# Looking Forward
## Canadian Class Actions in 2015

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Bennett Jones

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# Looking Forward

Developments in the courts continue to make class actions an attractive option for plaintiffs. The sphere of risk for companies operating in Canada is expanding. It is thus no surprise that activity in Canadian class actions did not slow down in 2014.

This past year, Bennett Jones was involved with some of the most important class actions in the country. Our active and growing class actions practice group continued to earn its reputation as a leader in the Canadian legal market. By leveraging our practical experience, litigation expertise, and unparalleled knowledge of procedure, we helped clients achieve meaningful results that aligned with their business objectives.

What follows is our analysis of trends in Canadian class actions in 2014 and likely developments in 2015. We predict that this coming year will see:

- more certainty in class actions under the *Securities Act* and in the CCAA context;
- an intensified focus by defendants resisting certification on the "credible and plausible methodology" requirement;
- appeal-level clarification of the identifiable class requirement;
- an increase in the frequency of summary judgment motions in class actions as litigants test the boundaries of *Hryniak*;
- more judicial guidance on employment class actions;
- judicial guidance on the viability of class actions involving tort claims based on breaches of the *Competition Act*;
- more inconsistency in judges' approaches to costs awards against plaintiffs under the loser-pays system in Ontario; and
- greater scrutiny of proposed settlements to ensure fairness to class members.

# Securities

### *More Clarity for Misrepresentation Claims in Securities Class Actions*

Ontario's statutory regime for secondary market liability came into effect in 2006 as a result of amendments to the *Securities Act* (Ontario) ("OSA"). Part XXIII.1 of the OSA creates a statutory cause of action for secondary market misrepresentations against reporting issuers, their officers and directors, and related parties. Each decision interpreting this new statutory regime continues to mould the scope of liability. In late 2014, important developments in Ontario brought welcome clarity in three critical areas.

The first issue to receive clarification is the limitation period for commencing an action under Part XXIII.1 of the OSA. The OSA provides that plaintiffs must commence such proceedings within three years of the date on which the document containing the alleged misrepresentation was released. Because plaintiffs must also obtain leave of the court to commence such an action, this raised the question of whether plaintiffs need to obtain leave within three years—or merely seek leave within that period.

In 2012, the Court of Appeal for Ontario interpreted the OSA to mean that plaintiffs must obtain leave within the three-year period.[1] But in 2014, a rare five-judge panel of the Court of Appeal in *Green v CIBC ("Green")* reversed its own decision.[2] The Court determined that a plaintiff's articulation of its intention to seek leave to commence a secondary market claim under the OSA was sufficient to suspend the limitation period, even though leave to commence the action had not yet been granted. In August 2014, the defendants in *Green* were granted leave to appeal the decision to the Supreme Court of Canada, along with two companion decisions in *Silver v IMAX* and *Celestica v Millwright*.

Less than one month later, the Legislative Assembly of Ontario stepped in to address the issue of how to apply the three-year limitation period. With little fanfare, it amended section 138.14 of the OSA, as part of the Government's budget bill, to provide that the limitation period is suspended on the date that the notice of motion for leave to commence the action is filed with the Court.

In December 2014, the Court of Appeal clarified two additional issues in its decision in *Bayens v Kinross Gold Corporation ("Kinross")*.[3] The first issue concerns the test for obtaining leave to commence an action under Part XXIII.1 of the OSA. Before commencing an action, plaintiffs must obtain the court's leave under a two-part statutory test: the action must be brought in good faith and the plaintiffs must have a reasonable possibility of success at trial. The first prong of the test is easily satisfied in most cases, but the threshold for the second prong has been the subject of much debate.

In *Green*, the Court of Appeal established that the test for leave was tantamount to the test to be applied under section 5(1)(a) of *Ontario's Class Proceedings Act, 1992* ("CPA") on a motion for certification. The Court acknowledged that the evidentiary record was very different when applying the tests—there is no evidence before the Court on a section 5(1)(a) analysis—but still held that the similar language was designed to weed out hopeless claims and to only allow those with some chance of success to proceed.

