COURT OF APPEAL FOR ONTARIO

CITATION: Mancinelli v. Barrick Gold Corporation, 2016 ONCA 571
DATE: 20160718
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Strathy C.J.O., Pepall and Brown JJ.A.

BETWEEN

Joseph S. Mancinelli, Carmen Principato, Douglas Serroul, Luigi Carrozzi, Manuel Bastos, Jack Oliveira and Cosmo Mandella, in their capacity as The Trustees of the Labourers' Pension Fund of Central and Eastern Canada, Mike Gallagher, Joe Redshaw, Rick Kerr, Alex Law, Brian Foote, Ron Martin, John Hartley, Nick Dekoning and Joe Keyes, in their capacity as the Trustees of International Union of Operating Engineers, Local 793, Members Pension Benefit Trust of Ontario and Michael Wiener

Plaintiffs (Appellants)

and

Barrick Gold Corporation, Aaron Regent, Jamie Sokalsky, Ammar Al-Joundi and Peter Kinver

Defendants

AND BETWEEN

The Trustees of the Drywall Acoustic Lathing and Insulation Local 675 Pension Fund and Royce Lee

Plaintiffs (Respondents in Appeal)

and

Barrick Gold Corporation, Aaron Regent, Jamie Sokalsky, Ammar Al-Joundi and Peter Kinver

Defendants

Paul Pape, Shantona Chaudhury and Joanna Nairn, for the appellants

W.A. Derry Millar and Peter Jervis, for the respondents

Kent E. Thomson and Steven G. Frankel, for the Defendants

Heard: April 27, 2016

On appeal from the order of the Divisional Court (Swinton, Harvison Young and Lederer JJ.), dated May 21, 2015, with reasons reported at 2015 ONSC 2717, 126 O.R. (3d) 296.

Strathy C.J.O.:

[1] This is an appeal in a "carriage dispute". Two consortia of law firms are litigating the right to represent the class in a multi-billion dollar securities action against Barrick Gold Corporation and four named executives, over alleged misrepresentations in Barrick's public filings.

[2] The motion judge awarded carriage to a group led by Rochon Genova LLP (collectively, "Rochon") and stayed an action brought by plaintiffs represented by Koskie Minsky LLP and others (collectively, "Koskie"). He preferred Rochon's broader claims and more extensive preparation to Koskie's more streamlined approach. Koskie appeals.

[3] The motion judge applied the multi-factor test set out in *Vitapharm Canada Ltd. v. F. Hoffman-Laroche Ltd.*, [2000] O.J No. 4594 (S.C.J). He made findings of fact in applying the factors to the competing consortia and determined the weight to be given to those factors. His findings are entitled to deference. The

appellants demonstrated no legal error in the application of the test. Accordingly, for the reasons that follow, I would dismiss the appeal.

I. BACKGROUND

[4] Barrick, a Canadian gold company, had interests in a mining project in Chile, referred to as the Pascua-Lama Project. It obtained approvals from the Chilean government to develop an open-pit mine, subject to conditions regarding the project's environmental impact.

[5] The proposed class actions allege that during the class period, Barrick's public disclosures represented that its activities in Pascua-Lama complied with Chilean regulatory requirements and that it had comprehensive environmental protection measures in place.

[6] The actions arise from Barrick's disclosure on April 10, 2013 that a Chilean court had issued an interlocutory order suspending construction of the mine. The following month, Chilean regulators closed the project due to environmental violations. The resulting plunge in Barrick's share price spawned shareholder class actions in the U.S. and Canada, alleging that the company and some of its officers had violated the *Securities Act*, R.S.O. 1990, c. S.5, by misrepresenting the progress of the mine in Barrick's public disclosures.

[7] Three actions remain active in Ontario. Two, referred to as the "Lee" and "DALI" actions, were commenced by members of the Rochon consortium. If

granted carriage, Rochon proposes to consolidate these actions. The third action, referred to as the "Labourers'" action, was commenced by Koskie.

