PARTY CANNOT NEGOTIATE CERTIFICATION DEFEAT FROM THE JAWS OF CONTESTED VICTORY

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The British Columbia Supreme Court ("**Court**") recently dismissed a party's second application attempt to certify their class action in *Leonard v The Manufacturers Life Insurance* ("***Leonard***").[1]

After having their first contested application for class certification dismissed, the plaintiffs returned to the Court with the defendant's consent to ask the Court to set aside the original decision and now proceed to consent certification as part of a negotiated settlement. The Court denied the second application, declaring that if an authority did exist allowing the Court to revisit an entered order, the factors in this case did not present any injustice significant enough for the Court to exercise that authority.

Background Facts

The action began in 2013 with claims against the defendants for alleged misconduct in the handling of the company's group creditor insurance plans, which were nationally distributed through third-party institutions.

The current action began in British Columbia, although parallel actions involving similar claims against the defendants were occurring at the same time in other Canadian jurisdictions. The Court originally dismissed the plaintiff's application for class certification on its merits in 2016. The plaintiffs began an appeal of this decision, but later abandoned the attempt when they entered into settlement discussions with the defendant. The parties arrived at an initial settlement agreement and began inquiries into the process of pursuing a consent appeal of the certification decision to advance their settlement agreement. Despite inquiries, they did not pursue a consent appeal.

The parties subsequently arrived at a second settlement agreement involving the release of all claims against the defendant in exchange for donations to particular charities. The Court's approval of the settlement was a significant condition of the agreement. Obtaining the Court's approval for this became difficult because of the previous dismissal of their certification application. An action must receive certification as a class proceeding under the British Columbia *Class Proceedings Act* ("***CPA***"), in order for the Court to approve any settlement.[2] Otherwise, the Court is not able to provide settlement approval unless the previous decision went to appeal and was overturned, or the original order was set aside and replaced with an affirmative class certification.

In an attempt to have their second settlement agreement approved by the Court, the parties applied to have the original decision set aside and substituted with a certification order. The main question for the Court then became if, in fact, the Court has this jurisdiction to pursue such a request, and, if it did, would the Court exercise it in this case.

Discussion

The plaintiffs advanced two arguments for the Court to rely on in finding the jurisdiction to set aside and certify the class. First, they asserted the power given to the Court in section 9(c) of the *CPA*,[3] to make discretionary orders following the denial of a party's certification, provides the Court with the authority to make the requested order. Second, they argued the Court has underlying inherent jurisdiction to re-evaluate the original decision. The granting authority was said by the parties to be found in three compelling grounds: (1) the settlement agreement was new evidence that was not available for the previous decision, (2) the parties should not be forced into expensive litigation when there is agreement to settle; and (3) encouraging settlement advances the purpose of the *CPA*, avoids further costs, and improves access to justice.

1. *Section 9(c) of the Class Proceeding Act*

The plaintiffs argued that as the provision grants the Court authority to make orders in an action where certification is rejected, that it can be interpreted as giving the Court authority to revise the original order and certify the class in this action. The Court rejected this interpretation, fearing that it created a different meaning than the statute intended. The Court looked outside the specific provision and after a complete examination determined no authority existed in the *CPA* allowing the Court to grant the proposed order. The Court confirmed the section authorized them to make orders allowing previously denied actions to continue in a different form, but clarified that it did not authorize them to re-open a previously refused certification application for another attempt by a party. As such, the original order was final.

2. *Inherent Jurisdiction of the Court*

The Court distinguished that the options available when there has been a final order not yet entered are distinct from those available once the order is entered. As a tool to avoid any miscarriage of justice, Courts are equipped with a broader discretionary power when dealing with an order that has not been entered. In contrast, once an order is entered, the Court is bound to the principle of '*functus officio*', barring them from any further action. The Court determined that the common law exceptions to this principle, allowing Courts to reconsider an entered order, did not apply in the circumstances. The plaintiffs, however, claimed the exceptions were unnecessary here as the concerns protected by the principle of '*functus officio*' are not present in the case at hand, specifically the significant change created by the settlement and the shared consent of both parties. They asserted that in this case the exceptions are not needed to avoid the barring

principle or to reconsider the original order.

The Court then queried if these circumstances do, in fact, create a residual power available to them. In doing this, they considered a British Columbia Court of Appeal ("**BCCA**") decision, where the Court suggests a possible authority exists where a serious threat to the interests of justice may necessitate that the Court re-open a formal order.[4] The circumstances of the BCCA case did not meet the threshold, and similarly, the circumstances in *Leonard* did not present a risk serious enough to pass the threshold.

In reaching this conclusion, the Court first addressed the argument that the settlement was "new" evidence, by looking at prior cases describing how the principle of finality cannot be disregarded in order to re-open a prior decision, simply because the circumstances have changed. The plaintiff's second argument, that the parties' consent allows the Court to revisit a decision, was also not accepted due to previous cases that held the Court cannot exercise an authority that does not exist, simply because of the parties' consent.

3. *Conclusion*

The Court emphasized the main reason for dismissing this application was that failing to re-open the final order in this case would not effectively create a miscarriage of justice. The Court also acknowledged that while granting the application would assist charities, and establish a desirable finality for the parties, this was not sufficient. As settlement could still be advanced successfully through different modes, the circumstances did not effectively jeopardize the principles of the judicial system.

Takeaway

This decision highlights the Court's reluctance to revisit or set aside a formal order, and further outlines the difficult threshold that a case must meet to receive this treatment. It makes clear that the Court will not allow a settlement agreement by consent of both parties as a back door approach to having a denied class certification reversed. This case, does, however, leave open the possibility for a future Court to exercise their power to re-open or set aside an entered order if extenuating circumstances arise creating a serious risk of a miscarriage of justice. The factors needed to meet this threshold are unclear from this decision, but it is clear that the Court will require much more than merely finality to the parties, gifts to charities, and consensual settlement agreements, to do so.

The Court's decision sends the message that a party who first opposes a class action will be rebuffed from soon after returning to Court with a change of mind to now support the very same certification they had previously opposed.

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[1] *Leonard v The Manufacturers Life Insurance Company*, 2019 BCSC 598.[ps2id id='1' target='/]
[2] *Class Proceeding Act*, RSBC 1996, c.50, ss 4, 5, 35(1).[ps2id id='2' target='/]
[3] *Ibid* at s 9(c).[ps2id id='3' target='/]
[4] *R v Khan*, 2001 BCCA 10.[ps2id id='4' target='/]

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.