ONTARIO'S COURT OF APPEAL CLARIFIES CLASS MEMBER'S APPEAL RIGHTS POST SETTLEMENT APPROVAL

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A recent decision of the Ontario Court of Appeal will be of interest to parties seeking to challenge court-approved settlements that attempt to oust or modify the jurisdiction of Ontario's Court of Appeal.[1] In dismissing a motion to quash brought by class counsel, the panel reminded counsel that parties cannot contract out of appeal rights to the Court of Appeal, unless doing so is permitted by statute. Once the rights of litigants are finally disposed of by a lower court, the Court of Appeal retains jurisdiction to hear an appeal unless otherwise expressed by statute.

The decision also suggests that any objections to a class member's standing to appeal a decision needs to be raised at the earliest of opportunity and confirmed that the time to appeal begins to run from when the meaning of a judgment is made certain. Additionally, for the first time, the Court of Appeal ruled that class members may appeal under the general rights of appeal under the *Courts of Justice Act* ("**CJA**").

Having overcome this hurdle, the appeal brought by Class Action Capital ("**CAC**"), on behalf of certain class members, will therefore proceed on an expedited basis led by McMillan LLP.

The Appeal and Motion to Quash

The appeal arose out of a class action alleging that the defendants formed an illegal cartel to restrict competition and fix prices for cathode ray tube products. Settlements were reached and approved by the Superior Court of Justice ("**SCJ**") on April 20, 2018.

The plan of distribution approved by the courts (the "**Distribution Protocol**") contains a standard deficiency process, requiring the claims administrator to (a) notify class members of deficiencies in the claims, and (b) give class members 30 days to correct such deficiencies, before deciding whether a class member is entitled to the settlement benefits (the "**Deficiency Process**").

In early 2021, certain class members appealed the decision of the claims administrator, disputing the threshold used to assess their proof of purchase. While the motions judge concluded that the claims administrator had interpreted documentary proof of purchases too narrowly and had not given sufficient reason for denying the

claims, the decision did not expressly require the claims administrator to implement a Deficiency Process (the "**January Decision**"). Thereafter, class counsel took the position that the claims administrator was only required to reconsider the claims in accordance with the motion judge's directions. Class counsel proceeded to send out revised decision notices, notwithstanding that CAC's clients have been fully deprived of the mandatory Deficiency Process.

In light of the ambiguities raised by the January Decision and the claims administrator's failure to implement a Deficiency Process prior to reconsidering claims, CAC sought further directions from the motions judge. The motions judge declined to revisit the issue and found there was no evidence that the claims administrator had not acted in accordance with his January Decision (the "**September Decision**"). Accordingly, CAC moved to appeal before the Court of Appeal.

Neither class counsel nor the claims administrator have denied that a Deficiency Process has never been given to CAC's clients. Instead, class counsel sought to quash the appeal to the Court of Appeal, relying, among other things, on a provision which states that appeals to the SCJ are "final and binding and shall not be subject to any further appeal or review whatsoever", as the January Decision and September Decision were both heard in the SCJ. Thus, class counsel argued that CAC had exhausted its appeal rights when it appealed to the Court of Appeal.

Court of Appeal Cautions Relying on a Clause to Eliminate Appeal Rights

The Court of Appeal cautioned counsel from attempting to eliminate appeal rights: "[t]he legislature knows how to oust or modify this court's jurisdiction in cognate areas."[2] It pointed to examples in the *Arbitration Act* and *International Commercial Arbitration Act*, where statute expressly permits parties to contract out of appeal rights. Agreeing that there is no language in the *Class Proceedings Act* ("**CPA**") or in any other Ontario statute that permits the ousting of the Court of Appeal's jurisdiction, Justice Lauwers, writing for the panel stated:

"This court's usual jurisdiction to hear appeals from orders of Superior Court judges can only be displaced by virtue of an agreement if doing so is permitted by statute."[3]

The Court of Appeal determined that the appeal provision on its own, being part of a court-approved settlement agreement and distribution protocol, is insufficient to oust the jurisdiction of the Court of Appeal. Accordingly, the panel cautioned counsel from attempting to rely on clauses that purport to extinguish a party's appeal rights.[4]

When No Appeal is Available under the Class Proceedings Act, the Courts of Justice Act will Govern Appeal Rights

The CPA in s. 30 contains various appeal provisions, directing parties to the proper court for their appeal in particular circumstances. The claims administrator argued that as no provision in s. 30 applied to the particular circumstances of CAC's appeal, CAC had no appeal rights. The Court of Appeal disagreed.

