LOOKING FORWARD

Canadian Class Actions in 2014

SECURITIES

Interaction between Regulatory Settlements and Class Actions

Late-Breaking from the Court of Appeal for Ontario

Good News for Defendants in Cross-Border Proceedings

INTER-PROVINCIAL PROCEEDINGS

COMPETITION

EMPLOYMENT

MEDICAL PRODUCT LIABILITY

FUNDING AND FEES

Third-Party Funding Gaining Traction

Settlement Take-Up Will have Greater Significance

Lower Costs Orders May be Coming

CERTIFICATION

Certification May be Denied Where Individual Issues Abound

LATE-BREAKING FROM THE SCC

Plaintiff-Friendly Trend Continues in Québec

BENNETT JONES CLASS ACTION LITIGATION GROUP

Bennett Jones

Looking Forward

The last few years have been very active years for class actions in Ontario. Bennett Jones continues to have an active and expanding class actions practice.

What follows is our discussion and analysis of trends and likely developments in class actions in 2014. We predict that the coming year will see:

- An increase in securities class actions regardless of the existence of separate regulatory investigations, proceedings and/or settlements;
- Canadian plaintiffs' counsel being cautious in pursuing global classes where parallel/overlapping proceedings exist;
- A shift in the battleground from certification/leave to trials in securities class actions.
- A flurry of activity by indirect purchasers in antitrust class actions, including certification motions and perhaps even new actions that were otherwise held back over the last few years;
- Appellate guidance on the certification of employment misclassification class actions;
- Employment class actions with an increased focus on provincially-regulated employers;
- A potential increase in the certification of medical device product liability class actions, along with broader class definitions;
- Third-party funding continuing to gain traction;
- Settlement negotiations that include increasing pressure from plaintiffs' counsel to include cy-près distributions to charities after settlements are administered, in lieu of reversionary defendant interests in unclaimed settlement funds; and
- Clarification respecting costs orders in certification and other pre-trial motions.

Securities

Interaction Between Regulatory Settlements and Class Proceedings

Increasingly, defendants may face the specter of both regulatory and civil proceedings for the same impugned conduct. The interaction between proceedings before regulatory bodies such as the Ontario Securities Commission (OSC) and the commencement of related class proceedings is an issue that will likely become more prevalent in the future. The class actions bar recently received guidance from the highest court regarding the interplay between regulatory proceedings, settlements and class actions. In 2013, we predicted correctly that class proceedings would continue to be viewed as the preferable procedure.

The Supreme Court of Canada (SCC) released a major class action decision in *AIC Limited v Fischer*. The case concerns whether a class action is the preferable procedure for resolving claims where regulatory proceedings relating to the same conduct have already resulted in a substantial monetary settlement. The Court held that a class action is the preferable procedure where a comparative analysis indicates that class proceedings can address procedural or substantive access to justice concerns and that these concerns remain even after considering alternative avenues of redress.

In *Fischer*, the plaintiffs alleged that the defendant mutual fund managers had permitted "market timing" to occur in the funds that they managed. Market timing, although not illegal, involves profiting at the expense of long-term investors.

The OSC conducted an in-depth investigation into market timing in the mutual fund industry. The investigation led to the OSC commencing enforcement proceedings against the defendants, who all entered into settlement agreements with OSC staff. Investors in the relevant mutual funds received a payment of $205.6 million.

After the OSC approved those settlements, the plaintiffs moved for certification of a class action relating to the very same market-timing activities. The plaintiffs claimed that the OSC settlements did not amount to full compensation and that their actual damages could be over $831 million. The plaintiffs also claimed that, since they had not participated in the OSC negotiations or signed the OSC settlement agreements, they had not yet had their day in court.

At the certification hearing, the motions judge held that the OSC proceedings had been the preferable procedure and he dismissed the certification motion. On appeal, the Divisional Court overturned this decision. On further appeal, the Court of Appeal agreed with the Divisional Court's result, but for different reasons. The Court of Appeal concluded that a class action is the preferable procedure for resolving the plaintiffs' claims for two principal reasons. First, the OSC's jurisdiction is regulatory and not compensatory. The OSC is not empowered to order parties to make restitution or to pay damages to affected investors, and thus its remedial powers were insufficient to fully address the class members' claims. Second, the OSC proceedings had not provided rights of participation to the affected investors comparable to the procedural rights available in a class action.

The SCC held that the preferability inquiry is a fundamentally comparative analysis conducted through the lens of the three principal goals of class actions: judicial economy, access to justice and behaviour modification. The SCC focused on access to justice and found that class proceedings will serve the goal where: (1) there are access to justice concerns that a class action could address; and (2) these concerns remain even when alternative avenues of redress are considered. The SCC noted that the most common access to justice barrier is economic, namely, the high cost of litigation as compared with the claim's modest value. But psychological and social barriers could also exist.

The SCC echoed the Court of Appeal's concern that the OSC's jurisdiction was regulatory and that there was no way to know how the OSC had arrived at the settlement agreements and the quantum involved. It accepted that the lack of investor participation in the OSC proceedings weighed heavily in favour of certifying the class action, but it cautioned that the Court of Appeal was wrong to place almost exclusive weight on this consideration. It also rejected the Court of Appeal's determination that the substantive outcome of the OSC proceedings was irrelevant. The SCC stated that access to justice requires access to just results, not simply to process for its own sake. In *Fischer*, the SCC concluded that substantive access to justice concerns

still remained and that, as a result, the correct legal principles required certification.

