ABUSE OF PROCESS

Whack-A-Mole and Cherry Trees: What Do Recent Stays Mean for Abuse of Process Arguments in Class Proceedings?

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Over the last two decades, defendants to Canadian class actions have regularly faced the prospect of defending identical or very similar proceedings filed by the same class counsel in two or more provinces.[1] Despite the general rule that plaintiffs may not litigate the same claim in two separate actions, defendants were largely unsuccessful in obtaining stays of duplicative class proceedings. Courts generally held that the interest of class members in obtaining access to justice trumped other considerations such as comity, best use of judicial resources, and fairness to defendants. At best, defendants obtained conditional stays that could be lifted if proceedings in another province were discontinued.

In the last two years, however, building on principles articulated in stay decisions in Saskatchewan,[2] courts in three other provinces have ordered stays of duplicative class actions against BCE, Inc. (the "BCE decisions").[3] In this article, I will review these decisions and consider their impact.

The Saskatchewan Decisions

In both *Englund* and *Duzan*, plaintiffs started duplicate actions against drug manufacturers in Saskatchewan and at least one other province. The Saskatchewan courts stayed the actions on the basis that they were abusive. Both courts agreed that filing duplicative class proceedings in several provinces could serve a legitimate purpose for plaintiffs, giving them the ability "to choose what they consider to be the most favourable jurisdiction in which to prosecute the claim."[4] As noted by Justice Ball, however, plaintiffs must at some point choose where they wished to pursue their rights:

> [I]t is not acceptable for plaintiffs to commence class actions in multiple jurisdictions and then leave the courts and the defendants guessing as to whether and when any particular action will proceed. ... To recap, Mr. Merchant initially consented to a scheduling order in the Romano action designed to move that claim forward in Ontario. Two years later, he obtained leave to discontinue the action by assuring the Ontario court that the claim would be pursued in Saskatchewan. Now almost three years after this action was commenced, after the filing of the plaintiffs' motion for certification and after the delivery of related material by both sides, Mr. Merchant asserts that the matter will be pursued instead in a third jurisdiction, British Columbia.
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> This multijurisdictional game of class action "whack-a-mole" would in itself be sufficient basis for an unconditional stay on the basis of abuse of process.[5]

The courts in *Englund* and *Duzan* were not the first to stay a class action based on abuse of process. The reasoning of these courts suggested, however, a willingness to entertain arguments based on fairness considerations for defendants that had, until then, largely fallen on deaf ears.

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[1] This is to be distinguished from a multiplicity of class proceedings initiated by different class counsel, resulting in a carriage motion.

[2] *Boehringer Ingelheim (Canada) Ltd. v. Englund*, 2007 SKCA 62 and *Duzan v. Glaxosmithkline, Inc.*, 2011 SKQB 118.

[3] A fourth court denied BCE's motion for a stay. In *Turner v. Bell Mobility Inc.*, 2015 ABQB 169, Justice Rooke of the Alberta Court of Queen's Bench denied a stay on the basis that Albertans should not be deprived of the potential certification of an "opt-out" class action in Alberta. This decision is under appeal.

[4] *Duzan*, supra note 2 at paragraphs 30.

[5] Ibid. at paragraphs 36 and 37.

The BCE Decisions in Manitoba, British Columbia and Nova Scotia

Beginning in 2012, defendants in duplicative class actions sought stays of class proceedings based on the principles set out in *Englund* and *Duzan*. The actions at issue were a subset of identical or near identical class proceedings commenced against BCE and other telecommunications companies in 2004 in nine provinces.

They proposed different representative plaintiffs but were filed by the same law firm. They each alleged that the defendants had improperly charged system access fees to cell phone users and proposed common issues based on an array of causes of action.

For ten years, only the Saskatchewan proceeding was actively pursued. In 2007, the Saskatchewan court certified the action, but limited the common issues to a claim for unjust enrichment (rejecting other causes of action based on consumer protection legislation, contract, negligence and other theories). The class as defined was also limited; it excluded any customers who had arbitration clauses in their contracts with service providers, and extended to only those non-Saskatchewan residents who took steps to opt in.[6] Over the next few years, class counsel appealed this decision and attempted to work around it in a variety of creative ways.[7] Class counsel also took steps to reactivate or preserve the actions in other provinces. In reaction, the defendants filed motions for stay in Manitoba, Alberta, B.C. and Nova Scotia.

