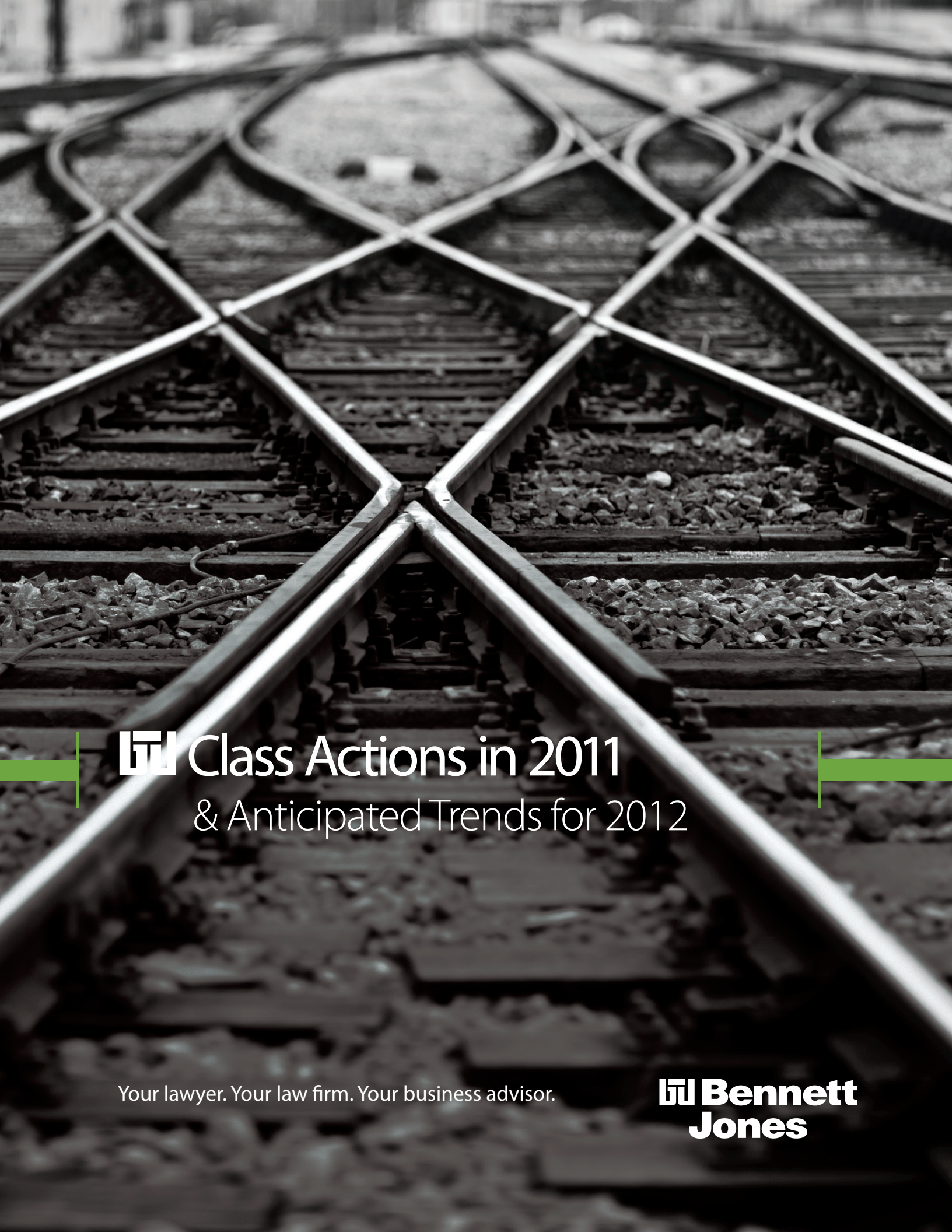

Class Actions in 2011

& Anticipated Trends for 2012

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In 2011, Canadian courts continued to demonstrate an expansive and plaintiff-friendly approach to class actions. Cases decided during the year include decisions in which:

- The test for leave to commence an action under Ontario securities legislation for misrepresentations made in secondary market disclosure was the subject of further judicial consideration;
- The existence of a cause of action for indirect purchasers under Canadian anti-trust law continued to be left uncertain;
- A number of common issues trial decisions were delivered; and
- Employment overtime class action certification motion decisions were delivered, with varying results, and are currently awaiting decisions on appeal.