The *Fischer* decision provides some clarity regarding the circumstances in which future defendants may avoid class actions by participating in regulatory settlements. The decision indicates that defendants may have little success relying on regulatory proceedings as the preferable procedure unless those alternative proceedings mitigate concerns about procedural and substantive access to justice. In this sense, the decision is consonant with the SCC's plaintiff-friendly trilogy of indirect-purchaser antitrust class action decisions also released in 2013.

Nonetheless, the Court has left defendants with room to argue in appropriate cases. For example, under provisions of the *Securities Act*, the OSC can apply to a judge of the Superior Court for, among other things, an order for the payment of compensation or restitution to the aggrieved parties or an order for the payment of general or punitive damages. The OSC could structure regulatory settlements differently in the future, or it might consider consulting with a committee of investors. Could different facts produce a different cost-benefit analysis? The SCC decision leaves open this possibility, a possibility that seems likely to be tested in 2014.

Late-Breaking from the Court of Appeal for Ontario

Limitation Periods

Under Part XXIII.1 of the OSA, plaintiffs can bring a statutory cause of action for misrepresentations made in secondary market disclosures; however, such an action cannot be commenced without leave of the court and, pursuant to section 138.14, must be commenced within three years of the date of the alleged misrepresentation.

Before the Court of Appeal's recent decision in *Green v Canadian Imperial Bank of Commerce*, the guiding case on the interpretation of the section was the Court of Appeal's decision in *Sharma v Timminco*.[1]

In *Timminco*, the plaintiff moved for an order declaring that the limitation period was suspended under section 28 of the *Class Proceedings Act* (CPA), which suspends limitation periods on the date a class proceeding is commenced. The issue before the Court was whether the cause of action under the OSA had been "asserted" for purposes of the CPA, suspending the limitation period even though the plaintiff had not yet been granted leave to commence such an action. The Court of Appeal clearly stated that leave must first be obtained from a court before the limitation period for the Part XXIII.1 cause of action can be suspended pursuant to the CPA.

It had been hoped that the *Timminco* decision would compel class action plaintiffs to bring leave motions on an expedited basis and would seem to strongly discourage the common practice of combining the leave motions with a motion for certification. However, this decision was followed by three other (conflicting) decisions on the issue (*Green*,[2] *Silver v IMAX*, and T*rustees of the Millwright Regional Council of Ontario Pension Trust Fund v Celestica Inc.*), as class action plaintiffs tried to circumvent expired limitation periods with varied success.

As a result of the above decisions, the state of the law on this issue was in clear conflict. In light of these discrepancies, the Court of Appeal convened a special and rare five-judge panel to hear the joint appeals of the decisions in *CIBC*, *IMAX* and *Celestica Inc*. In its recently released decision, the five judge panel reversed its decision in *Timminco* and concluded that the statutory limitation period was suspended under section 28 of the CPA. The Court held that articulating an intention to seek leave to commence a claim under the OSA (as well as pleading the facts that would support such a claim) was sufficient to suspend the limitation period even though the plaintiff had not yet been granted leave to commence such an action.

The Court of Appeal acknowledged that this decision reversed its decision in *Timminco* and provided class action plaintiffs with a procedural advantage that non-class action plaintiffs would not enjoy, but held that this interpretation was the only way to preserve one of the main benefits of a class action, the suspension of limitation periods for all class members. The Court of Appeal also relied on pending legislative reform, which it anticipated would have clarified the statutory limitation period, as evidence that this newest interpretation was to be preferred.

The Test for Leave

The most frequent issue arising in securities class actions is the threshold for leave. Prior to bringing an action under Part XXIII.1, the plaintiffs must obtain leave of the court pursuant to a two-part statutory test: (1) the action must be brought in good faith and (2) the plaintiffs must have a reasonable possibility of success at trial. The first part of the test is generally easily satisfied; the threshold for the second part of the test has been the subject of much debate.

The initial decisions in Ontario set a notably low standard for plaintiffs to obtain leave of the court. Decisions out of other Canadian provinces

that have legislated similar causes of action to Part XXIII.1, suggested that a higher standard was appropriate. There had recently been an indication that perhaps these decisions were having an influence in Ontario when in *Dugal v Manulife Financial*,[3] Justice Belobaba stated that for his part, he would interpret the provision to have a higher standard for leave, consistent with the test established in other provinces and moving away from the earlier Ontario cases setting a very low threshold.

In *Green*, the Court of Appeal established the standard to be applied and held that the test to be applied for leave was tantamount to the test to be applied under section 5(1)(a) of the CPA on a certification motion. The Court acknowledged that the evidentiary record was very different when applying the two tests (there is no evidence before the Court on a 5(1)(a) analysis), but still held that the tests should be the same and that both tests were merely designed to "weed out hopeless claims and only allow those to go forward that have some chance of success." This threshold is arguably even lower than the low threshold that had been established in the early leave decisions.

Negligent Misrepresentation

One of the articulated reasons for the Legislature instituting the statutory cause of action for secondary market misrepresentations was the purported inability of plaintiffs to successfully pursue a common law cause of action in negligent misrepresentation, largely as a result of the requirement to prove individual reliance. The issue of whether common law negligent misrepresentation claims are appropriate for certification on a class basis has invariably been an issue in these cases.

In *Green*, the Ontario Court of Appeal clarified the matter, and again, in a manner that generally favours plaintiffs. The Court held that, while individual reliance is not an appropriate issue for certification, there were common issues within the negligent misrepresentation claims that would significantly advance the litigation and ought to be certified. Moreover, the Court of Appeal stated that in certain circumstances (although not those presently in front of the court), inferred group reliance could be certified as a common issue.