[8] The actions seek damages in the billions of dollars. If certified, the proceeding will be one of the largest securities class actions in Canada.

[9] The actions are grounded in the common law and Part XXIII.1 of the *Securities Act*, and allege negligent misrepresentations by Barrick relating to the development and operation of the Pascua-Lama Project. Koskie's action, however, focuses only on alleged misrepresentations about environmental compliance. Rochon's DALI action, on the other hand, is broader. It alleges misrepresentations in three related areas: environmental compliance, the capital expenditure budget and Barrick's financial statements. The DALI action also includes claims of conspiracy and fraudulent concealment.

[10] Rochon filed a motion to certify the DALI action on September 22, 2014. This prompted a motion by Koskie on October 20, 2014 for a carriage order and a stay of Rochon's action. Rochon brought a similar motion on the same day. The carriage motion was heard on November 12 and 13, 2014.

II. THE TEST IN CARRIAGE MOTIONS

[11] There cannot be two or more certified class actions in the same jurisdiction representing the same class in relation to the same claim. Where there are rival actions, a practice has developed for a proposed representative plaintiff to bring

a motion for authorization to have his or her action proceed on behalf of all class members and to stay pending or future proceedings relating to the same issues. This is referred to as a "carriage" motion.

[12] There are several sources of the court's jurisdiction to grant such relief. Section 12 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (*"CPA"*) authorizes the court to "make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination". Section 13 gives the court jurisdiction to "stay any proceeding related to the class proceeding". Moreover, s. 138 of the *Courts of Justice Act*, R.S.O. 1990 c. C.43, provides that "[a]s far as possible, multiplicity of legal proceedings shall be avoided." Section 106 provides that a court may stay any proceedings in the court "on such terms as are considered just."

[13] The seminal carriage case is the decision of Cumming J. of the Superior Court of Justice in *Vitapharm*. He identified, at para. 48, the main criteria for determination of a carriage motion as: (a) the policy objectives of the *CPA*, namely, access to justice, judicial economy for the parties and the administration of justice, and behaviour modification; (b) the best interests of all putative class members; and, at the same time, (c) fairness to defendants.

[14] He listed, at para. 49, the following factors for consideration on a carriage motion: (i) the nature and scope of the causes of action advanced; (ii) the

theories advanced by counsel as being supportive of the claims advanced; (iii) the state of each class action, including preparation; (iv) the number, size and extent of involvement of the proposed representative plaintiffs; (v) the relative priority of commencing the class actions; and (vi) the resources and experience of counsel.

[15] In *Sharma v. Timminco Inc.* (2009), 99 O.R. (3d) 260, an additional factor was identified: (vii) the presence of any conflicts of interest.

[16] In *Smith v. Sino-Forest Corporation*, 2012 ONSC 24, Perell J. described the foregoing factors as non-exhaustive. He added six others that he considered relevant to the circumstances of the competing actions before him: (viii) funding; (ix) definition of class membership; (x) definition of class period; (xi) joinder of defendants; (xii) the plaintiff and defendant correlation; and (xiii) prospects of certification.

[17] This list remains non-exhaustive. Other factors may have significance in the unique circumstances of other cases. Determinative factors in one case may have little or no significance in another.

[18] I suggest an additional factor that may have a bearing. The proposed fee arrangement between class counsel and the representative plaintiff is a factor that vitally affects the interests of the class. While the fee is ultimately subject to

the approval of the court, significant differences between the fee arrangements may be considered on a carriage motion.