In *Kinross*, the Court expanded on how the same test could be applied in two "entirely different contexts". It explained that, on a leave motion, the reasonable possibility of success standard is brought to bear on an evidentiary record consisting of affidavit evidence and the transcripts of any cross-examinations on affidavits. The court is thus not required to accept the evidence filed by the plaintiffs. In contrast, under section 5(1)(a) of the CPA, no evidentiary record is filed and the facts as pleaded are assumed to be true, which gives rise to what the Court called a "deemed evidentiary record". The Court concluded that the reasonable possibility of success requirement of the leave test is a "relatively low threshold, merits-based test." The determination of whether a plaintiff's statutory action has a reasonable possibility of success at trial requires some critical evaluation of the action's merits, based on all the evidence adduced by the parties on the leave motion.

*Kinross* offers an excellent example of how applying the same test in very different contexts can produce different results. When the facts as pleaded were assumed to be true and certain amendments to the pleadings were assumed, section 5(1)(a) of the CPA was satisfied. But when the expert evidence put forth by the plaintiffs was evaluated, the judge at first instance in *Kinross* determined that there was no reasonable possibility that the claim could succeed at trial and, on this basis, refused leave. On appeal, the Court of Appeal concluded that this evaluation of the plaintiffs' evidence was the proper role of a judge on a leave motion and upheld the motion judge's refusal to grant leave.

The second critical issued addressed in *Kinross* is whether negligent misrepresentation claims at common law are appropriate for certification as class actions. When establishing the statutory cause of action, the Legislative Assembly of Ontario identified the apparent inability of plaintiffs to successfully pursue a common law action for negligent misrepresentation as a key reason, largely due to the requirement that plaintiffs prove individual reliance. In *Green*, the Court of Appeal found 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. The Court of Appeal also stated that, in certain circumstances (although not in the circumstances in front of it in *Green*), inferred group reliance could potentially be certified as a common issue.

In *Kinross*, the Court of Appeal clearly found that reliance was not a common issue. The Court clarified its decision in *Green* by emphasizing that such reliance-based claims were particularly unsuitable for resolution in a class proceeding. The Court ultimately held that, if the class action were certified, the resulting proceeding would involve a vast number of individual trials on the important issues of reliance, causation, and damages, thus undermining two key goals of class actions—namely, judicial economy and access to justice.

In addition, when addressing the preferable procedure criterion of the certification test, the Court of Appeal in *Kinross* accepted that it is appropriate to consider the outcome of the leave motion for the statutory claims if:

- statutory misrepresentation claims and common law misrepresentation claims, based on the same evidentiary foundation, are combined; and
- the statutory misrepresentation claims were found to have no reasonable possibility of success under a statutory mechanism directed at access to justice.

In *Kinross*, the Court of Appeal concluded that a class action was not the preferable procedure for stand-alone negligent misrepresentation cases. It distinguished this finding from *Green* since, in *Kinross*, there was no other cause of action that ought to be certified on which the common law negligent misrepresentation claims could piggy-back. Thus, *Kinross* appears to stand for the proposition that common law misrepresentation claims should not be certified independent of complementary statutory claims.

After *Green*, some suggested that the apparent blurring of the leave and certification tests, combined with the manner in which they were likely to be applied, made it difficult to oppose leave in practice. But the explanation and application of the tests in *Kinross* hold out promise that courts will take a hard look at statutory claims and weed out those with less apparent merit. As noted, leave to appeal to the SCC in the *Green* case was granted, and so the Court of Appeal may not have the final word on these issues.