The Supreme Court of Canada recently refused to grant leave to appeal in *Timminco*, which the Court of Appeal has now reversed, notwithstanding arguments that there was conflicting authority on the issues in that case. It is likely that the defendants in *Green* will similarly seek leave to appeal. Especially as *Green* deviates from prior authorities on three issues, the Court of Appeal in *Green* may not be the last word on the secondary market and negligent misrepresentation issues it decided. If, however, the law remains as stated in *Green*, then this may well shift the battleground in securities class actions away from leave/certification motions to trial where plaintiffs will have to prove their allegations.

Good News for Defendants in Cross-Border Proceedings

Companies defending overlapping class actions in multiple jurisdictions may enjoy some clarity in 2014. They now have the means to settle in one jurisdiction and achieve a resolution of claims of class members, including those comprising part of a certified class in another jurisdiction. Going forward, Ontario courts will have a framework to recognize foreign settlements as binding on members of an Ontario class. There is no longer the concern that Ontario class counsel will have the ability to effectively veto, by failing or refusing to settle on the same terms, a settlement that had already been found by the court of another jurisdiction to be fair and reasonable. This will likely lead to more settlements in cross-border proceedings in 2014.

In 2013, the continuing securities class action saga of *Silver v IMAX* led to the release of yet another decision of note: the Ontario Superior Court held that members of a class certified in Ontario can be bound by a settlement in a related U.S. class action and therefore excluded from participating in the Ontario class proceeding.

In *IMAX*, the Ontario class plaintiffs brought a proceeding under Part XXIII.1 of the OSA, alleging that the defendants made misrepresentations in IMAX's financial reports. The class plaintiffs obtained leave to proceed and the action was certified as a class proceeding for a class of investors that included persons who purchased their shares on both the TSX and the NASDAQ. Subsequently, in the parallel U.S. class proceeding, which only affected NASDAQ purchasers, a settlement agreement was conditionally approved, pending an order from the Ontario court amending its class to exclude persons who purchased IMAX securities on the NASDAQ. The defendants brought a motion to amend the Ontario class to exclude persons who were part of the class in the parallel U.S. proceeding. The Ontario Court granted the order, sending a message to class counsel as to the practical realities of and the risks inherent in a cross-border class action. The decision provides the prospect of potential relief to defendants involved in cross-border class actions where settlements are being negotiated separately.

The Court rejected Ontario class counsel's assertion that the order being sought was in substance a motion to approve a settlement of an Ontario class proceeding. Equally, the Court rejected defence counsel's assertion that, once satisfied that the U.S. Court had jurisdiction, the Ontario Court should grant automatically the order requested, in the interests of comity. Instead, in determining whether to recognize the conditional U.S. settlement, the Court applied the test for recognition of a foreign judgment approving a class action settlement. Specifically, the Court found that there was a real and substantial connection between the U.S. claims and the NASDAQ purchaser claims in the Ontario class. The Ontario class plaintiffs were adequately represented and accorded procedural fairness in the U.S. proceeding.

The Court then considered whether it ought to amend the Ontario class to give effect to the recognized U.S. judgment. The Court accepted that, if the U.S. settlement was demonstrated to be improvident when compared with the prospect of litigating the claims of the overlapping class members in Ontario, it may be the "preferable procedure" to continue to include the overlapping class members' claims in the Ontario Action. In granting the order to narrow the Ontario class, the Court determined that the settlement in the U.S. furthered the objectives of class proceedings. Keeping the U.S. purchasers in the Ontario class proceeding would not promote access to justice.

1. 2012 ONCA 107.
2. 2012 ONSC 3637.
3. 2013 ONSC 4083

Inter-Provincial Proceedings

Joint hearings will likely continue to be encouraged and successfully used in the context of inter-provincial class actions, including for the purposes of settlement approval. A notable example is the 2013 decision of then Chief Justice of Ontario Winkler, sitting *ex officio* as a Judge of the Superior Court, in *Parsons v The Canadian Red Cross Society*. In that case, the then Chief Justice approved the participation of an Ontario Superior Court Judge in a joint hearing conducted outside of Ontario with judges of the superior courts of British Columbia and Québec to consider the approval of settlement in the Hepatitis C class actions. He found that a joint hearing of all three supervisory courts would avoid, to the greatest extent possible, the potential for inconsistent orders and the associated costs. This would be in keeping with the principle of judicial independence. A single hearing would help to avoid potential additional costs by facilitating the process of rendering consistent judgments, as mandated by the settlement agreement. The joint hearing ensured that the supervisory judges received the same oral and written submissions and would be able to confer directly with one another before issuing an order on the merits.

"Joint hearings will likely continue to be encouraged and successfully used in the context of inter-provincial class actions…"

Competition

The Supreme Court's 2013 decisions in a trilogy of antitrust actions will have far-reaching and lasting impacts on Canadian antitrust class actions. The Supreme Court's decisions in *Pro-Sys Consultants Ltd v Microsoft Corporation*, *Sun-Rype Products Ltd v Archer Daniels Midland Company*, and *Infineon Technologies AG c Option Consommateurs* have likely set the stage for the next decade of antitrust class actions in Canada.

In cases involving foreign defendants, indirect purchasers make up the vast majority of Canadian antitrust plaintiffs, in part because Canada has few direct purchasers. Thus, Canadian plaintiffs' counsel depend on joint direct-indirect purchaser classes to launch economically viable actions. The loss of indirect purchaser class members would mean fewer Canadian antitrust class actions, and in particular, fewer actions alleging international conspiracies. Classes made up of only direct purchasers currently do not exist or will inevitably prove too small to justify the costs and risks of litigation.