[19] In the hearing in the Superior Court, the motion judge indicated that if the seven *Vitapharm* and *Sharma* factors had failed to yield a measurable and objective difference between the competing firms, he would have considered the fee arrangements of the respective consortia. Both counsel had proposed a 30 percent contingency fee, a common arrangement in class proceedings. He mused whether counsel might be prepared to "reduce their fee to say 25, or 20, or 10 percent if granted carriage". He referred to the possibility of a "reverse auction". I note in this regard that some United States courts have instituted competitive bidding procedures in carriage cases: see Federal Judicial Center, *Manual for Complex Litigation*, (3d U.S. West Publishing, 1995) at p. 221, citing *In re Wells Fargo Securities Litigation*, 156 F.R.D. 223, 157 F.R.D. 467 (N.D. Cal. 1994); and *In re Oracle Securities Litigation*, 131 F.R.D. 688, 132 F.R.D. 538 (N.D. Cal. 1990), 136 F.R.D. 639 (N.D. Cal. 1991).

[20] There is room for debate about whether auctioning the right to represent the class will be in the best interests of the class. Is it in the best interests of the class to be represented by counsel who is prepared to take on the onerous professional and financial challenges of serving as class counsel at the lowest price? Will such counsel have a strong incentive to settle the case to recover their discounted fee at the earliest moment? Will such counsel be vulnerable to

being ground down by the defence? On the other hand, is an auction a legitimate proxy for market realities? The issue does not call for a decision in this case and I would leave it, if necessary, for another day.

[21] It seems to me that regardless of the balancing of the other factors, counsel's fee arrangements are a factor to be considered, among others.

[22] I would resist a "tick the boxes" approach to carriage motions. The issue is not which law firm "wins" on the most factors. Rather, it is the best interests of the class and fairness to the defendants, having regard to access to justice, judicial economy and behaviour modification.

III. DECISIONS IN THE COURTS BELOW

A. The motion judge

[23] Near the beginning of his reasons, the motion judge observed that the choice on a carriage motion is not between the relative resources and expertise of the competing firms. Rather, the question is "which of the competing actions is more likely to advance the interests of the class?": see *Sino Forest* at para. 19 and *Tiboni v. Merck Frosst Canada Ltd.*, [2008] O.J. No. 2996 (S.C.J.). aff'd [2009] O.J. No. 821 (Div. Ct.). He also observed that the court should not embark on an analysis of which claim is most likely to succeed: see *Sino-Forest* at para. 20 and *Setterington v. Merck Frosst Canada Ltd.*, [2006] O.J. No. 376 at para. 19.

[24] He concluded that in this case two of the *Vitapharm* factors were most significant and the remainder were neutral.

[25] First, the causes of action being advanced in the Rochon claim were broader than those in the Koskie claim. He found that Rochon's misrepresentation claims, and the conspiracy claim, were genuinely viable and had evidentiary support. The fraudulent concealment claim was pleaded to address potential limitation periods. It was in the best interest of the class that the proceeding not be limited to one claim when three were genuinely available.

[26] Second, the motion judge found that Rochon had achieved a level of preparation that was "measurably and objectively superior" to the Koskie group. This was reflected in the statement of claim. He would have granted carriage to the Rochon group on this basis alone.

B. Leave to Appeal

[27] Nordheimer J. granted Koskie's motion for leave to appeal to the Divisional Court. He recognized that decisions on carriage motions generally involve the exercise of discretion, but held that this case raised serious issues about the principles to be applied in the exercise of that discretion. He found that the reasons of the motion judge suggested there was a conflict between the decision in *Locking v. Armtec Infrastructure Inc.*, 2013 ONSC 331, and the decision in *Setterington*, a conflict that the Divisional Court should resolve. He also

considered that there was good reason to doubt the correctness of the decision below and that the issue of carriage was a matter of importance in class proceedings that warranted the Divisional Court's consideration.

C. Divisional Court

[28] The Divisional Court noted that the *CPA* gives judges broad discretion. Reviewing courts, it said, should defer to their decisions, unless an error of law is established: see *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.); *Cassano v. Toronto Dominion Bank*, 2007 ONCA 781. This is especially so when the motion judge is a member of the small group of judges across the province with expertise in class proceedings. If the motion judge has identified and applied the correct test in determining which of the competing actions is most likely to advance the interests of the class, his or her carriage decision is entitled to considerable deference.