The year's developments have provided clarification in some opaque areas of class actions law, but have left a number of questions to be answered in the future. It remains difficult to avoid certification and class action defense practitioners are turning their focus to post-certification battles, including common issues trials. However, in the areas of competition and employment, some of the most important decisions on certification and on the merits of the claims are still yet to come, with noteworthy appellate decisions expected in 2012 and 2013.

Securities Law

2011 saw a number of significant developments in securities class actions. Prior to 2011, there had only been one decision considering whether to grant leave under Part XXIII.1 of the *Securities Act* (Ontario) (OSA). In 2011, several decisions were issued, providing some further clarification on that leave test as well as the first indications of how courts will interpret the statutory limitation period for such actions. Other decisions addressed when pleadings must be filed and the interplay between settlements with securities regulators and securities class actions.

Further Judicial Consideration of the Leave Test

Part XXIII.1 of the OSA creates a statutory right of action against reporting issuers, their officers and directors, and related parties for misrepresentations made in secondary market disclosures. Before such a claim can be brought, the plaintiffs must obtain leave of the court. There is a two-part test for leave: (1) the action must be brought in good faith, and (2) the plaintiffs must have a reasonable possibility of success at trial.

In *Silver v. IMAX*, the first decision to consider this new statutory cause of action, Justice van Rensburg set a relatively low threshold for plaintiffs to obtain leave. Under the first part of the test, the plaintiffs must establish that they are bringing the action in the honest belief that they have an arguable claim and for reasons that are consistent with the purpose of the statutory cause of action and not for an oblique or collateral purpose. Under the second part, the Court must consider all of the evidence put forward on the leave motion and must be satisfied that the evidence supports plaintiffs having a reasonable possibility of success at trial.

An application for leave to appeal to the Divisional Court was argued in July 2010 and on February 14, 2011, Justice Corbett denied the application for leave. In his reasons for denying leave to appeal, Justice Corbett left what he acknowledged were the controversial and difficult substantive issues to the Court of Appeal, following an actual trial of the issues (assuming a trial is held and an appeal is taken). Given the increasing number of secondary market class actions, counsel and clients would have benefited from immediate appellate consideration of the leave test. However, in the interim, and subject to a judge taking a different view, the low threshold for leave to bring an action under Part XXIII.1 as pronounced by Justice Van Rensburg stands.

While defendants had hoped that the next judge to address the leave test following IMAX would raise the threshold for leave, the second decision on this issue served to further lower the leave bar. On March 1, 2011, Justice Tausendfreund of the Ontario Superior Court released his decision in *Dobbie v. Arctic Glacier Income Fund*, granting the plaintiffs leave and certifying a national class of Arctic investors for both the Part XXIII.1 cause of action and related common law claims. Justice Tausendfreund granted leave against certain defendants despite a lack of evidence establishing that they had played any role in the complained of misrepresentations based upon his inference that such defendants were "probably aware" that the misrepresentations had been made. The Defendants have sought leave to appeal and a decision is expected in early 2012.

As one of the first two decisions granting leave under Part XXIII.1, this case provides further guidance on how courts will treat the leave requirement, which so far is quite favourable for plaintiffs. A low bar for leave has been set, suggesting that the protection the leave test was designed to provide to issuers, as well as to their directors and officers, is in reality very limited.

