Silver v Imax: the saga continues

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Introduction

In a recent decision in the ongoing *Silver v Imax*(1) saga, the Ontario Superior Court of Justice denied leave to appeal from the order of Justice van Rensburg to amend the global class definition in the parallel Ontario class proceedings by excluding those persons that had been included in the US settlement. The decision of the superior court is an indication of the high standard upon which leave to appeal from an interlocutory order may be granted under the Rules of Civil Procedure(2) and underscores the broad discretionary jurisdiction conferred on the motions judge in accordance with the Class Proceedings Act, 1992.(3)

Background

The parallel Ontario and US class actions against IMAX Corporation were initiated in 2006 and involved allegations of misrepresentations in the financial reporting and recognition of revenue for cinema systems. In Ontario, the court certified a class proceeding consisting of all persons that had acquired IMAX securities on the Toronto Stock Exchange and on the NASDAQ during the relevant class period.

In the United States, the lead plaintiff initially sought to certify a global class, but was precluded due to a decision of the US Supreme Court, which excluded purchasers of shares on foreign stock exchanges from bringing US securities class actions.(4) Accordingly, the proposed class in the US proceeding was ultimately made up of all persons that had acquired IMAX securities on the NASDAQ during the relevant class period.

The US proceeding was resolved pursuant to a settlement agreement, which was approved by the US District Court for the Southern District of New York. However, the court's approval was conditional upon the amendment of the global class definition in the related Ontario proceeding to exclude the class members that opted to benefit from the US settlement agreement.

In a carefully reasoned decision dated March 19 2013, the motions judge amended the class definition in the Ontario proceeding to exclude those persons that had been included in the US settlement (For further details please see "*Silver v IMAX*: avoiding war on two fronts"). The plaintiffs brought a motion for leave to appeal the decision to the Ontario Divisional Court.

Law and analysis

Test on motion for leave to appeal and judicial deference in class proceedings

Leave to appeal from an interlocutory order of a judge of the superior court may be granted in accordance with Rule 62.02(4) of the Rules of Civil Procedure where:

> "*(a) there is a conflicting decision by another judge or court in Ontario or elsewhere on the matter involved in the proposed appeal and it is, in the opinion of the judge hearing the motion, desirable that leave to appeal be granted; or*
>
> *(b) there appears to the judge hearing the motion good reason to doubt the correctness of the order in question and the proposed appeal involves matters of such importance that, in his or her opinion, leave to appeal should be granted*." (5)

The superior court confirmed that:

> "*Rule 62.02(4) is intended to be a 'rigorous' screening mechanism that is designed to narrow the number of interlocutory decisions that qualify for appellate review. The test for granting leave is high. Leave will not be granted where the decision is well-reasoned and the issues raised are not of general importance.*"(6)

The superior court also recognised that in class actions, the motions judge should be granted substantial deference due to his or her detailed understanding of the case. Indeed, Section 12 of the Class Proceedings Act, 1992 provides the motions judge with broad, discretionary power:

> "*The court, on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate.*"(7)

The superior court referred to the Ontario Court of Appeal's decision in *1250264 Ontario Inc v Pet Valu Canada Inc*,(8) which interpreted Section 12 as follows:

> "*A discretionary decision to safeguard the fairness of a class proceeding is entitled to receive significant deference from this court. It may only be set aside if it is based on an error of law, a palpable and overriding error of fact, the consideration of irrelevant factors or omissions of factors that ought to have been considered, or if the decision was unreasonable.*"(9)

Was there a conflicting decision by another judge or court?

The superior court stated that the motions judge's decision to amend the global class definition did not conflict with a decision of another judge or court. The motions judge ordered the amendment only in response to a settlement agreement in the corresponding US class action. In order to prevent double recovery, it was reasonable for the motions judge to remove the Canadian class members that were included in the US settlement class. This was a reasonable objective and it would not be desirable to grant leave to appeal.(10)

Was there good reason to doubt the correctness of the motions judge's decision?