[29] The Divisional Court found that the motion judge made no error in law or principle and no palpable and overriding error of fact in considering and applying the "cause of action/claims advanced" factor. The motion judge considered the viability of the claims and the reasons advanced by the parties. He also carefully considered the applicable jurisprudence, including both *Setterington* and *Locking* (discussed later in these reasons). While the motion judge criticized *Locking* and stated that the decision was in conflict with what he found to be the preferable

approach in *Setterington*, he applied both cases and reached the same conclusion in doing so.

[30] The Divisional Court also agreed with the motion judge's conclusion that the Rochon action was in a more advanced state of preparation and his finding that this reflected "a sustained and in-depth pattern of research and preparation" by Rochon, which would further the interests of the class.

[31] The Divisional Court found that the motion judge articulated and applied the correct test. The application of the factors to the circumstances of the particular case is an exercise of discretion to which considerable deference is owed. Koskie's submissions asked the court to reweigh the factors applied by the motion judge and did not demonstrate any reversible error in the exercise of his discretion. There was no basis on which to set aside the motion judge's decision.

IV. SUBMISSIONS OF THE PARTIES

A. Appellants' submissions

[32] Although this is an appeal from the order of the Divisional Court, Koskie focussed its submissions on the motion judge's alleged errors in principle. Koskie submits that the motion judge made four errors in principle.

[33] First, and foremost, it says the motion judge erred in principle in preferring the complex and unworkable claim articulated by Rochon to the focused and streamlined theory pleaded by Koskie.

[34] Second, the motion judge erred by examining the quality of Rochon's preparation, whereas he ought to have considered the stage of preparation. The motion judge was unduly impressed that Rochon had taken a trip to Chile to meet with authorities and witnesses. Further, in attempting to win carriage, Rochon had disclosed its expert reports, contrary to the interests of the class.

[35] Third, the motion judge failed to give any weight to the fact that Koskie had made a favourable third party funding arrangement and erred in assuming, without any factual basis, that Rochon would be able to do the same in short order.

[36] Fourth, the motion judge failed to recognize Koskie's greater expertise in securities class action and to take into account the history of disciplinary infractions and judicial criticism of the Merchant Law Group ("Merchant"), one of the members of the Rochon consortium.

B. Respondent's submissions

[37] Rochon points out that there is no disagreement concerning the applicable test, nor with the proposition that a class action judge on a carriage motion has a broad discretion in the application of that test. The motion judge set out the correct test, identified and weighed the relevant factors and his decision is entitled to deference.

[38] The motion judge made no error, Rochon says, in finding that a more comprehensive theory was in the best interests of the class and that, as found by the Divisional Court, the trip to Chile was only one of the factors that informed the motion judge's conclusion that Rochon was better prepared.

[39] There was evidentiary support for the conclusion that both consortia had extensive experience in class actions and securities litigation. The appellants' position with respect to Merchant is hypocritical, Rochon says, given that members of the Koskie consortium had their own history of co-counsel agreements with Merchant.

V. ANALYSIS

[40] I will discuss these grounds of appeal in order.

(1) The pleadings and scope of the action

[41] In my view, this appeal turns on the appellants' argument with respect to the first *Vitapharm* factor: the nature and scope of the causes of action advanced. The appellants put a novel spin on this factor, in three ways. First, they say that this factor refers to the "workability" of the action, a term that is not found in any of the authorities. Second, they say that it should be given priority over other factors. Third, they say that as a general proposition "less is more" when it comes to the scope of the action and a streamlined claim, like Koskie's, should be preferred to a more complex claim, like Rochon's.