Defendants to Plead Prior to Certification

The convention in class proceedings in Ontario has been for defendants to not deliver a Statement of Defence until after the case has been certified by the court as a class action. On July 14, 2011, Justice Perell released *Pennyfeather v. Timminco*, in which he expressed the view that it "is time to revisit the convention that defendants do not deliver a Statement of Defence before the certification motion". Even though leave had not yet been granted to commence the secondary market liability claim (as required under the OSA), Justice Perell ordered all of the defendants to deliver Statements of Defence prior to certification. This decision means, in certain circumstances, the defendants, or proposed defendants, may be required to actively defend, even though leave to assert the claim has yet to be granted. This is a marked departure from the prevailing procedure in class actions, and it remains to be seen whether other judges in Ontario and elsewhere in Canada will follow this decision.

Confusion Regarding the Tolling of Limitation Periods

The OSA provides for a three-year limitation period in which to bring a Part XXIII.1 claim, which commences to run from the date of the first release of the document containing the alleged misrepresentation. While 2011 saw the first three decisions considering this limitation period, the inconsistency and reasoning in these decisions suggests the need for appellate pronouncement, which is expected in early 2012.

In *Arctic Glacier*, Justice Tausendfreund granted leave for alleged misrepresentations in documents dating back to March 2002, based on his determination that the misrepresentations could be treated as one continuing fact situation, such that the limitation period under section 138.14 did not apply. This has the effect of bootstrapping earlier misrepresentations to those which occurred within the limitation period. This decision opens up the scope of liability in the face of a clear limitation period. As mentioned above, the defendants have sought leave to appeal this decision.

Section 28 of the *Class Proceedings Act* tolls limitation periods for causes of action that have been asserted in a class proceeding. In *Nor-Dor Developments Ltd. v. Redline Communications Group Inc.*, the plaintiffs took the position that the limitation period for their proposed Part XXIII.1 claim was tolled even though leave to commence the action had not yet been obtained (the statement of claim simply expressed an intention to assert such a claim). The defendants argued that the limitation period was not tolled due to the fact that the OSA requires leave *prior* to commencing a Part XXIII.1 claim. Justice Rady agreed, finding that until leave was obtained, the action could not be asserted and the limitation period was not tolled.

While defendants took comfort from Justice Rady's decision, Justice Perell subsequently came to the opposite conclusion on the same issue in *Timminco*, where the plaintiffs had disclosed an intention to seek leave for a Part XXIII.1 claim in their statement of claim related to alleged misrepresentations that had been made more than three years previously. The *Timminco* defendants argued that the claim was barred by the limitation period. Justice Perell disagreed, finding that the plaintiffs had effectively asserted their claim by filing a claim

that mentions the Part XXIII.1 claim (even though leave is required before it can be commenced). Therefore, the limitation period was tolled upon the plaintiffs' expression of an intent to seek leave, in spite of the three-year limitation period. The *Timminco* defendants appealed; the Court of Appeal reserved and the much needed appellate guidance on this issue is expected in early 2012.

Fischer v. IG Investment Management Inc. Overturned

In 2011, the Divisional Court overturned the motion judge's decision in *Fischer v. IG Investment Management Inc*. In 2010, the motion judge had denied certification of this class action on the basis that the plaintiff had not established that a class proceeding was the preferable procedure, a requirement for certification. This was mainly based on an OSC settlement pursuant to which the defendants paid $205.6 million in compensation to investors. The motions judge had concluded that this OSC settlement served the purposes of a class action (access to justice, behaviour modification and judicial economy). This decision was welcomed by the defence bar, as it indicated that regulatory settlements could limit potential civil liability in subsequent actions. However, the Divisional Court found that once the plaintiffs established that they may be owed damages in excess of the OSC settlement amount, the purpose of the OSC proceeding could not be determinative in the certification motion. Moreover, the OSC settlement specifically contemplated future civil actions. This decision indicates that even if a restitutionary payment is made pursuant to a regulatory proceeding, it is very unlikely to prevent or preclude future class actions.

The cases discussed above demonstrate that 2011 was, on the whole, yet another plaintiff-friendly year in the securities class actions realm.

Competition Law

Despite being a year with few new high profile claims, 2011 will be remembered as one of the most noteworthy and memorable years for Canadian competition class actions.