Among the arguments made by the plaintiff was the suggestion that the motions judge's decision created an impermissible opt-in class that effectively compromised the overlapping class members' procedural rights. The superior court did not find this argument to be persuasive as the motions judge directly addressed the issue of litigation autonomy in her analysis. The overlapping class members had a choice either to accept compensation in settlement of the US action or to remain in the Ontario proceeding and continue with the uncertainty of litigation.(11) As the superior court indicated, the motions judge's decision facilitated the class member's litigation autonomy. Since the US settlement was contingent upon amendment of the global class in Ontario, a refusal to amend the class would deprive the overlapping class members of the settlement option.(12)

The plaintiff also contended that the amendment was a procedural move by the defendants to extinguish the class members' claims and, as such, was barred by issue estoppel. The superior court provided that "[i]f there is one issue that cannot be said to be precluded by issue estoppel it is the possible amendment of the global class in these proceedings".(13) The motions judge noted that certification orders are interlocutory in nature and could be amended as the case proceeded. Issue estoppel could hardly serve to prevent the amendment of the Ontario class definition when no settlement was underway at the time of certification.(14)

The plaintiff claimed that the motions judge should have considered the merits of the US settlement before deciding to amend the Ontario class definition. The superior court stated that such an inquiry would have been contrary to principles of international comity. It is not appropriate for an enforcing court to evaluate the substantive or procedural law of a foreign jurisdiction without evidence of fraud or conduct that was a violation of natural justice or of public policy.(15)

The motions judge recognised the US judgment approving the pending class action settlement after applying the factors established by the Ontario Court of Appeal in *Currie v McDonald's Restaurants of Canada Ltd.*(16) The motions judge then engaged in a preferability analysis to consider the alternative prospect of resolving the claims of the overlapping class members in Ontario. This included an inquiry of:

> "*(a) the alleged advantages of litigating the claims under Ontario law;*
>
> *(b) the discovery evidence which supports the plaintiffs' claims; and*
>
> *(c) their estimate of the maximum value of the class members' claim.*"(17)

The motions judge ultimately concluded that Ontario's class actions regime was not demonstrably more favourable to the claims of the overlapping class. The superior court found no overriding error in the motions judge's assessment to support appellate review.

Should the motions judge's broad discretion be reviewed?

Both the Rules of Civil Procedure and the Class Proceedings Act, 1992 provide the motions judge with broad, discretionary authority. The plaintiff was unable to demonstrate any errors of law or significant errors of fact that would warrant a review of the motions judge's discretionary power. Instead, the superior court lauded the motions judge's carriage of the case:

> "*Justice van Rensburg was the case management motions judge for 6 years… From the very beginning Her Honour set the direction and the foundation for a fair process in an incremental and sequential basis so as to preserve the integrity of the administration of justice*."(18)

In the result, the superior court concluded that "Her Honour earned the right to be shown substantial deference for her decision to amend the global class".(19)

Comment

The superior court's decision and the underlying decision of the motions judge demonstrate that overlapping class members in parallel class proceedings will not be permitted to benefit from settlement in one jurisdiction while continuing to participate in the litigation vagaries in another. The superior court also confirmed that parties seeking leave to appeal from an interlocutory order are faced with a challenging task especially in the context of class proceedings, where the case management motions judge is granted substantial deference in the exercise of his or her discretion.

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Endnotes

(1) *Silver v Imax*, 2013 ONSC 6751.

(2) *Rules of Civil Procedure*, RRO 1990, Reg 194.

(3) *Class Proceedings Act, 1992*, SO 1992, c 6.

(4) *Morrison v National Australian Bank Ltd*, 130 S Ct 2869 (2010).

(5) Rule 62.02(4)(a) and (b).

(6) *Imax*, *supra* note 1 at para 34.

(7) CPA, *supra* note 3 at s 12.

(8) *1250264 Ontario Inc v Pet Valu Canada Inc*, 2013 ONCA 279.

(9) *Imax*, *supra* note 1 at para 37, citing *Pet Valu*, *supra* note 8 at para 40.

(10) *Imax*, *supra* note 1 at para 39.

(11) *Ibid* at para 43.

(12) *Ibid* at para 44.

(13) *Ibid* at para 48.

(14) *Ibid* at para 50.

(15) *Ibid* at para 55.

(16) *Currie v McDonald's Restaurants of Canada Ltd* (2005), 74 OR (3d) 321, 250 DLR

(4th) 224, 2005 CarswellOnt 544.

(17) *Imax*, *supra* note 1 at para 57.

(18) *Ibid* at para 66.

(19) *Ibid* at para 67.

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