### *Class Action Settlements in the CCAA Context*

Sino-Forest Corporation, its insiders, and third parties became embroiled in class action litigation after a third party published a report alleging fraud in June 2011. By March 2012, Sino-Forest had filed for creditor protection under the *Companies' Creditors Arrangement Act* ("CCAA") and obtained a stay of the class actions against it. The CCAA proceedings reached their final conclusion in March 2014 when the Supreme Court of Canada dismissed applications for leave to appeal by a group of alleged former institutional shareholders who objected to the terms of the CCAA plan. Other litigation relating to a claims bar order issued in favour of a settling class action defendant was resolved in November 2014 when the Ontario Divisional Court denied leave to appeal. Two useful lessons arise from these proceedings.

The first lesson is for class members who are considering opting out of a class action: participate in the CCAA proceedings early or risk losing your right to participate at all. Before the CCAA filing, there was a battle over carriage of the class action between law firms representing different subgroups of class members. The firms that were awarded carriage of the class actions filed an appearance in the CCAA proceeding and actively participated in an effort to protect the interests of the plaintiff group. Conversely, a group of entities claiming to be institutional shareholders of Sino-Forest (represented by a law firm that lost the carriage motion) did not file their own proofs of claim in the proceedings.

A meeting of creditors to vote on the CCAA plan was scheduled for the week of November 26, 2012. On the eve of the creditor meeting, the class action plaintiff group reached an agreement in principle to settle class action claims against one defendant, Sino-Forest's former auditor, Ernst & Young ("E&Y"). At this point and for the first time, the group of alleged institutional shareholders appeared in the CCAA proceeding, initially to oppose Sino-Forest's CCAA plan (which created the framework for the E&Y settlement) and later to oppose the E&Y settlement. These parties claimed to want to preserve their right to opt-out of the Ontario class action and to maintain the right to bring one or more individual actions. Despite their objections, both the plan and the settlement were approved.

Sino-Forest's CCAA plan was implemented on January 30, 2013. Some members of the group filed opt-out forms by the deadline, but the opt-outs were expressly conditional on the court not later granting a release in favour of a party against whom the group wanted to preserve rights of action (such as E&Y). In approving the settlement, Justice Morawetz of the Ontario Superior Court of Justice concluded that the purported opt-outs of the institutional shareholder group were a nullity. He concluded that the CPA does not allow for opt-outs conditional on the absence of prejudice to the putative class member.

On June 26, 2013, the Court of Appeal denied leave to appeal from both orders. In denying leave to appeal the plan sanction order, the Court noted that, as the plan had been implemented, any appeal from the order was moot. The plan sanction order was made on December 10, 2012, and the plan was implemented on January 30, 2013—more than enough time to seek an expedited appeal, a stay pending appeal, or both. CCAA courts can take a dim view of delay, especially where it appears to be tactical. In any event, the Court of Appeal concluded that Justice Morawetz had correctly applied the principles governing the ability to grant releases to third parties in CCAA proceedings.

The second lesson that arises from the Sino-Forest proceedings is that a CCAA release can be a more effective form of release than the standard "claims bar order". Claims bar orders are a common feature of partial settlements in multi-party class actions where only a subset of defendants settles the claim. The purpose of the order, is to protect the settling defendants from claims for contribution or indemnity by non-settling defendants. This allows the settling defendants to extricate themselves from the proceedings with more certainty and finality. The bar order is usually narrowly worded to preserve non-settling defendants' rights to make independent unrelated claims against the settling defendants.

Shortly before Sino-Forest filed for CCAA protection, the class action plaintiff group entered into an agreement to settle their claims against the defendant Pöyry. Rather than implement the settlement as part of the CCAA plan, the CCAA stay was temporarily lifted so that the settlement could be approved through an ordinary order. The settlement approval order included language that barred all claims for "contribution, indemnity or other claims over" relating generally to the claims that the class members had against Pöyry.