[42] The appellants acknowledge that the merits of the respective claims are not at issue on a carriage motion. In *Setterington*, at para. 19, Winkler J., as he then was, said that the claim may be scrutinized for "glaring deficiencies" or to see whether it is "fanciful or frivolous". See also: *Sino-Forest* at para. 20. Apart from this, however, he said it is inappropriate for the court to embark on an analysis of which claim is most likely to succeed.

[43] The Divisional Court did not address the issue identified by Nordheimer J. on the leave motion, namely the potential conflict identified by the motion judge between *Setterington* and the Divisional Court decision in *Locking*. The latter case suggested that when the competing actions are similar in strength a more detailed and nuanced analysis of the cause of action criteria may be required.

[44] The appellants say that the proper question to ask is not whether one claim or the other will succeed, but rather whether the claims are "workable". They submit that the Rochon claim is overly complex, that it would be costly and time-consuming to litigate and that it would eventually collapse under its own weight. They say that the motion judge should have analyzed the issue following the "less is more" principle.

[45] In my view, it is and should be the rule that the court should not enter into an examination of the underlying merits of the respective claims on a carriage motion. . The motion judge gave three good reasons for the rule: (i) it is

impossible to predict how the litigation will unfold and which claims will succeed and which will not; (ii) it is unfair and inappropriate to undertake such an analysis in full view of defence counsel; and (iii) a merits analysis should not be done on a carriage motion when it is not done on certification. I respectfully agree.

[46] It is also my view, consistent with the jurisprudence, that there may be cases in which the actions are sufficiently indistinguishable that, to use the language of *Locking*, "a more detailed analysis may be necessary": see, *e.g.*, *Sharma*. This analysis will not consider the merits but will consider, as the Divisional Court said in *Locking*, at para. 23, "the nature and scope of the causes of action advanced and the theories advanced by counsel for their approach to the case". This may include an assessment of the efficiency and costs of the competing strategies. I regard this factor as important, but not necessarily of greater importance than every other factor.

[47] While some cases have given preference to "lean" actions over more comprehensive ones, I would reject any firm rule that "less is more" or, indeed, that "more is better". The ultimate question is whether the proposed strategy is reasonable and defensible.

[48] In this case, the motion judge appreciated the argument that the Koskie claim was simpler and more focused. But he noted that Rochon's capital expenditure, accounting and conspiracy claims were viable and supported by the

evidence. The conspiracy claim added a further basis of liability and, significantly, opened up the defendants' exposure to damages in excess of the statutory limits. It could also help to lift the corporate veil. The conspiracy claim and the fraudulent concealment claim had a strong rationale and were genuinely viable.

[49] In my view, this was precisely the kind of analysis that was appropriate. It resulted in the motion judge concluding that it was in the best interests of the class to plead the broader misrepresentation claims and the conspiracy and fraudulent concealment claims, resulting in a more comprehensive litigation framework.

[50] The motion judge considered the appellants' argument that their claim was more streamlined and ultimately concluded that Rochon's "viable" and evidence-based claims provided the class with a more effective framework within which to litigate the claims. This was a call he was entitled to make.

(2) State of preparation

[51] I agree that in general the focus under this heading is the extent of preparation as opposed to the quality of preparation. As Winkler J. observed in *Setterington*, at para. 22, this factor is relevant to the loss of efficiency and unfairness to the defendant if a less advanced action is given carriage. Nevertheless, quality of preparation can be a relevant factor. Perell J. did not consider it in *Sharma*, because he was unable to judge the relative quality of the

work of the two firms, noting that it would be better assessed in the "crucible of battle".

[52] But since only one firm will go into battle, it is not unreasonable to ask which has done the best job in preparing itself for battle and whether its preparation has yielded benefits for the class. And this is precisely what the motion judge did.

[53] He found that the Rochon pleading demonstrated a more informed and sophisticated understanding of the underlying factual issues than the more formalistic Koskie pleading. This was achieved through on-the-ground legal work, including retaining one of the leading environmental lawyers in Chile to prepare a detailed report, retaining a number of mining and financial experts, and going to Chile to meet with legal and government officials, to interview a large number of witnesses and to visit the mine site.

