Toronto Law Journal

The Future of Misleading Advertising Class Actions?

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The ideal class action lawsuit is a case in which there are many similarly placed people who have been injured or who suffered a loss from the same cause, and in the same way, but where few or none of them have suffered sufficient injury to make individual lawsuits worthwhile. If you say that quickly, without giving it a great deal of consideration, misleading advertising seems to be a classic case for such actions. Thousands, perhaps millions, of consumers may have seen the same advertisement and purchased the same product – perhaps all from the same vendor. None of them are likely to have a sufficient loss to make an individual claim worthwhile. But despite the superficial attractiveness of class actions for misleading advertising, motions for certification have often proven unsuccessful.[1]

A recent decision by the Supreme Court of British Columbia, which involved a claim under the BC *Business Practices and Consumer Protection Act* (BPCPA), explains why we may see few such further attempts.[2] The *Energy Brands* case involved an allegation that the marketing and labels for "Vitaminwater" were contrary to the provision of the BPCPA, which prohibits deceptive practices. The allegation was, in essence, that the marketing and labels were misleading because they failed to disclose the considerable amount of sugar added to this "vitamin" product.

The court refused to certify the case as a class action for several reasons. Its key ruling was on the requirement of "commonality": the court held that the issue of whether any given representation induced a specific consumer to purchase a product will almost always be a matter for individual inquiry, and that consequently there were not sufficient common issues to justify a class action. The court noted:

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[1] See e.g. *Wilkinson v Coca-Cola Ltd.*, 2014 QCCS 2631; *Wakelam v Johnson & Johnson*, 2014 BCCA 36, leave to appeal to SCC refused, [2014] SCCA No 125; *Ileman v Rogers Communications Inc*, 2014 BCSC 1002; *Arora v Whirlpool Canada LP*, 2013 ONCA 657, leave to appeal to SCC refused, [2013] SCCA No 498; *Singer v Schering-Plough Canada Inc.*, 2010 ONSC 42; *Griffin v Dell Canada Inc*, [2009] OJ No 418 (Ont SCJ) (certification granted, but not in respect of the alleged misleading representation); *Bédard c Kellogg Canada Inc.*, 2008 FCA 125.

[2] *Clark v. Energy Brands Inc.*, 2014 BCSC 1891.

> There is of course, no evidence that all consumers were misled, at all times, in respect of each and every consumer transaction in question. No such evidence would be possible. Yet the relief sought by the plaintiff in the context of the plaintiff's arguments for potential remedies would practically amount to such a conclusion. Otherwise there would be no utility in the declaration sought. (¶125)
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> In the circumstances of this case, reliance on the various representations whether alone or in combination (as the plaintiff asserts) is inherently individual, as is any potential claim for damage or loss. (¶128)
>
> In my view similar reasoning [to that in the *Singer* case[3]] applies in this case. As I have already stated, the motivations lying behind the multitude of consumer transactions at issue are almost endlessly variable among consumers, and even within the context of any individual consumer. This is not a case where the plaintiff is asserting a specific and defined representation, nor is it a case where reliance could reasonably be inferred. (¶133)

This ruling is likely to be applicable to many, if not most, consumer misleading advertising class actions. Unless overturned on appeal, it is likely to militate against certification of most proposed consumer misleading advertising class actions, on the basis of lack of sufficient common issues.

The *Energy Brands* court also refused to certify on the basis that there was not an appropriately identified class.[4]

> The defendants argue, and I agree, that the proposed class definition would include persons who have no claim against the defendants, as well as persons who may have a different claim premised on a different factual basis than the one asserted by the plaintiff, and that the proposed class would include individuals who did not rely on any of the representations set out in the plaintiff's claims, who purchased Vitaminwater for reasons that have no connection to the plaintiff's claims, and who would have purchased it in any event. Therefore, as the defendants argue, the proposed class includes purchasers who may have been uninfluenced by the misleading representations the

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[3] *Singer v Schering-Plough Canada Inc.*, 2010 ONSC 42.

[4] The plaintiff proposed the following class: "Residents of British Columbia who, while residents of British Columbia, purchased one or more of the following nine varieties of Vitaminwater (collectively "Vitaminwater"): "defense"; "energy"; "essential"; "focus"; "formula 50"; "mega c"; "multi-v"; restore"; and "xxx" for consumption and not for resale.

> plaintiff asserts, or who were not misled, in that they may have purchased the product with a full and accurate appreciation of the product's attributes including its sugar content. (¶145)

Ultimately, given the finding on identifiable class, and the variable and indirect nature of the claim, the count found that a class action was not the preferable procedure for such cases. Accordingly, for each of these three reasons, the claim was not certified as a class action.

