NORTON ROSE FULBRIGHT

Legal update

Ontario court shuts down end-runs on letters rogatory into the US by plaintiff class counsel

January 2017
Class actions

Perell J. of the Ontario Superior Court released a significant decision to commence the new year in a pre-certification motion in *Mancinelli v Royal Bank of Canada*, a $1 billion Ontario class action proceeding against several banks accused of price-fixing in foreign exchange markets. One of the plaintiffs had obtained on an *ex parte* basis in the US federal court in Manhattan a subpoena against a non-party, the market news service Bloomberg LP, in order to gather evidence for use in the Ontario litigation. In obtaining the subpoena, the plaintiff had attempted to circumvent the traditional – and typically cumbersome – route of obtaining letters rogatory from an Ontario court for enforcement through the US courts pursuant to principles of comity and reciprocity.

As requested by certain of the defendant banks, Justice Perell ordered that the plaintiffs not act on the Bloomberg subpoena or obtain any other non-party evidence without authorization of his Ontario court. In doing so, Justice Perell found that the material submitted to the US District Court had mischaracterized the policies and procedures under Ontario's *Rules of Civil Procedure* with respect to the discovery of non-parties in class actions prior to certification, and rendered ineffective in Canada the order issued by the influential US District Court for the Southern District of New York, faulting the plaintiff for failing to disclose to the US court in the *ex parte* hearing a number of significant differences in Canadian class action and discovery procedures vis-à-vis the US.

The decision constitutes an important procedural victory for class defendants and puts the brakes on plaintiffs' class counsel using a US statute to avoid the letter of request (or letters rogatory) procedure. Prior to the decision, Canadian courts had been reluctant to intervene in such cases, even despite the risk that plaintiffs' class counsel would misuse US statutes to obtain much broader discovery than is typically permitted in Canada at the pre-certification stage. Perell J. distinguished those decisions, and declined to follow *Catucci v Valeant Pharmaceuticals International Inc*., 2016 QCCS 3431, leave to appeal refused 2016 QCCA 1349, which appeared to be squarely on point.

In his decision, Perell J. emphasized that in class actions in Ontario, pre-certification discovery is only available where the moving party shows the discovery is necessary to inform the certification process or relevant to the specific certification criteria. Moreover, orders for non-party discovery are exceptional and subject to a standard not just of relevancy to a disputed issue but rather to a *material* disputed issue, and non-party disclosure should only be ordered where the unfairness to the non-party is outweighed by the necessity to the moving party.

Although the plaintiffs argued they were merely gathering evidence, which is their right, Perell J. observed that they were in fact going one step further in *compelling* production of evidence, and in doing so not only circumvented Ontario's *Rules of Civil Procedure*, which govern the compulsion of evidence, but also Canadian jurisprudence on class action procedure. The decision defends firmly the Ontario jurisprudence restricting the scope of pre-certification discovery in class proceedings, even where direct motions to foreign courts might save expense and the fruits of the US subpoenas might ultimately be inadmissible in Canada. However, Perell J. left open the possibility that letters rogatory for Bloomberg's data might still be sought.

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