In *Hafichuk-Walton v. BCE, Inc.*,[8] Justice Schulman of the Manitoba Court of Queen's Bench acknowledged that the commencement of duplicative class proceedings did not necessarily amount to an abuse of process. This is not surprising since a stay of proceedings is never granted as of right; it is always subject to the court's "inherent and residual discretion to prevent abuse of a court's process."[9] In determining whether a stay should be granted, the court must consider the circumstances and history of the case. In *Hafichuk-Walton*, the involvement of the same class counsel and the same group of plaintiffs militated for a stay:

> In assessing whether the filing of multiple class actions constitutes an abuse, the court must consider the entire context in which the actions have been brought .... The fact that the plaintiffs are the same in each action is a relevant fact .... The fact that the same law firm filed each claim is a relevant fact .... The fact that one action was commenced in an opt out province and the other in an opt in province, is not a valid reason to justify the conduct of class actions in more than one province ....[10] [citations omitted]

Justice Schulman rejected the plaintiffs' argument that Manitoba class members would not be adequately protected because they would have to opt in to participate in the *Frey* class action in Saskatchewan. He acknowledged that opt-out procedures generally provide better access to justice than opt-in procedures. But he noted that class counsel was aware of the existence of opt-out procedures in Manitoba, yet chose over a ten-year period to seek certification only in Saskatchewan.[11]

In *Drover v. BCE, Inc.*, the British Columbia Supreme Court followed suit, dismissing an application to revive the class proceeding that had been filed in that province nine years earlier.[12] The Court held that there is "nothing wrong with multiple proceedings against the same defendants in relation to the same subject matter," but, based on *Englund* and *Duzan*, it could be an abuse of process if the same plaintiffs were involved.[13] Although the representative plaintiffs in the Saskatchewan and B.C. actions were different, the Court concluded that "even a superficial examination readily reveals that, on any practical view of

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[6] *Frey v. BCE, Inc.*, 2006 SKQB 328 and 2007 SKQB 328.

[7] An exhaustive description of the "myriad" of motions and appeals in the *Frey* action in Saskatchewan is beyond the scope of this article. They are summarized by Justice Schulman in *Hafichuk-Walton*, infra note 8 at paragraphs 5 to 15.

[8] 2014 MQBQ 175.

[9] *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, cited more recently by the Supreme Court in *Behn v. Moulton Contracting Ltd.*, [2013] 2 S.C.R. 227 at paragraph 39.

[10] Supra note 8 at paragraph 24.

[11] Ibid. at paragraph 30.

[12] *Drover v. BCE, Inc.*, 2013 BCSC 1341.

[13] Ibid. at paragraphs 40 and 41.

the facts, the Frey Action and the Drover Action were commenced and are being litigated by the same people."[14]

Having reached this conclusion, the Court held that the B.C. action served "no legitimate or proper purpose." The abuse was not that identified in *Duzan*, where the defendants had been left to guess the plaintiff's prosecutorial intentions. The problem was instead that class counsel had never intended to move forward with the B.C. action, unless the Saskatchewan courts refused to certify essentially the same proceeding:

> It is plain that Mr. Merchant's plan was to commence virtually identical class action proceedings in Saskatchewan, Manitoba, Ontario, Quebec, Alberta and British Columbia with the goal of certifying one national class in Saskatchewan. Once that goal had been achieved, the plan was to obtain either a settlement or a judgment on behalf of the national class. If that plan failed, one or more of the dormant actions in the other provinces would be resuscitated.
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> This is not a situation where class actions have been commenced in multiple jurisdictions and the courts and the defendants have been left to guess as to whether and when any particular action will be prosecuted. It has been clear from the outset that MLG intends to litigate the Frey Action [the Saskatchewan proceeding] only.[15]

Unlike in *Hafichuk-Walton*, the B.C. court did not, however, grant the defendants an unqualified victory. It stayed the B.C. action subject to reactivation if the right of B.C. residents to participate in the Saskatchewan action was time-barred and if the Ontario action was discontinued.

Finally, in *BCE, Inc. v. Gillis*, the Nova Scotia Court of Appeal unconditionally stayed the action filed in that province in 2004.[16] Like the B.C. court in *Drover*, the Nova Scotia court held that the filing of duplicative class proceedings, where the plaintiff only intended to proceed in one province, was an abuse of process. Justice Scanlan equated the filing of such proceedings to:

> planting legal cherry trees across the country. For ten years the only tree they cared for was in Saskatchewan. Now they want to go from jurisdiction to jurisdiction picking only the cherries they like in jurisdictions they have totally neglected for a decade. With this selective harvesting the appellants are left to guess at where the respondents and MLG may choose to go next. If they are permitted to do what they ask, the appellants will have no choice but to re-litigate the same issues repeatedly, potentially having divergent outcomes.

Justice Scanlan emphasized that he was not saying that commencing actions in multiple jurisdictions was "*prima facie* vexatious or an abuse of process," and that doing so in certain cases could well be justified.[17] Various factors might determine whether duplicative processes were abusive:

- Lack of intention to prosecute in the jurisdiction where the stay was sought. In Scanlan J.'s view, absent an intent to prosecute, filing a claim could be improper.[18]
- Delay in advancing a claim. "Delay in and of itself can result in an abuse of process."[19]
- Multiplicity/duplicity of proceedings. Justice Scanlan noted that refusing a stay of a duplicative action would encourage re-litigation, an evil that the abuse of process doctrine was designed to prevent.
- Actions of counsel.