With the viability of so many ongoing actions threatened by the possible outcome of the appeals at the Supreme Court, many Canadian actions were largely inactive in 2012 and 2013, as plaintiffs and defendants waited for the Supreme Court of Canada to decide whether Canada would follow the U.S. approach and prohibit indirect purchasers from bringing antitrust class actions. Now that the Supreme Court has released its decision, we can expect a flurry of activity. The Court's decisions allow indirect purchasers to claim for antitrust damage. Indirect purchasers must also be able to "self-identify" as members of the proposed class. If they cannot, for example, because they do not know whether they in fact purchased products containing the allegedly overpriced component, then the court will deny certification of the indirect purchaser class.

The favourable result for plaintiffs who can "self-identify" will likely unleash a flood of certification records, scheduling demands, and perhaps even new actions that were otherwise held back over the last two years. Conversely, the unfavourable result for plaintiff who are unable to "self-identify" will likely prompt some decertification motions, motions to strike or summary judgment motions.

In all three cases at issue, the plaintiffs alleged that the defendants had engaged in anti-competitive behaviour resulting in overcharges to consumers. At first instance, the lower BC courts certified both *Pro-Sys* and *Sun-Rype*, but the Québec court refused to certify Infineon. The outcomes reversed on appeal. In both *Pro-Sys* and *Sun-Rype*, the BC Court of Appeal refused to certify the indirect purchaser claims. It relied on the reasoning behind the "passing-on" defence, which provides that a defendant cannot reduce its liability to a plaintiff with evidence that the plaintiff had passed-on all or some of the cost of the harm to a third party. The BC Court of Appeal reasoned that if defendants cannot use the passing-on defence as a shield, then indirect purchaser plaintiffs cannot use it as a sword. To permit otherwise would subject defendants to double liability: they would have to pay 100 percent of the overcharge to direct purchasers and an additional amount to indirect purchasers. The BC Court of Appeal rejected the notion that combined classes of direct and indirect purchasers fixed the double liability problem. It reasoned that the *Class Proceedings Act* is a procedural statute that cannot affect the substantive legal rights of direct and indirect purchasers. Thus, courts could not reduce the legal entitlements of direct purchasers by allocating the overcharge between direct and indirect purchasers in the same class.

In contrast, in *Infineon*, the Québec Court of Appeal reached the opposite conclusion. It held that the fusion of direct and indirect purchasers into one class eliminated the possibility of double liability. It reasoned that, although direct purchasers may recover 100 percent of the overcharge when litigating on their own, indirect purchasers could demonstrate that direct purchasers had been unjustly enriched because they had passed-on some of the total overcharge to the indirect purchasers. This argument was in line with the dissent expressed in the BC Court of Appeal.

The decisions of the BC and Québec Courts of Appeal presented the Supreme Court with two issues pertinent to competition class actions: 1) Do indirect purchasers have a cause of action? 2) If indirect purchasers do have a cause of action, what evidence must they lead at certification to establish some basis in fact that some of the alleged overcharge was passed-on to them, and how much scrutiny should courts give this evidence?

First, the Supreme Court held that it is not plain and obvious that indirect purchasers do not have a cause of action. The Court held that, in rejecting the passing-on defence, it did not shut the door on plaintiffs who can prove that harm was passed-on to them. In *Pro-Sys*, the Supreme Court comprehensively rejected policy arguments for denying indirect purchaser actions. Most notably, it held that the risk of double liability was illusory because courts could mitigate any harm through damage awards after a trial.

Despite permitting indirect purchaser actions generally, the Court made it clear that not all indirect purchaser actions will be amenable to certification. In *Sun-Rype*, the Court refused to certify the indirect purchaser class because there was no evidence that the indirect purchasers could self-identify themselves. In that case, class members were purchasers of products containing high fructose corn syrup, a ubiquitous food sweetener, whose products were hard to identify.

Second, with respect to the common law provinces and the evidence required at certification, the Court confirmed the "some basis in fact" standard, which is less than the regular civil balance of probabilities standard. With reference to the "some basis in fact" test, in the context of indirect purchasers' actions, the Court held that plaintiffs must have a methodology that can establish that the overcharge was passed-on to the indirect purchasers, making the issue common to the class as whole. At the certification stage, plaintiffs need not prove the actual loss to the class, only that there is a methodology capable of doing so.

Overall, the decisions are plaintiff-friendly in that they confirm the viability of indirect purchaser class actions at the certification stage. But there are benefits for defendants as well. The Court confirmed that the "some basis in fact" test remains an important screening device. It remains to be seen how lower courts will apply the Supreme Court's comments on the sufficiency of expert evidence in the context of the "some basis in fact" test. Defendants in Canadian antitrust class actions may increasingly look to post-certification litigation opportunities in 2014.

Employment

Employment class actions will likely become more prevalent in 2014, given the Court of Appeal's certification of two "off-the-clock" cases against CIBC and Scotiabank and mass termination and misclassification cases working their way up to the Court of Appeal. In addition, enterprising plaintiffs' counsel may continue to be on the search for other types of employment cases, including discrimination claims or other types of "wage and hour" cases (for example, cases involving allegations of unpaid vacation pay or holiday pay).

The Ontario Court of Appeal has granted leave to appeal in *Brown v Canadian Imperial Bank of Commerce*, a "misclassification" overtime class action that was denied certification in 2012. The appeal decision will not likely be issued before late 2014. The leave decision represents an unexpectedly quick return of overtime class actions to the Court of Appeal following the 2012 "overtime trilogy", (*Fresco v Canadian Imperial Bank of Commerce*, *Fulawka v Bank of Nova Scotia* and *McCracken v Canadian National Railway*). In 2013, the unsuccessful employers in two of those cases sought and were denied leave to appeal the decisions to the Supreme Court of Canada. However, the Court of Appeal's leave decision in Brown notably follows Ontario's precedent-setting 2013 certification of a similar overtime class action in *Rosen v BMO Nesbitt Burns Inc*, where the defendant's motion for leave to appeal the certification decision to the Divisional Court was recently denied. Justice Sachs found that the motions judge's decision in *Rosen* did not conflict directly with the Divisional Court's decision in *Brown*, due to the carefully distinguished facts.