In an April 15, 2011, decision that surprised some and was thought by others to be long overdue, the British Columbia Court of Appeal refused to certify the claims of indirect purchaser classes on the basis that indirect purchasers do not have a cause of action in Canadian antitrust law. The companion reasons in *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, and *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, were the first decisions of a Canadian appellate court to decide this issue and represented significant departure from the previous Canadian jurisprudence. A handful of Canadian courts had certified antitrust class actions with direct and indirect purchasers in the last two years, including the BC Court of Appeal in the DRAM class action.

In his reasons in *Microsoft/Sun-Rype*, Justice Lowry relied on the Supreme Court of Canada's 2007 decision, *Kingstreet Investments Ltd. v. New Brunswick (Finance)*. In *Kingstreet*, the Supreme Court of Canada rejected the defence of passing on, just as the U.S. Supreme Court had in *Hanover Shoe Inc. v. United Shoe Machinery Corp*, nearly 40 years before. Applying Kingstreet, Justice Lowry held that the law did not recognize the fact that harm had been passed on. Thus, passed on damages could not support a defence (the situation in *Kingstreet*) or ground a cause of action (the situation in *Microsoft/Sun-Rype*). A majority of the Court rejected the plaintiffs' arguments that the unique procedural structure of a class action relieved against some of the traditional problems with proving whether harm had been passed from direct to indirect purchasers. Justice Lowry, writing for the majority, reasoned that procedural legislation, such as the *Class Proceedings Act*, could not affect substantive rights, such as the existence of a cause of action. His Lordship held that indirect purchasers do not have a cause of action and denied certification of their claim as a class proceeding.

Whether these decisions represent the beginning of a sea change in Canadian antitrust class actions is an open question. On November 16, 2011, the Quebec Court of Appeal in *Option Consommateurs et al v. Infineon Technologies AG et al*, rejected the result in *Microsoft* and *Sun-Rype*, holding that it was too early to determine

whether any damages had been passed on to indirect purchasers. It certified a class of direct and indirect purchasers of DRAM, a component in electronic devices.

In Ontario, just days after the Quebec Court's decision, Justice Rady granted the defendants leave to appeal certification to the Divisional Court in the LCD class action (*Fanshawe College v. LG Philips LCD Co. et al*) on the basis that "the availability of the passing on defence is a fundamental issue underlying most price-fixing cases and as such, warrants review by an appellate court in Ontario." Her Honour commented that "whether indirect purchasers have a cause of action is in a state of uncertainty".

With the Supreme Court of Canada granting the *Microsoft* and *Sun-Rype* plaintiffs leave to appeal on December 1, 2011, its decision on the merits of the appeals is likely to be the most significant to date involving antitrust class actions in Canada and should provide certainty on this issue for plaintiffs and defendants.

While plaintiffs and defendants wait for the Supreme Court's decision on these appeals, they face ongoing actions with continuing uncertainty about whether plaintiffs can certify indirect purchaser classes. So far, the uncertainty produced by the *Microsoft* and *Sun-Rype* decisions has resulted in decisions to allow ongoing actions to slow down procedurally in some cases (the DRAM action in B.C.), and had little impact on others (the chocolate class action in Ontario).

In terms of 2011's new actions, the class action against Visa, MasterCard and several major banks is likely the year's highest profile competition class action claim. The putative class of merchants alleges that the defendants conspired to inflate the fees merchants pay for every Visa or MasterCard transaction they process. Certification and other preliminary motions have yet to be scheduled.

The final notable development comes from the U.S.: Justice Wilkens' decision in the Northern District of California in the context of the Canadian SRAM class action. His Honour refused to vary the U.S. protective order and to grant the Canadian SRAM plaintiffs leave to intervene for the limited purpose of accessing certain evidence, namely unredacted expert reports and deposition transcripts. Justice Wilkens held that the plaintiffs' motion was not timely as the U.S. proceedings had settled. The U.S. defendants could not reasonably expect their confidential documents filed under seal in the context of the U.S. proceeding to be subject to use in Canada. Finally, policing the confidentiality of these documents in the Canadian action would prejudice the defendants. The result was a significant setback to Canadian plaintiffs who do not prosecute Canadian proceedings until U.S. proceedings have settled hoping to rely on U.S. documents and evidence to achieve early resolution in Canada.