> I am satisfied that MLG is now trying to do an end run around what courts in other jurisdictions have ruled. From the beginning they knew of the opt-in versus the opt-out differences in various provinces. Now that the Saskatchewan courts have refused to include non-residents on an opt-out basis, MLG is trying to circumvent that ruling. This, after they ignored the Nova Scotia actions for ten years. In addition, they have had rulings in other jurisdictions that have determined that the multiplicity of proceedings was and is an abuse of process. MLG presses on in this jurisdiction in an attempt to do an end run around those decisions as well.[20]

[14] Ibid. at paragraph 44.
[15] Ibid. at paragraph 46.
[16] 2015 NSCA 32.
[17] Ibid. at paragraph 35.
[18] Ibid. at paragraphs 38 to 41.
[19] Ibid. at paragraphs 42 to 48.
[20] Ibid. at paragraph 67.

- Carriage of action. As noted by Justice Scanlan, commencing an action for the purpose of securing carriage is an abuse of process. To the extent it motivated class counsel to file duplicative actions, it weighed in favour of a finding of abuse of process.[21] Furthermore:

  > [I]f there were indeed claimants in this province who wished to pursue this case as a class action, on a national or provincial basis, they would first have to enter into a carriage dispute with the MLG group. What is especially distasteful in this case is that the action filed in Nova Scotia was one that was never intended to be pursued. Filing to maintain carriage must be discouraged. MLG's involvement in Nova Scotia should come to an end. It is an abuse of process to file a claim in Nova Scotia simply to maintain carriage.

- Tolling the limitation period. In Justice Scanlan's view, filing an action for the sole purpose of preserving plaintiffs' rights was abusive if they never intended to prosecute the case.[22]

- Comity. Justice Scanlan held that "to allow the action in Nova Scotia to continue would permit a collateral attack on the Saskatchewan decision, which refused certification for non-residents on an opt-out basis."[23]

Justice Scanlan rejected the argument that a stay should be denied if it meant that Nova Scotia residents had to opt in to benefit from a class action in another province. Justice Scanlan found that this was a neutral factor when determining if a class action was abusive. He held that an opt-in scheme for Nova Scotians did not mean that they were denied access to justice, noting that placing too much weight on this consideration would invariably tilt the playing field in favour of a denial of any stay:

> If the "opt-out" regime of a particular province trumps bad behaviour in other Canadian jurisdictions, plaintiffs can act irresponsibly elsewhere with impunity, relying on the court in their home province to come to their rescue. Abuse of process becomes what plaintiffs do elsewhere, with the apparent approval of their "home court". Comity means nothing.[24]

Impact of the BCE Decisions

The BCE decisions make it tempting to conclude that courts will now take a more serious look at abuse of process arguments raised in duplicative class proceedings. Where the same law firm and same set of plaintiffs are directing actions in two or more provinces but have focused almost exclusively on proceedings before one court, the recent stay decisions in Manitoba, B.C. and Nova Scotia provide solid arguments in favour of a stay. Proof that class counsel never intended to prosecute – that they were simply filing to keep their options open – would appear to weigh heavily in favour of a stay.

Arguably an even more important element of the BCE decisions is the rejection by the B.C. and Nova Scotia courts of the argument that requiring non-residents to opt-in to class proceedings is inherently unfair. This was the basis for the Alberta Court of Queen's Bench refusal to grant a stay in yet another BCE case.[25] That decision is now under appeal. If the appeal is granted, it will put to bed the last principled argument by class counsel resisting a stay in the BCE cases.

Having said all of this, the context of the BCE cases is unique. A single class counsel filed the same action on behalf of the same group in nine provinces and did nothing for almost ten years to advance claims in eight of them until the results of his certification motion in the other province were not to his liking. Class counsel's manoeuvres were so nakedly strategic in this case that a finding of abuse of process seems almost inevitable. We are left to wonder if, absent these extreme circumstances, Canadian courts would make the hard decision to stay a class action of potential benefit to residents of their home province.

Another limitation of the BCE decisions is the inference that abuse of process may not be provable at the outset of a case. All three courts held that filing duplicative class proceedings is not *per se* abusive, and identified

[21] Ibid. at paragraphs 69 to 74.
[22] Ibid. at paragraphs 75 to 76.
[23] Ibid. at paragraph 83.
[24] Ibid. at paragraph 58.
[25] *Turner*, supra note 3.

the actions of class counsel over a long period of time as significant factors in their decisions. It is hard to reconcile this reasoning with the idea, articulated in *Drover* and *Gillis*, that filing an action that the plaintiffs never intended to prosecute in a particular court is itself an abuse. If the intention not to prosecute was evident from the outset -- as evidenced in the BCE cases by class counsel's repeated statements that he only intended to move to certification in Saskatchewan – then did the defendants have to wait ten years to get a stay of proceedings?