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October 18, 2019

No risk, no appeal: Ontario Court of Appeal rules that class members cannot appeal settlement approvals

On October 17, 2019, a five-judge panel of the Ontario Court of Appeal released its unanimous decision in *Bancroft-Snell v Visa Canada Corporation*. The Court's decision has significant implications for the procedural rights of class members involved in settlement discussions and approval under the *Class Proceedings Act, 1992*.

Originating in 2011, the class action brought by representative plaintiff Jonathan Bancroft-Snell and his corporation, 1739793 Ontario Inc., alleged that two credit card networks (Visa Canada Corp. and Mastercard International Inc.), as well as ten banks, engaged in a conspiracy to fix, maintain, increase or control merchant discount fees paid by merchants who accept payment by Visa or Mastercard credit cards. This proceeding was commenced alongside similar class actions in British Columbia, Alberta, Saskatchewan and Quebec — with the proceeding in British Columbia ultimately becoming the lead action. In 2014, Chief Justice Bauman of the Supreme Court of British Columbia certified the class action, with subsequent consent certifications for the purpose of settlement occurring in the other provinces at various times.

In Ontario, Justice Perell approved four partial settlements in November 2015 and June 2016. His Honour also certified the Ontario action for the purpose of the fifth, sixth and seventh partial settlements in January 2018. On September 11, 2018, Justice Perell approved the fifth, sixth and seventh partial settlements in this class action. This appeal was brought by two class members — Wal-Mart Canada Corp. and Home Depot of Canada Inc. — of Justice Perell's September 11, 2018 Order.

Under the *Class Proceedings Act*, class members have two ways to try to avoid a settlement that would otherwise bind them. First, at some stage of the litigation prior to the settlement being approved, class members will have the right to opt out of the class so that the settlement does not bind them. Second, class members can object to a settlement when the settlement comes before the Court for approval.

In this case, class members who did not opt out during the first

four settlements were no longer entitled to opt out during any subsequent consent certification for settlement purposes. Neither Wal-Mart nor Home Depot opted out.

While Wal-Mart and Home Depot had exercised their right to object to the settlements before Justice Perell, their arguments were unsuccessful. Justice Perell approved the settlement over their objections. Having not opted out of the class proceeding and their objections having failed, Wal-Mart and Home Depot appealed. The defendants, supported by the representative plaintiff, brought a motion to quash the appeal on the basis that class members, other than the representative plaintiff, had no standing to appeal a settlement approval order.

In a punchy 25 paragraph judgment, Chief Justice Strathy affirmed existing law on the procedural rights of class members under the Act. Drawing back on the Court of Appeal's 1998 decision in *Dabbs v Sun Life Assurance Co.*, Chief Justice Strathy held that class members were barred from appealing a settlement approval order.

While the Court of Appeal acknowledged that class members may exercise their power under ss 30(3) and 30(5) of the *Class Proceedings Act* to appeal a judgment on common issues or a determination of aggregate damages, an approval of a settlement does not fall into these categories. Instead of resolving a contentious issue, the settlement approval judge's task is often to assess whether the settlement is fair and reasonable, and in the best interests of the class.

In coming to this decision, Chief Justice Strathy emphasized some of the fundamental purposes of class actions settlements generally: efficiency and certainty. If members of the class were permitted to appeal a settlement order, the process of negotiating and approving a fair settlement would be undermined. Should a class member choose to not opt out of the proceedings, they are bound by the outcome of the action.

Implications

The Court of Appeal's decision reduces the risk that settlements will be the subject of lengthy legal challenges by formerly absent class members. Ultimately, this is favourable for the active litigants in class proceedings with primary carriage of reaching a resolution to the dispute. Representative plaintiffs are required to act in the best interests of the class when making litigation decisions. However, in exchange for having this control, representative plaintiffs also bear the risk involved in a class proceeding — notably the possibility of an adverse costs award. It would add to the burden shouldered by these plaintiffs if they were forced to negotiate a settlement

under a cloud of uncertainty as to the finality of proceedings. Defendants similarly need not worry about future lengthy appeals derailing a settlement that itself was almost invariably the outcome of protracted negotiations. By putting the concern of settlement appeals to rest, the Court of Appeal seems to have also taken a firm stance against objector tactics more commonly seen in the United States, where class members have attempted to extract money from the parties or class counsel in exchange for their acquiescence with the proposed settlement. Overall, the decision is positive for parties to class actions by ensuring that there are fewer hurdles to a final and approved settlement.

However, the Court's decision also raises practical issues for class members. While class members have the right to opt out of proceedings pursuant to s 9 of the *Class Proceedings Act*, this process often occurs well before (sometimes years before) settlement discussions would ever occur. As the Court of Appeal recognized here, most class actions are resolved through settlement. Thus, if a class member chooses not to opt out of the proceedings but believes the negotiated settlement by the representative plaintiff is unfair, their only recourse is to object before the settlement approval judge. While there is an intuitive pull to the concept that class members should have more robust rights of objection regarding settlement approval similar to their rights of appeal under s 30(3) of the *Class Proceedings Act*, the Court's decision here makes clear that the settlement approval judge's decision becomes the last word on the matter.