As noted above, if this decision is confirmed on appeal – and the reasoning adopted in other provinces – it may spell the death knell for most misleading advertising consumer class actions.

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Arbitration Provisions, the Right to Associate and Franchisee Class Actions

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The Superior Court of Justice recently concluded in *1146845 Ontario Inc. v. Pillar to Post Inc.*[1] that the right to associate contained in s. 4 of the *Arthur Wishart Act (Franchise Disclosure), 2000*[2] ("*AWA*") does not negate an arbitration provision in a franchise agreement in the context of a yet to be certified class proceeding commenced by franchisees. This decision will have far reaching implications for franchisees and their counsel contemplating class actions to remedy system-wide issues.

The Facts

The facts are straightforward. The proposed representative plaintiffs commenced a class proceeding claiming relief arising from breaches of ss. 3, 4 and 7 of the *AWA*, among other things. The system's franchise agreements all contained arbitration provisions in which the parties agreed that "all controversies, claims or disputes … of whatever kind or nature" would be submitted to arbitration. The plaintiffs brought a motion for a determination that the class proceeding was the preferable procedure for the resolution of the common issues in the action. The defendants sought a stay of the class proceeding, relying on s. 7(1) of the *Arbitration Act, 1991*[3] ("*AA*"), which provides:

> 7.--(1) If a party to an arbitration agreement commences a proceeding in respect of a matter to be submitted to arbitration under the agreement, the court in which the proceeding is commenced shall, on the motion of another party to the arbitration agreement, stay the proceeding.

The plaintiffs argued that, despite the mandatory language of s. 7(1) of the *AA* requiring a court to stay an action in the face of an arbitration agreement, which under the *AA* can be an independent agreement or part of another agreement, the right to associate under s. 4 of the *AWA* includes the right to join in a class action that cannot be defeated by an arbitration provision in a franchise agreement. In this regard, s. 4 of the *AWA* states:

> 4. (1) A franchisee may associate with other franchisees and may form or join an organization of franchisees.
>
> (2) A franchisor and a franchisor's associate shall not interfere with, prohibit or restrict, by contract or otherwise, a franchisee from forming or joining an organization of franchisees or from associating with other franchisees.

[1] 2014 ONSC 7400.
[2] S.O. 2000, c. 3.
[3] S.O. 1991, c. 17.

> (3) A franchisor and franchisor's associate shall not, directly or indirectly, penalize, attempt to penalize or threaten to penalize a franchisee for exercising any right under this section.
>
> (4) Any provision in a franchise agreement or other agreement relating to a franchise which purports to interfere with, prohibit or restrict a franchisee from exercising any right under this section is void.
>
> (5) If a franchisor or franchisor's associate contravenes this section, the franchisee has a right of action for damages against the franchisor or franchisor's associate, as the case may be.

The plaintiffs also relied on the decision in *405341 Ontario Ltd. v. Midas Canada Inc.*[4] ("*Midas*"), in which Cullity J. expressed his opinion that "the right of association in section 4 does encompass the right of franchisees to participate in a class action for the purpose of enforcing their rights against the franchisor under the statute or otherwise" (¶ 17).

The Decision

Referring to *Seidel v. TELUS Communications Inc.*[5] ("*Seidel*"), Justice Perell stated that the Supreme Court of Canada has unanimously confirmed "that absent legislative language to the contrary, courts must enforce arbitration agreements" (¶ 65). The particular issue for the court in this case therefore was whether, as the plaintiffs argued, "the *AWA* manifests a legislative intervention mandating court proceedings and preempting resort to arbitration" (¶ 73). Put another way, the question to be decided was whether the legislature in enacting the *AWA*, and in particular the right to associate, intended that franchisees could pursue a class action notwithstanding the fact that the franchise agreements at issue contained arbitration provisions.

Perell J. rejected the plaintiffs' arguments. In reaching that decision, the court cited s. 5 of the General Regulation[6] under the *AWA*, which refers to mediation and other alternative dispute resolution processes, as an indication that the *AWA* envisions that parties may arbitrate their disputes (¶ 75). Furthermore, the *AWA* does not contain *express* language precluding arbitration (¶ 83) or protecting any right to bring a class action (¶ 85). This is to be contrasted with ss. 7 and 8 of the *Consumer Protection Act, 2002,*[7] which do contain such express language (¶ 83).

The court also distinguished the decision of Cullity J. in *Midas*. First, that case did not involve a motion to stay a class action (¶ 94). Second, the issue there was whether, in the context of a class proceeding that was already certified, the franchisor's requirement that renewing or assigning franchisees execute a general release as a pre-condition for renewal or assignment infringed the right to associate so as to render the releases invalid (¶ 95). As to the relevance of *Midas* to the issues before him, Justice Perell stated:

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[4] [2009] O.J. No. 4354 (S.C.J.).
[5] 2011 SCC 15.
[6] O. Reg. 581/00.
[7] S.O. 2002, c. 30.

