on both sides.

Conversely, the Quebec action proceeded unopposed by the same defendants. The authorization (Quebec's version of the certification process) ultimately was heard on November 7 and December 5, 2019. Notably, two days before the hearing, plaintiff's counsel amended the Statement of Claim to add a claim of civil conspiracy and to change the class period to match that in the Ontario action. These amendments did not prompt a response from the defendants, who did not oppose authorization of the claim, which was authorized as a national class action.

Three months later, when the motion for certification was heard in Ontario, the defendants brought a concurrent motion to stay the proceeding on the basis that it was duplicative of the Quebec action which was already certified and, therefore, an abuse of process.

Justice Morgan considered the stay motion and motion for certification together, proceeding through the analysis for certification prior to considering if a stay of the proceeding should be granted. In that analysis, Justice Morgan found that the plaintiff met the test for certification set out in section 5(1) of the *Class Proceedings Act*.

Justice Morgan then moved to the defendants' motion to stay the action as an abuse of process on the basis that it would be duplicative of the Quebec action, which had already been authorized.

In considering the motion, Justice Morgan considered the circumstances in which a parallel action could be permitted to continue. Given that the Ontario action had been commenced first, there was no basis to suggest that it was duplicative or an abuse of process from the starting gate.

In recounting the procedural history, particularly comparing the defendants' different approaches to the action in Quebec versus the Ontario proceeding, Justice Morgan took issue with the defendants' strategy in both actions. The defendants' disparate strategic approaches of fighting the Ontario action on all fronts allowing the Quebec action to sail through certification unopposed, even where the Claim was amended on the eve of the hearing, created enough of a spectre of forum (or counsel) shopping to give the Court pause.

Justice Morgan found that the defendants' request for a stay of

the Ontario proceeding looked “like a way of ensuring that they will go to trial with what they hope is the ‘least formidable foe’”.

Ultimately, Justice Morgan found that the Ontario action was not an abuse of process and had a legitimate rationale for proceeding. The action was certified as a national class action and the motion to stay the action was dismissed.

While the Ontario action lived to fight another day, the decision raises many interesting strategic questions for class action litigants facing jurisdictional horse races. Here, the plaintiff’s claim coming strong out of the gate turned out to be more significant than who got to the finish line of certification first.

How this matter unfolds, with two parallel certified national class actions, remains to be seen. Given the frequency of parallel class actions being brought in multiple jurisdictions, the potential implications of this decision could be far-reaching. The possibility of multiple certified class actions proceeding toward trial raises the significant risk of inconsistent decisions down the line. Additionally, it is both unfair and impractical for defendants to be forced to litigate the same allegations in respect of the same class in multiple different forums concurrently. Courts will have to be sensitive to these issues going forward.