[54] The motion judge found that it was "this hands-on effort on the part of [Rochon] that best explains the detail and the deep understanding of the alleged environmental violations" that was evident in Rochon's statement of claim. The same superior level of understanding was found in Rochon's pleading of the capital expenditure claim and the accounting claims. The motion judge concluded, at para. 48, that Rochon had "conducted the more superior

investigation and analysis of the facts and issues herein and is more prepared than [Koskie] to assume carriage of this proceeding forthwith."

[55] These conclusions are appropriate and supported by the evidence.

[56] Although not necessary to my conclusions, I will comment on two submissions made by counsel for Koskie.

[57] First, he submits that it was improper for Rochon to produce its expert reports for the purpose of demonstrating its superior state of preparation, for this put the interests of counsel ahead of the interests of the class. It was detrimental to the class because it put their cards on the table in full view of the defendants. It appears this occurred in *Sharma* and *Sino-Forest* as well, where one party was more forthcoming in producing its work product: see *Sharma* at para. 86; *Sino-Forest* at paras. 24-26. Koskie submits that there should be a bright line rule that prevents the production of a party's expert evidence on a carriage motion.

[58] I would not favour such a rule and would leave it to the good judgment of counsel and the supervisory jurisdiction of the court to prevent harm to the interests of the class.

[59] Second, Koskie says it is an error in principle to give significant weight to events that take place after the carriage motion is scheduled. Rochon's trip took place after the carriage motion had been scheduled and the motion judge should not have considered it.

[60] The Divisional Court rejected this argument and found that the trip to Chile was only part of an "ongoing and continuing narrative of preparation that began well before the motion was scheduled."

[61] I would reject a rule that sees carriage motions decided based on a "freeze frame" on the date the motion is filed. For one thing, counsel cannot afford to down tools simply because a carriage motion is pending. For another, carriage motions can be contemplated in major class action litigation and the date of the carriage motion is an artificial one. That said, the court should be suspicious of conspicuous new activity after the filing of a carriage motion or of any attempts to "leapfrog" a lagging action ahead of a more advanced one.

(3) Funding

[62] Funding is one of the factors identified in *Sino-Forest*. It refers to access to external funding to provide indemnity against adverse costs awards and, in some cases, funding for disbursements.

[63] Funding is an important consideration because it goes to the issue of whether the class, or, as is usually the case, class counsel, will be able to withstand adverse costs awards as the action progresses, or in the event it does not succeed at certification, trial or other interlocutory steps such as leave or summary judgment. The terms of the funding agreement are also important,

because the funder's fee is typically taken off the top of any settlement or judgment, thereby reducing the net available to the class.

[64] In Ontario, the Class Proceedings Fund provides financing for disbursements and indemnity for costs awards in return for a 10 percent share of any settlement or judgment and reimbursement of funded disbursements. Funding arrangements with commercial third party funders have also been approved: *The Trustees of the Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corporation*, 2012 ONSC 2937; *Dugal v. Manulife Financial Corporation*, 2011 ONSC 1785, 105 O.R. (3d) 364; *Rooney v. ArcelorMittal S.A.*, 2013 ONSC 7768; *Musicians' Pension Fund of Canada (Trustees of) v. Kinross Gold Corp.*, 2013 ONSC 4974, 117 O.R. (3d) 150.

[65] Koskie had entered into an agreement with a third party funder, Claims Funding International, which provided an indemnity against any adverse costs award in the action and $50,000 towards counsel's disbursements. This was in return for a contingency fee of 7 percent, capped at $7 million if the action was resolved before the filing of a pre-trial conference brief and $10 million if resolved by settlement or judgment thereafter.

[66] Koskie argued that this arrangement was very favourable because it was less than the 10 percent uncapped levy charged by the Class Proceedings Fund. Rochon had no funding agreement.