In the *Rosen* decision, the Ontario Superior Court of Justice certified a class action alleging that BMO Nesbitt Burns Inc. failed to pay overtime to a group of current and former Investment Advisors. *Rosen* was the first "misclassification" case of its kind to be certified in Canada, as well as the first overtime class action to be certified advancing claims under the *Employment Standards Act* (Ontario) (*ESA*). Class members allege that, contrary to their employer's position, they did not properly qualify for one of two exemptions under the *ESA* from the requirement to pay overtime for employees who have managerial or supervisory duties and employees who receive a "greater benefit".

In *Brown*, the case alleged violations of the *Canada Labour Code* (as opposed to the *ESA*). Despite acknowledging the general appropriateness of the misclassification cases for certification (due in part to inherent commonality of employment functions and treatment by the employer), the Court in *Brown* ultimately declined to certify the action on behalf of a group of Investment Advisors. The Court concluded that it would be too difficult to make a fair determination as to whether class members performed managerial duties – the critical issue in determining eligibility for overtime on a class-wide basis.

Despite the fact that the decision to deny certification in *Brown* was rendered on the basis of a group consisting of nearly identical class members, the Court differentiated the proposed class before it in *Rosen* on the basis that the class had already specifically excluded employees with managerial or supervisory functions. On that basis, the Court in *Rosen* concluded the proposed class and common issues were appropriate.

The Court found the key questions at issue in *Rosen* could be assessed without examining individual claims, concluding that "success for one does indeed mean success for all". In this particular case, the court viewed a class proceeding as being "generally more effective than individual claims under the *ESA*", where there are strict time-limits and caps on recovery. The Court concluded that a class proceeding might also provide class members with the added advantage of anonymity, which could limit employees' fears of reprisal from their employer.

The decision to certify the class action in *Rosen* (in contrast to the decisions in *Brown* and other recent certification denials of other misclassification cases such as *McCracken v Canadian National Railway Co.*), appears to bring Ontario in line with the current approach adopted by U.S. courts, which have generally viewed misclassification cases more favourably than "off-the-clock" cases. It also suggests that class counsel may be focusing more closely on provincially-regulated employers in the future. Ultimately, the expansion of the scope of overtime claims certified in Ontario suggests prudent employers should carefully review their own overtime and classification policies to ensure they are complying with the statutory minimum requirements under the *ESA*. It will also continue to be of interest to see whether the legislature will take any steps to expand the class of prescribed exempt employees under the *ESA* in 2014.

Though the last few years in employment class actions have been focused on overtime cases, the recent decision in *Brigaitis v IQT Limited* demonstrates that mass termination or wrongful dismissal class actions may still have legs. On January 2, 2014 Justice Perell certified a class-action alleging that, amongst other things, a group of over 500 former employees of IQT Solutions have been wrongfully dismissed. Even though IQT Solutions had been ordered to pay back wages to some of the putative class members by the Ontario Labour Relations Board, Justice Perell found that these class members, as well as the class members who were not subject to the OLRB order could proceed with a class-action for, amongst other things, negligence, conspiracy, including breach of contract and oppression.

Medical Product Liability

2014 may see a retreat from certain past cases that applied a cautious approach to the certification of medical device class actions. The potential increase in certification of medical product liability class actions may also be accompanied by broader class definitions in such proceedings, including not only class members who have been physically injured by improperly designed devices, but also those who suffer emotional distress from their use of improperly designed devices.

Prior to 2012, medical product liability class proceedings were viewed as a relatively plaintiff-friendly environment, where certification of a proposed class action against manufacturers and distributors of allegedly defective products, particularly medical products, was almost assured. Then a series of decisions in 2012, (including *Martin v AstraZeneca Pharmaceuticals PLC* and *Arora v Whirlpool Canada*) prompted some to suggest that the pendulum may have started to swing to a more central position, as the courts appeared to be applying greater scrutiny to, and in some cases refusing, certification. It was anticipated by some that courts would continue to advance a more cautious approach to the certification of product liability class actions. However, in 2013, the Ontario Superior Court of Justice certified a class action with a broad class definition against DePuy Orthopaedics Inc. (DePuy) on behalf of persons who were surgically implanted with any one of two DePuy hip replacement systems. In *Crisante v DePuy Orthopaedics Inc*, the core allegation against the defendants is negligence in the design and manufacturing of the hip replacement systems and in the defendants' failure to warn. There was a higher than normal failure and revision rate for the DePuy hip implants, which ultimately led to DePuy's voluntary recall of the implants.

On the issue of whether there was an identifiable class, the defendants in *DePuy* argued that the class definition should include only those who had revision surgery, as opposed to all persons who have been implanted with either of the DePuy hip systems, regardless of whether revision surgery was required. In rejecting this argument, the Court held that the broad class definition was appropriate given the broad pleading and the fact that the defendants' recall notices had not differentiated between the two products. The proposed class definition reflected the plaintiffs' claim that the DePuy implants were improperly designed and should not have been sold or implanted at all and therefore anyone with a DePuy implant was allegedly entitled to damages for the implant surgery, related personal injury, emotional distress and associated out-of-pocket expenses.