Unless the Supreme Court issues its decision in the *Microsoft* and *Sun-Rype* appeals in 2012 (highly unlikely), 2012 will be hard pressed to live up to 2011's exciting developments.

Employment Law

This past year, three major overtime class action cases wound their way slowly through Ontario's appeal courts. The Court of Appeal for Ontario is expected to rule in all three cases in 2012 but plaintiffs and employers may not have the satisfaction of finality until much later when, as we expect may occur, the Supreme Court of Canada hears the cases. The biggest employment class action of 2011 comes from the U.S., where the Supreme Court of the United States dismissed a discrimination claim against Wal-Mart, the largest class action in U.S. history.

Off-the-Clock Overtime Class Actions

Scotiabank and CIBC have been fending off overtime class actions since 2008. In both cases, former and current employees of the banks allege they were not paid overtime pay in breach of the *Canada Labour Code*, the employees' employment contracts and bank policy. Both plaintiffs allege that the banks' failure to pay overtime pay was a systemic issue. Notwithstanding these similarities, both banks started 2011 on opposite sides of the ledger.

In *Fresco v. Canadian Imperial Bank of Commerce*, the certification judge dismissed the plaintiff's motion to certify the action in June 2009. Ontario's Divisional Court upheld that decision in September 2010. As expected, the plaintiff appealed to the Court of Appeal. The hearing of the appeal was completed in December 2011.

In *Fulawka v. Bank of Nova Scotia*, the certification judge reached a different conclusion despite some similarities in the two cases. He certified the class action in February 2010. In June 2011, the Divisional Court dismissed Scotiabank's appeal. The bank's arguments were divided into two broad categories: the causes of action asserted by the plaintiff were bound to fail and the claims did not raise common issues. The Divisional Court concluded that the certification judge was correct in finding that the causes of action asserted by the plaintiff met the plain-and-obvious test. In the court's view, his reasons were "appropriately anchored in the evidentiary record, keeping in mind that the ultimate question of weight of such evidence is appropriately left to the trial judge." Similarly, the Divisional Court concluded that the certification judge was correct in finding these to be common issues which could be adjudicated on a class-wide basis. Scotiabank attempted to cast the plaintiff's claim as individual in nature. The certification judge found that the claims must be assessed in the systematic terms advanced by the plaintiff, and the Divisional Court agreed. Finally, the Divisional Court took no issue with the certification judge's finding that a class proceeding was the preferable procedure for the determination of the common issues.

Given that CIBC was successful in having the plaintiff's motion for certification and the subsequent appeal in *Fresco* dismissed, Scotiabank attempted to rely on those decisions in support of its argument. The Divisional Court made clear that it is "neither possible nor appropriate" for it to assess the merits of Scotiabank's appeal with reference to the evidence and decisions in *Fresco*.

Interestingly, Scotiabank's appeal to the Court of Appeal was expedited, and it was heard together with the appeal in *Fresco* in December 2011. A decision in both appeals is expected in mid-2012.

Misclassification Overtime Class Actions

Following close on the heels of the bank class actions is a misclassification class action against Canadian National Railway Company. In *McCracken v. Canadian National Railway Company*, CN's employees allege that they were wrongly classified as managers to avoid CN's obligations to pay overtime pay to them under the *Canada Labour Code*.

In August 2010, the certification judge granted the plaintiff's motion to certify the action. He also granted CN's motion to strike the plaintiff's claims alleging negligence and breach of the duty of good faith. Though CN's appeal of the certification decision would normally lie to the Divisional Court with leave, the plaintiff's appeal on the striking of part of its claim lies to the Court of Appeal. As a result of the parties' agreement and the Court of Appeal's indulgence, both appeals are scheduled to be heard in the Court of Appeal in February 2012.