> [97] … Strictly speaking, [Cullity J.'s] judgment has nothing to say about the enforceability of an agreement to arbitrate, which unlike the release in [*Midas*] is not an agreement that would deny the franchisee any forum for access to justice. An agreement to arbitrate does not take away a vested right to participate in a certified class action. Put differently, [*Midas*] did not address the circumstance where there was a legislative tension between a right to participate in a court proceeding and a statutory imperative and jurisprudence that supports resort to arbitration by agreement even in a contract of adhesion.
>
> [98] Put differently again, and the point is subtle, [*Midas*] presupposes that there was an available class action for a franchisee to associate with and the case begs the question about whether an agreement to arbitrate, which provides an alternative route to access to justice, albeit not collectively, and which is supported by public policy, is made illegal by s. 4 of the *AWA* and counts as legislative intervention pre-empting an agreement to arbitrate.

Lastly, Perell J. cited the Ontario Court of Appeal's decision in *MDG Kingston Inc. v. MDG Computers Canada Inc.*[8] as authority for the proposition that,

> [100] … the *AWA* does not limit or restrict the right of parties to a franchise agreement to agree to resolve disputes by arbitration, which is another of saying that there is no legislative intervention to relieve the court of its obligation to give effect to the terms of an arbitration clause.

Accordingly, the defendants' motion for a stay of the class action was granted. In light of that conclusion, it was not necessary for the court to determine whether the class proceeding was the preferable procedure for resolving the common issues.

Conclusion

The import of this decision is significant. Simply by inserting an arbitration clause into its franchise agreement, a franchisor can preclude its franchisees from commencing a class proceeding to enforce their statutory and other rights. No doubt franchisors that have not already done so will amend their franchise agreements to include binding arbitration provisions. Franchisees will thus have to resort to individual arbitrations to vindicate their rights, a costly and time consuming prospect that may be beyond the capacity of many. Such an apparent curtailment of the rights of franchisees is inconsistent with earlier and repeated interpretations of the *AWA* as being remedial legislation aimed squarely at the protection of franchisees. Perhaps it will be up to the legislature to clarify what is and what is not encompassed by the right to associate under the *AWA*.

[8] [2008] O.J. No. 3770.

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Taping Medical Assessments

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In the recent decision of Alladina v. Calvo, 2014 ONSC 2550, the Defendants brought a motion for an order that the Plaintiff attend at a medical assessment with psychiatrist Dr. Lawrence Reznek and that the assessment be conducted without video recording. This case considered a variety of factors in determining the onus required for a Plaintiff to challenge the competence and/or bias of an expert to conduct a defence medical assessment.

This decision is the latest addition to an array of cases which considers whether a Plaintiff can be videotaped at his/her defence examinations due to possible expert bias.

In opposing the Defendants' motion, the Plaintiff contended that although the Defendants were entitled to a medical assessment, a psychiatrist other than Dr. Reznek should conduct the assessment due to his alleged bias and lack of professional competence, and in the alternative, if Dr. Reznek conducts the medical assessment, that it be videotaped and/or audiotaped.

The Plaintiff provided Affidavit evidence from his lawyer who believed that Dr. Reznek was biased based on his own personal beliefs and past experiences when 'at least three' of his clients were examined by him. In particular, opposing counsel took issue with Dr. Reznek's methodology in conducting the examination which allegedly involved improper evaluation of the DSM criteria.

Dr. Reznek provided his own Affidavit in response to this motion. In his affidavit, Dr. Reznek emphasized that he does not view himself as an advocate for any party and views his responsibilities to the court. He further noted that he does not tailor his medical conclusions to align with the interests of insurance companies and uses the same set of criteria for assessment no matter the source of the retainer. On cross-examination, Dr. Reznek expressed reservations about assessments being videotaped and stated that the video camera introduces a third person.

In the end, Master Glustein (as he then was) granted the Defendants' motion and concluded that the Plaintiff led no substantial or compelling evidence that the medical assessment should be video or audio taped. More importantly, the Master added that it would be unfair to the Defendants to have the assessment videotaped or audio taped when the Plaintiff's own psychiatric expert was not subject to such conditions. He stated that at a minimum, substantial and compelling reasons are required before the court can exclude a health practitioner from conducting a defence medical assessment.

In his analysis, reference was made to the Ontario Court of Appeal decision, *Adams v. Cook*, 2010 ONCA 293 ("*Adams*"), where it was held that a Defendant's medical

assessor has the right to conduct the assessment in a manner in which "in the judgment of the doctor, best facilitates the examination." The Court of Appeal in *Adams* also reiterated the principle that recording defence medical assessments should not be routine and that experts must be independent and objective with the role of assisting the court and not the parties.