[67] I agree with the Divisional Court that the motion judge did not err in finding that funding was not a significant differentiating factor. Rochon's litigation plan stated that if granted carriage it would secure a funding arrangement. The motion judge expressed no doubt that it would be able to do so "in short order". In light of his experience and his familiarity with the claim and the issues, this was a finding he was entitled to make.

(4) Counsel

[68] The appellants submit the motion judge should have engaged in a detailed weighing of the resources and expertise of the two counsel groups. They say that such an inquiry is mandated by the case law, including *Tiboni* at para. 26; *Setterington* at paras 22-24; and *Ricardo v. Air Transat A.T. Inc.*, [2002] O.J. No. 1090 at para. 28. The appellants argue that if the motion judge had engaged in this weighing, he would have given far greater weight to his finding that Koskie had greater experience in securities class actions. He also would have been more concerned about the absence of evidence from the other members of the Rochon consortium, its failure to produce the agreement between counsel (including fee-sharing arrangements) and the presence of Merchant in the consortium.

[69] The motion judge observed that any one of the "elite class action firms" who were members of the consortia would have more than enough expertise and

experience on their own to do an excellent job as carriage counsel. As he pointed out, both consortia had added external securities specialists to their teams.

[70] Like the Divisional Court, I see no error in law or principle nor palpable and overriding factual error in the motion judge's reasons on this factor. They were fully supported by the record. It is not our function to reweigh the evidence.

[71] Neither party filed the agreements between members of the consortia as to their fee and work allocation arrangements. Since the fee is ultimately borne by class members, the court has an interest in how the work and fees are divided. Where appropriate, it is open to the court to require counsel to provide evidence as to the allocation of responsibilities and fees between members of the consortia. In this case, the appellants have not demonstrated that the motion judge erred in the exercise of his discretion by not doing so.

[72] The court has a duty to protect class members and a broader duty to the administration of justice when approving counsel in a carriage motion. The discharge of this duty may require the exclusion of counsel due to prior misconduct. It may also require the exclusion of counsel with a record of commencing class actions, not pursuing them, and then using them to demand ransom from other counsel in carriage disputes. The motion judge was clearly aware of these duties and of Merchant's history and I am not prepared to say that

he erred in the exercise of his discretion in awarding carriage to Rochon in spite of Merchant's participation in that consortium.

(5) The undertaking

[73] One of the components of the carriage test is whether the outcome is fair to the defendant: see *Setterington* at para. 13. Usually, this requires a consideration of whether giving carriage to one counsel over another would require the defendant to retrace steps already taken in the other proceeding. As a result, the defendant has standing on a carriage motion.

[74] Barrick proposed an innovative and practical solution to the problem of overlapping or duplicative class actions. It requested an undertaking from counsel on both sides to prevent the continuation or commencement of multiple proceedings in Canadian jurisdictions. The parties agreed, and the motion judge made an order in the following terms: "[Rochon and Koskie] are directed to take all necessary steps to permanently stay or dismiss any parallel Canadian proceeding that they or their local agents have commenced and not to commence, instruct local agents to commence or otherwise permit, facilitate or encourage the commencement of any other parallel Canadian proceedings."

[75] Counsel for Barrick appeared in the Divisional Court to request that the undertakings be maintained. Counsel for the competing counsel groups repeated

their agreement to the undertaking and the Divisional Court ordered that it be continued.

[76] Counsel for Barrick appeared before us to ensure that the undertakings and the orders giving effect to them would remain in place. The parties acknowledged this was the case.

VI. CONCLUSION AND ORDER

[77] For these reasons, I would dismiss the appeal. The undertakings given by the parties remain in effect. By agreement between the parties, I would make no order as to costs.

G.R. Strathy C.J.O.

Released: JUL 18 2016

I agree. S.T. Sepall J.A.

I agree. [illegible] J.A.