With respect to the preferability analysis, the Court stated that, while this was the defendants' strongest argument opposing certification, it was satisfied that a class action was the preferable procedure for the resolution of the common issues. The defendants urged the court to reshape the claim such that (i) the focus would only be on the 30 to 40 people who had, thus far, undergone revision surgeries; and then (ii) the preferable procedure would be case management rather than a class proceeding. The Court rejected this position on the basis of its earlier finding that the action as pleaded was not just about the individuals who have endured a premature revision surgery, but also those who claim damages, including emotional distress damages, simply on the basis that they were implanted with allegedly defective devices. Since at least 400 people fell under the claim as pleaded, it was therefore too large for case management and was suited to a class proceeding.

The Court further held that a class proceeding was preferable given that the proposed common issues trial would answer the breach of duty and defective design questions, and therefore move the litigation forward one way or another and perhaps help the parties achieve an overall settlement. This was the case even though the Court accepted that a finding on the common issues in favour of the class members would lead to a plethora of individual trials being required to determine causation and individual damage claims.

Time will tell whether the certification decision in *DePuy* represents a return to the more plaintiff-friendly approach of past cases. The *DePuy* case involved a narrow set of issues and only two specific products. Future cases displaying a greater diversity of products and alleged problems may yet prove more difficult to certify.

Of course, defendants seeking to obtain certainty and peace may continue to use the class action settlement vehicle in appropriate cases. In *Roveredo v Bard Canada*, 2012 ONSC 6979 (Sup Ct), national settlement was reached effectively resolving class actions in Québec, Ontario, British Columbia and Alberta for the global settlement amount of $1.375M.

"The potential increase in certification of medical product liability class actions may also be accompanied by broader class definitions in such proceedings…"

Funding and Fees

Third-Party Funding Gaining Traction

Third-party funding will likely continue to gain traction in Ontario class actions in 2014. Ontario class counsel are increasingly entering into third-party funding arrangements to hedge against the risks of adverse costs awards. Though the practice is still in its infancy, courts are aware that third-party funding could significantly affect the risk-reward analysis of class counsel and representative plaintiffs. Some might ask whether courts should, in assessing fees, consider whether class counsel has assumed the risk of an adverse costs award or whether they have offloaded that risk to a third party. Given that the cost of third-party funding is paid from the class' recovery, the willingness of counsel (or lack of willingness) to expose itself to the risk of an adverse costs award would seem to merit some judicial consideration in the assessment of counsel's fees. In the interim, the continuing message from Ontario courts is that class counsel should tread lightly in this area and only enter into third-party agreements where outside funding is truly necessary.

Among other things, the *Class Proceedings Act* is intended to enhance access to justice in circumstances where there are inadequate economic incentives for individual plaintiffs to proceed. Though the upfront cost of retaining counsel is the most fundamental barrier to the commencement of a class action, the risk of an adverse costs award is a further barrier that will almost always overwhelm the prospective rewards for a representative plaintiff. The traditional workaround is for class counsel to accept the matter on a contingency basis and to assume the risk of an adverse costs award. However, the prospective upside of a class action does not always outweigh the risks of an adverse costs award. This is particularly true in circumstances where the claim involves complex securities market misrepresentation claims where the quantum of an adverse costs award could be in the millions.

Although the Legislature has taken some steps to mitigate the prospect of an adverse costs award (through the establishment of the Class Proceedings Fund of the Law Foundation of Ontario and by providing judges with statutory discretion to consider costs in novel cases or those involving a matter of public interest), the risk of an adverse costs award continues to threaten the viability of some class proceedings before they even reach the pleadings stage. In these types of circumstances, third-party indemnity agreements provide a means of mitigating the risk of an adverse costs award in exchange for a stake in the plaintiff's recovery.

While the concept of third-party funding remains a work in progress, the current state of the practice was reviewed and summarized by the Ontario Superior Court in 2013 in *Bayens v Kinross Gold Corporation*. The *Kinross* proceedings involved a securities market misrepresentation claim. Though counsel for the plaintiff agreed to accept the retainer on a contingency basis, they were not prepared to indemnify the plaintiff against adverse costs awards in the class proceeding.

After an application for funding was rejected by the Class Proceedings Fund of the Law Foundation of Ontario, class counsel approached an established private litigation funding group headquartered in the United Kingdom. The private funding group agreed to indemnify the plaintiff against adverse costs awards, up to certain limits. In exchange, the private funding group was entitled to receive 7.5% of any net recovery if the action is settled prior to certification or 10% of the net recovery if the action is resolved afterwards.

In *Kinross*, the Court reviewed the terms of the proposed third-party agreement and observed that third-party funding agreements are not categorically illegal on the grounds of champerty or maintenance. However, plaintiffs must obtain approval before entering into third-party funding agreements, which must be promptly disclosed to the court. To be approved, the third-party agreement must not 1) compromise or impair the lawyer / client relationship or the lawyer's professional judgment or 2) diminish the representative plaintiff's rights to instruct and control the litigation. The court must be satisfied that the agreement is necessary to provide access to justice and is fair and reasonable to the class.

Settlement Take-Up Will Have Greater Significance

In 2014, fees awarded to class counsel in settled class proceedings will likely be lower where few class members actually participate in the class action settlements. Courts will increasingly focus on the objective of compensating class members who have been injured, through the judicial economy of the class proceeding, while ensuring that it is they and not class counsel who are truly benefitting. If the take-up from the settlement is

low, there will be the basis to argue that the "access to justice" objective of class proceedings legislation does not justify a significant fee multiplier as a means of appropriately incentivizing class counsel.