Pöyry was later sued by the trustee of the Sino-Forest litigation trust created as part of the CCAA plan. Pöyry invoked the claims bar order as a basis to strike the claim. But in a decision released in June 2014, Justice Wilton-Siegel held that there were significant differences between the claims asserted by the litigation trust and the claims of the class action plaintiffs, including that: (1) the material facts pled in support of the actions were similar but not identical; (2) the litigation trust claimed in tort and contract, whereas the class action plaintiffs principally claimed under the OSA; and (3) the damages at issue were those suffered by Sino-Forest and not its shareholders. The claims bar order thus did not bar the litigation trust's claim. In denying leave to appeal, the Ontario Divisional Court distinguished "claim over" as having a narrower meaning than "cross-claim".

By contrast, the E&Y settlement granted E&Y a broad release from all potential future claims that would form part of Sino-Forest's plan of compromise and reorganization. Because CCAA courts can grant broader protections in CCAA plans than can courts in class actions, including by granting orders that are binding on all class members, some parties will seek to settle claims within the CCAA context and obtain CCAA releases. This can be a win-win for the settling party and creditors: courts want to facilitate the settlement of claims that can impede the formulation of a successful CCAA plan, and broader protections should serve to increase the quantum a settling party is prepared to pay. As with E&Y, it can also encourage early settlement, before a CCAA plan is submitted to creditors for approval.

# Certification

### *Does the Credible and Plausible Methodology Requirement Have Bite?*

In 2013, the Supreme Court of Canada released its now-leading decision in *Pro-Sys Consultants Ltd v Microsoft Corp ("Pro-Sys")* which considered the proper approach courts should take in assessing methodologies of expert witnesses in class actions.[4] Plaintiffs who propose common issues relating to causation or damages often rely on expert evidence to establish some basis in fact for the commonality requirement. But in *Pro-Sys*, the Supreme Court clarified that judges must scrutinize proposed methodologies at the certification stage to ensure they are "sufficiently credible or plausible" and thus offer a "realistic prospect of establishing loss on a class-wide basis". There was subsequent speculation that *Pro-Sys* could be limited to antitrust cases. Litigants awaited judicial clarification.

In May 2014, the Alberta Court of Appeal obliged with its decision in *Andriuk v Merrill Lynch Canada Inc ("Andriuk")*.[5] The plaintiffs in this case sought to certify a class action against Merrill Lynch Canada in which they alleged that Merrill had breached various duties to its clients, causing them to suffer losses, in connection with Merrill's conduct in buying, holding, and selling a speculative biotech stock. The plaintiffs alleged that Merrill's conduct, among other things, artificially depressed the stock's price.

At first instance, Justice Martin of the Alberta Court of Queen's Bench rejected the plaintiffs' application to certify the class action. She noted that the plaintiffs' theory of damages required proof of a methodology that could establish or quantify the alleged class-wide share price depreciation loss. The plaintiff's novel theory of damages was complicated by the need to prove loss that linked to Merrill's conduct and not other market forces. Justice Martin found that the plaintiffs had not adduced evidence of a methodology that could overcome these hurdles. Common issues relating to causation or damages thus could not be certified.

On appeal, the Court of Appeal agreed with Justice Martin that the absence of a workable methodology was an insurmountable obstacle. Citing *Pro-Sys*, the Court accepted that plaintiffs must offer some proof of a methodology that could be capable of establishing an actual class-wide loss. The methodology must also be sufficiently credible or possible to establish some basis in fact for the commonality requirement and offer a realistic prospect of establishing the alleged class-wide loss. Finally, plaintiffs must adduce some evidence of the availability of the data to which the proposed methodology would be applied. The Court did not distinguish *Pro-Sys* as an anti-trust case. Justice Martin's dismissal of the application was thus upheld.

*Andriuk* confirms two important trends in the wake of *Pro-Sys*. First, notwithstanding the slate of recent plaintiff-friendly decisions judges at certification hearings still require plaintiffs to adduce some evidence of a workable methodology. Second, the Supreme Court's comments about the credible and plausible methodology requirement in *Pro-Sys* apply to cases outside of the antitrust context, despite early speculation to the contrary.