The Largest U.S. Class Action Dismissed

In June 2011, the U.S. Supreme Court dismissed certification of a discrimination class action against Wal-Mart in *Dukes v. Wal-Mart Stores, Inc*. The class, which comprised approximately 1.5 million current and former female Wal-Mart employees, alleged that Wal-Mart engaged in a systemic policy or practice of denying female employees raises and promotions.

The majority of the Supreme Court held that the plaintiffs had failed to demonstrate that there was a common answer for why women at Wal-Mart were allegedly disfavoured, making the action unsuitable to class certification. Wal-Mart admittedly delegated raises and promotions to local managers, which necessarily undermined the plaintiff's claim that the case raised national, common issues. Though the Supreme Court's decision should bring some finality to this matter for Wal-Mart, the court's reasons left open the possibility that plaintiffs could assert class actions on a store-by-store or local basis.

We are unlikely to see similar discrimination class action in Canada. There is no recognized "tort of discrimination" and Canada has a system of human rights tribunals and employment equity commissions, which are aimed at remedying the types of claims made in *Dukes*.

Common Issues Trials

2011 saw a number of common issues trials and some key decisions were issued which should provide at least some guidance on how courts will approach common issues trials.

In *Smith v. Inco*, the Court of Appeal for Ontario overturned the trial judge's $36-million award. The case was brought by a class of approximately 7,000 property owners who were situated surrounding the former Inco nickel refinery in Port Colborne. The class alleged that historical emissions from the plant and the subsequent disclosure of the potential impacts of these emissions negatively affected property values after September 2000. For class actions practitioners, the most notable component of the Court of Appeal's decision is the portion relating to limitation periods. The Court of Appeal strongly disagreed with the trial judge's conclusion, and held that a limitation period for a class cannot be considered a common issue when the period began to run from the date when a majority, even an overwhelming majority, of the class members knew or ought to have known the material facts in issue. This approach would have allowed some class members' claims, which had expired, to be unfairly resuscitated. While these comments could be considered *obiter dicta*, their importance lies in the court's clear statement that they were made to provide guidance in future class actions.

Jeffrey v. London Life Insurance Company is another decision of the Court of Appeal for Ontario in which the trial court's decision on liability was upheld, but the quantum of damages was reduced. The class, made up of former insurance policyholders, claimed that when Great-West Life Assurance Company acquired London Life Insurance Company, $220 million in participating account transactions were exchanged for pre-paid expense assets (PPEAs), which represented the anticipated expense savings to be realized by those accounts over a 25-year period. The $220 million was used to finance approximately 7.5 percent of the $2.9 billion acquisition price. This practice was held to have run afoul of the *Insurance Companies Act* (Ontario) and that the PPEAs were not assets under Generally Accepted Accounting Principles. The trial judge ordered the insurance companies to pay $390 million and the Court of Appeal reduced this figure to $220 million, which still represents a significant recovery for the class.

The Ontario class actions bar eagerly awaits the decision in *Andersen v. St. Jude Medical Inc.*, a medical products liability claim on behalf of a class of persons with allegedly defective artificial heart valves. The common issues trial lasted approximately 140 days and the decision is currently under reserve. The decision will be especially helpful, as it will provide some guidance to class actions litigators on how claims framed in waiver of tort will be treated by the courts.

2011 has shown that certification is continuing to be a low procedural bar and practitioners have continued to look past certification as they develop the strategy for their cases. A trend toward more common issues trials being conducted has resulted and, as decisions continue to be released, additional guidance will be available concerning the special considerations that apply to trials in class proceedings.

Conclusion

In 2012, important decisions on post-certification issues, including common issues trials and the associated costs consequences for unsuccessful parties, will continue to be released and the Canadian class actions landscape will be further defined. Over the past year, some clarification in the securities and competition fields has been achieved at the pre-certification stage but litigators will have to continue to wait on appellate courts for more certainty about issues of both substantive and procedural law which have an impact on class proceedings in Canada.

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