In settlement agreement negotiations going forward, plaintiffs' counsel will be pushing for the inclusion of cy-près distributions to charities, in lieu of reversionary defendant interests in unclaimed settlement funds. From the perspective of defendants in cases where the scope of injury or the extent of individual harms are doubtful, there will be an increased advantage to including in the settlement a reversionary interest in favour of the defendant after the settlement is fully administered. The reversionary interest will provide such defendants with greater standing to contest a final award of class counsel fees if the ultimate take-up rate is low.

The Ontario Court of Appeal's 2013 decision in *Lavier v MyTravel Canada Holidays Inc* dealt with the approval of class counsel fees in a settled class proceeding. The decision provided useful guidance regarding the structuring of class action settlements going forward. The Court's analysis indicates that where few class members participate in the settlement, it diminishes the objective of incentivizing class counsel to achieve access to justice for wronged persons who would not otherwise obtain redress. Accordingly, in such cases, a lesser fee award may be appropriate.

The claim in *Lavier* alleged that the defendant had knowingly sent travellers to resorts that were experiencing a viral outbreak. The court-approved settlement required the defendant to make a fund of $2.25 million available to compensate class members who could demonstrate they had been affected by the outbreak. However, any amount remaining in the fund after all eligible claims had been processed would revert to the defendant.

At the settlement approval hearing, the motions judge awarded an initial class counsel fee of $600,000. When the settlement had been fully administered, class counsel requested approval of an additional $395,000. At that time, however, the actual value of the settlement achieved for the class had become apparent: only a few hundred class members had submitted eligible claims, for a total value of less than a third of the total requested counsel fees. Nonetheless, the motions judge approved the requested additional fee.

The Court of Appeal overturned the approval order, holding that the total amount of fees would be "grossly disproportionate to the results achieved and the risks undertaken." The Court was influenced by the speculative extent of the harm that was alleged. It was doubtful that all class members had been affected, and possible that the few hundred individuals who received compensation under the settlement were the vast majority of those actually harmed. In addition, the Court found that the reversionary interest in the settlement fund diminished the access to justice value achieved by class counsel, unlike the obvious value in a settlement where the residue is distributed by way of a cy-près distribution to a charity. The Court suggested that when the take-up rate is known, then there is information relevant to assessing the results achieved. In those circumstances, a court can assess the connection between the efforts of counsel and what was achieved for the class. Otherwise, there is a real risk that a disproportionate fee might result.

Lower Costs Orders May be Coming

A trend of more predictable, and potentially lower, costs orders may be emerging in class proceedings. While the Law Commission of Ontario will likely continue its ongoing review of class action legislation throughout all or most of 2014, it will remain to be seen whether it will recommend that class actions legislation be amended to create a no-costs regime.

In 2013, Justice Belobaba of the Ontario Superior Court of Justice released five costs decisions with a strong message for the class action bar: access to justice is becoming too expensive and the excesses of counsel are at least partly to blame (*Rosen v BMO Nesbitt Burns Inc*, *Crisante v DePuy Orthopaedics*, *Dugal v Manulife Financial, Brown v Canada (Attorney General)*, and *Sankar v Bell Mobility Inc*). The decisions found that excess appears to have become the norm, causing access to justice to become too expensive in class actions, an area of law specifically designed to achieve this fundamental objective. As a result, he suggested that a "no costs" rule would be much more sensible in the world of class actions.

In 1982, the Ontario Law Reform Commission (OLRC, now the Law Commission of Ontario) recommended establishing class action legislation with a distinctive "no-costs" regime as a general rule, whereby costs would not be awarded to any party to a class action, at any stage of the proceedings, including an appeal. A similar regime was already in place in the U.S. Instead of following that recommendation, the provincial legislature adopted the views of the Attorney General's Advisory Committee, of which Justice Belobaba was a member, to follow Ontario's general rule that "costs follow the event". In 2013, Justice Belobaba said that the OLRC was right and he was wrong. He hopes that the mistake will be corrected in the course of the Law Commission of Ontario's current review of Ontario's class action legislation.[4] There is already a no-costs regime in British Columbia and certification costs awards are capped in Québec.

Justice Belobaba clarified that, while he will continue to consider and apply the factors set out in the *Rules of Civil Procedure* and the various binding directions of the Court of Appeal, he will also aim for more transparent and predictable costs decisions in conventional certification motions. Historical costs awards in similar cases will be seriously considered. With the "access to justice" objective keenly in mind, Justice Belobaba's anticipated results are: 1) lower than expected costs awards, 2) leaner and more focused certification motions, with a greater measure of predictability, and 3) overall, the continuing viability of class actions.

Justice Belobaba's decisions do appear to be part of a growing trend. Justice Perell released a costs decision in late 2013 as a result of a motion for documentary productions (*The Trustees of the Drywall Acoustic Lathing and Insulation Local 675 Pension Fund v SCN Group Inc*) where he noted that access to justice is an entitlement of defendants just as it is for plaintiffs and that spiraling costs in class proceedings have become a threat to the viability of the class action regime.

A "no costs" regime is not imminent and, as Justice Belobaba acknowledges, it remains to be seen how his approach will play out. Assuming that significant adverse cost awards act as a disincentive for plaintiffs' lawyers to commence class actions, then reducing that risk may increase the prospect of class actions going forward in 2014. However, some members of the plaintiff bar argue that access to justice will actually be further denied, given that plaintiffs' lawyers are often the beneficiaries of costs awards. They suggest that defendants will have incentive to drive up the costs of certification motions, forcing plaintiffs' lawyers to spend more time but be compensated with less, thereby bearing increased risks.

4. *Rosen v BMO Nesbitt Burns Inc*, 2013 ONSC 6356 at para. 2.