Overall, this decision sets out certain criteria a Plaintiff must meet in order to exclude a health practitioner from either conducting a defence medical examination and/or compelling video/audio recording of it.

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New Regulations, Reporting Requirements and Returns under the *EATA*

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In 2011, amendments were made to Ontario's *Estate Administration Tax Act, 1998*[1] (the "***EATA***") to provide for expanded reporting requirements and enforcement powers, promising new regulations to follow. There was speculation in the wills and estates community that this might bring an end to a number of estate planning techniques which had become popular as ways of reducing the amount of estate administration tax payable. The long-awaited regulation[2] came into force on January 1, 2015, providing some guidance as to what effects this will have on applications for certificates of appointment of estate trustee going forward.

Section 4.1 of the *EATA* provides that, upon an application for a certificate of appointment of estate trustee, the estate representative must provide information about the deceased person to the Minister of Revenue. The new regulation details the nature of the information that now needs to be disclosed, and the corresponding form, the "Estate Information Return" (the "**Return**"), provides the format for this disclosure.

New Reporting Requirements

Under the new rules, persons applying for a certificate of appointment of estate trustee with or without a will are required to file the Estate Information Return within 90 days after the issuance of the certificate.[3] Under the regulation, the Return is only deemed to be given to the Minister on the day that it is received, so it is advisable to file it in advance of the deadline.[4]

The regulation provides a detailed list of the information that will need to be reported on the Return.[5] In general, details about the application for the certificate of appointment, the deceased person, and the estate representative must be included in the Return. The regulation also requires detailed information about the assets of the estate.

For real property, the Return asks for the fair market value of the property at the date of death, the municipal address, the value of any encumbrances, the assessment roll number under the *Assessment Act*,[6] and the property identifier number under the *Land Titles Act*[7] or *Registry Act*.[8]

For cash and investments, a description including the type of asset, the number of units held at death, particulars of the asset including the particular series of bonds or shares, contact

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[1] S.O. 1998, c. 34, Sch [*EATA*].
[2] *Information Required Under Section 4.1 of the Act*, O.Reg. 310/14.
[3] *Ibid.*, s. 1.
[4] *Ibid.*, s. 2.
[5] *Ibid.*, s. 3.
[6] R.S.O. 1990, c. A.31.
[7] R.S.O. 1990, c. L.5.
[8] R.S.O. 1990, c. R.20.

information of the adviser or financial institution, and account number (if applicable) are required.

For other kinds of assets, the type of asset and other identifiers (such as the VIN on a vehicle or HIN on a boat) must be included. If any assets were held as tenants in common with another, the percentage of the deceased's ownership at the time of death should be included as well.

The estate representative is required to certify that information given in the Return and in any supporting documents is true, correct and complete. A failure to provide accurate and honest disclosure can result in penalties including a fine of at least $1,000, imprisonment for up to two years, or both.[9]

Multiple Wills

Contrary to some speculative concerns expressed by the wills and estates bar prior to the release of the regulation, the new regulation does little to affect the Ontario practice surrounding the use of multiple wills as an estate planning tool. The Return provides that if the certificate of appointment is limited to the assets referred to in the will, only assets included in that will are to be listed on the Return. Further, the *EATA*'s definition of "value of the estate" refers to section 32 of the *Estates Act*, which provides that where an application or grant is limited to only part of the deceased's property, it is sufficient to set out only the value of property intended to be affected by the application or grant.[10]

Joint Assets

Assets passing outside of the estate, including the proceeds of life insurance policies and assets held jointly with right of survivorship, do not need to be included on the Return and it continues to be the case that no estate administration tax is payable on these assets. However, if the asset was transferred into joint tenancy for convenience purposes only and therefore the deceased held the beneficial interest in that asset, it must be declared as an estate asset and tax will be payable thereon. Accordingly, it may be advisable to include in a secondary (non-probate) will any beneficial interests in assets where legal title is held jointly with another.

Questions

There are still many open questions as to how these regulations will affect estate administrations going forward. How will these new regulations be applied by the Ministry of Finance? How aggressively will auditors be scrutinizing Estate Information Returns? Will information about assets passing outside of the estate be sought by the Ministry on an audit?

As the regulation is brand new, we simply do not have all of the answers yet. As assessments and audits begin, a clearer picture will begin to take shape. Wills and estates professionals will be keeping a close watch on developments in this area as they begin to take shape.

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[9] *EATA*, *supra* note 1, s. 5.1.
[10] R.S.O. 1990, c. E.21, s. 32(3).