The panel clarified that when s. 30 of the CPA is silent on the appeal routes available to class members, that this does not mean there are no appeal rights altogether. In doing so, the panel provided that the leading authorities of *Dabbs v. Sun Life Assurance Co. of Canada*[5] and *Bancroft-Snell v. Visa Canada Corporation*[6] can be distinguished on the facts. Both *Dabbs* and *Bancroft* state that the appeal rights of class members under the CPA are not supplemented by the general appeal provisions of the CJA.

Declining to apply *Dabbs* and *Bancroft* to the facts before it, the panel ruled that in a class proceeding, a class member still enjoys the general appeal rights under the CJA when s. 30 of the CPA has no application to it – a party's appeal rights will not be confined to those available alone under the CPA.[7] The panel noted access to justice concerns: "[a] more formalistic approach would only undermine the goals of class proceedings by, for example, requiring each claimant inefficiently and expensively to advance its own appeal."[8]

Ultimately, the Court of Appeal ruled that it has jurisdiction to hear CAC's appeal under the CJA. The claims administrator's motion to quash was dismissed on the basis that the provision limiting appeal rights is unenforceable, and that the CPA will not serve as the only appeal rights available to class members.

Court of Appeal Clarifies when Time Begins to Run for an Appeal

The claims administrator also argued that the time for appeal had run out, since the 30-day time period to appeal had run its course. The panel rejected this argument. Though the time to appeal ordinarily begins when the judgment under appeal is pronounced by oral or written reasons, the Court of Appeal ruled that when a judgment is uncertain on an issue, the time may begin to run from when the meaning of the judgment is settled and made certain.[9]

Accordingly, as CAC and the claims administrator disputed the meaning of the January 2021 decision, the 30-day timeline to appeal did not begin to run until the meaning of the January 2021 decision was made certain on September 21, 2021. CAC appealed on October 20, 2021 and thus, the panel determined that the 30-day limitation period was not contravened, as it agreed that the January 2021 decision may be unclear.[10]

Implications of the Decision

Provisions in agreements which purport to limit appeal rights of a party are now called into question. Parties would be well advised to review their agreements and determine if such limitation of appeal rights is permitted by statute. This issue is prevalent in class action settlement agreements and distribution protocols, which often contain internal appeal procedures.

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Further, in the class actions context, the appeal rights of parties are now broadened. The appeal routes provided in s. 30 of the CPA are not fully exhaustive, and the door is now open to class members seeking redress to the Court of Appeal, pursuant to the CJA, where the CPA does not apply.

Finally, parties must be made aware of the potential for an appeal timeline to be extended through disputes over the meaning of a judgment. If concerns over how a judgment is to be interpreted are genuine, this may extend the time for a party to file an appeal.

The main issue in the appeal, being whether the claims administrator must reconsider claims in accordance with the Deficiency Process, remains to be decided on its merits. McMillan LLP will represent CAC on this appeal as well, on an expedited basis.

[1] *Fanshawe College of Applied Arts and Technology v. Hitachi, Ltd.*, 2022 ONCA 144 [*Fanshawe*].
[2] *Fanshawe* at para 17.
[3] *Fanshawe* at para 17.
[4] *Fanshawe* at para 18.
[5] (1998), 41 O.R. (3d) 97 (C.A.) [*Dabbs*].
[6] 2019 ONCA 822 [*Bancroft*].
[7] *Fanshawe* at para 20.
[8] *Fanshawe* at para 23.
[9] *Fanshawe* at paras 25-26.
[10] *Fanshawe* at para 31.

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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