Certification

Certification May Be Denied Where Significant Individual Issues Abound

In an era in which Ontario courts have been observed to have delivered a number of plaintiff-friendly certification decisions, the hurdles imposed by the certification provisions of the *Class Proceedings Act* will remain meaningful in cases advancing only tenuous claims of systemic liability. Actions with a lack of commonality and a host of individual issues will continue to be unsuitable for certification in 2014. Where certification will not advance the goals of the legislation and will inevitably require resolution of a host of individual issues, certification will still be denied.

In *Dennis v Ontario Lottery and Gaming Corporation*, the Ontario Court of Appeal upheld the denial of certification of a proposed class action commenced by problem gamblers against the Ontario Lottery and Gaming Corporation (OLGC). The 2013 decision in *Dennis* serves as a clear reminder that claims with a deficient level of commonality should be denied certification in Ontario.

The putative class action was commenced on behalf of members of a group of individuals who voluntarily signed self-exclusion forms asking the OLGC to ban them from entry to its gaming establishments. The action alleged that putative class members suffered losses after the OLGC failed to prevent them from entering its gaming sites, notwithstanding they had self-excluded.

The motions judge denied certification after finding that substantially all of the issues of liability surrounding the allegations turned on proof that individual class members were vulnerable, pathological problem gamblers who returned to the OLGC sites despite signing the self-exclusion forms. The majority of the Divisional Court upheld the motion judge's decision and declined to grant certification, finding that the issues of liability were predominantly individual in nature.

The Court of Appeal upheld the Divisional Court's and motion judge's reasons, unanimously dismissing the appeal on the basis of its failure to overcome a number of procedural hurdles. The Court of Appeal distinguished the circumstances in *Dennis* from other certified actions, finding that not all of the signatories of the self-exclusion forms were in the same position. Rather, claims were dependent on the actions of the members of the proposed class. The promise to use "best efforts" to exclude was, by its very terms, directly tied to the actions of the self-excluder, many of whom had admittedly never attempted to gain re-entry and thus had no actionable claim. The Court of Appeal emphasized the lack of rational relationship between the class identified by the plaintiff and the proposed common issues.

The Court of Appeal concluded that the action failed to satisfy section 5(1)(d) of the *CPA*, even though there are a number of cases in which Ontario courts have determined that class proceedings are the appropriate procedure to deal with "systemic wrongs". However, in each of those other cases, liability turned on unilateral action of the defendants and was not dependent on the individual circumstances of class members. The claims advanced against the OLGC in *Dennis* differed significantly. Rather than arising out of the defendant's unilateral actions, the OLGC's alleged wrongdoing was held to be inextricably bound up with the vulnerability of the individual class members and arose by the class members' own actions. The Court of Appeal concluded that a general finding of "systemic wrong" in *Dennis* would not avoid the need for protracted individualized proceedings.

Late-Breaking from the Supreme Court of Canada

Plaintiff-Friendly Trend Continues in Québec

The trend of plaintiff-friendly decisions appears likely to continue in 2014, especially in Québec. The Supreme Court of Canada's first decision of 2014, *Vivendi Canada Inc v Dell'Aniello*, addressed a Québec action that sought to be authorized as a class action. The decision clarified the authorization test for Québec class actions, which is comparable to the certification test in the common law provinces. At the authorization stage, a Québec judge's function is to screen motions to ensure that defendants do not have to defend against untenable claims.

The action in *Vivendi* was brought on behalf of beneficiaries of a health insurance plan that had been unilaterally amended by *Vivendi*. The action seeks to challenge the validity of Vivendi's amendments, which are adverse to the interests of the only remaining beneficiaries of the insurance plan, being retirees and surviving spouses of former employees. The Québec Superior Court dismissed the plaintiff's motion for authorization on the basis that the claims of the members of the proposed class did not raise questions that were "identical, similar or related", as required under the Québec *Code of Civil Procedure*. However, the Québec Court of Appeal allowed the plaintiff's appeal and authorized the institution of a class action, finding that the question of whether the insurance plan amendments were valid or lawful was a question common to all plan beneficiaries.

Ultimately, the Supreme Court dismissed Vivendi's appeal, agreeing with the Québec Court of Appeal to find that a common question did indeed exist. The Supreme Court noted that, in all provinces, the common success requirement for a class action must not be applied inflexibly. A common question can exist even if the answer given to the question might vary from one member of the class to another. However, success for one member must not result in failure for another. It is enough that the answer to the question does not give rise to conflicting interests among the members.

The Supreme Court then provided a comparison of the level of commonality required under the Québec authorization test, versus the commonality requirement applied under the certification test in the common law provinces. While the common law provinces require common issues, the Québec legislation requires only similar or related questions. The Court found that Québec's authorization test in respect of commonality is less stringent than the common law certification requirement of commonality. Québec's approach to the commonality requirement is often broader and more flexible. The authorization test may be met even if the common questions raised by the class action require nuanced answers for the various members of the group.

The Supreme Court also distinguished the authorization test's "proportionality" principle from the "preferable procedure" requirement in the common law provinces. The authorization test does not require courts to ask whether a class action is the most appropriate procedural vehicle, as required in the common law provinces. Though the Québec authorization test incorporates the proportionality principle throughout, proportionality is not itself a separate criterion necessary for authorization, unlike the preferable procedure requirement in other provinces. When applying the proportionality principle, the Québec courts must be careful not to indirectly introduce the preferable procedure requirement into the analysis for authorization. Moreover, Québec courts cannot rely on the principle of proportionality to refuse to authorize an action that otherwise meets the authorization criteria established under the Québec *Code of Civil Procedure*.

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