These developments are good news for defendants who wish to resist certification, despite the low threshold of the certification test. As evidenced by *Andriuk*, defendants can achieve success in appropriate circumstances by attacking an expert's methodology or by challenging the absence of a workable methodology and the evidence on which it is based. Although judges are unlikely to delve into expert evidence as deeply as they do in the United States, the credible and plausible methodology requirement may yet have bite.

### *The Identifiable Class Requirement Plays Out in the Courts after Sun-Rype*

The identifiable class requirement has been addressed regularly by defendants since the Supreme Court of Canada released its 2013 decision of *Sun-Rype Products Ltd v Archer Daniels Midland Company ("Sun-Rype")*.[6] In 2014, defendants continued to test the limits of the identifiable class requirement—with mixed results.

In March 2014, the Ontario Divisional Court released its appeal decision in *Keatley Surveying Ltd v Teranet Inc ("Keatley")*.[7] In this case, the plaintiff commenced a class action against the manager of Ontario's electronic land registry system, Teranet, for copyright infringement in connection with its decades-old practice of making and selling copies of surveys deposited in provincial land registry offices. The plaintiff moved to certify the class proceeding, and the defendant opposed certification on the ground that the plaintiff failed to show that there was an identifiable class of two or more persons.

At first instance, Justice Horkins of the Ontario Superior Court of Justice dismissed the motion. She agreed with Teranet that the plaintiff failed to meet the identifiable class requirement. Although it identified 349 licensed surveyors in private practice in Ontario, Justice Horkins concluded that the plaintiff had failed to lead evidence showing that any of those surveyors had a complaint that they wished to have determined in a class proceeding. She concluded that this failure barred the certification of the proposed class action. The plaintiff appealed.

On appeal, the plaintiff substantially recast its case by changing the class definition, amending the common issues, and withdrawing two common issues. The Ontario Divisional Court allowed the recasting of the action. Then, it concluded that Justice Horkins had erred in principle by interpreting the identifiable class criterion as requiring a plaintiff to adduce evidence of two or more people who wish to have their claims determined in a class proceeding. The Court noted that *Sun-Rype* contains no mention of a requirement that two or more people be "desirous" of joining the litigation. The Supreme Court merely stated that two or more people must be able to establish that they are members of the class. The Court therefore set aside the decision of Justice Horkins and certified the class action.

The *Keatley* identifiable class requirement seems less demanding than what has been required by other courts. The error identified by the Divisional Court ostensibly relates to the difference between evidence of the *existence* of a class and of the *desire* of two or more people to join the litigation. But the decision is equally about the amount and quality of evidence that plaintiffs must adduce to satisfy this prong of the certification test. The plaintiff in *Keatley* relied on: (1) two affidavits and transcripts of cross-examinations which provided no direct evidence that two or more people had claims to adjudicate; and (2) various circumstances that were said to indicate the existence of an identifiable class. In this sense, *Keatley* appears to set the evidentiary bar lower than many earlier (and later) cases, especially given the line of authority endorsing the "desirousness" test.

*Ladas v Apple Inc ("Ladas")* offers an interesting counterpoint.[8] The plaintiff in *Ladas* alleged that the defendant, Apple, had designed and produced an operating system that recorded and stored unencrypted location data on devices and copied that data onto computers when the devices were being synchronized. This process was said to breach the privacy of users and constitute a deceptive practice under provincial consumer protection legislation. The plaintiff moved to certify the class action. Apple resisted certification on several grounds, including the lack of an identifiable class.

In his post-*Keatley* decision, Justice Adair of the British Columbia Supreme Court dismissed the motion and refused to certify the class action. She found that the plaintiff had failed to show that an identifiable class existed. The only relevant evidence tendered by the plaintiff was the affidavit of a legal assistant at class counsel's law firm listing 17 people alleged to be potential members of the proposed class and attaching their retainer agreements. The affidavit did not, however, provide sufficient details about these individuals to satisfy Justice Adair that they were potential class members. Citing *Sun-Rype*, Justice Adair agreed with *Keatley* that there is no requirement to prove that two or more people are desirous of joining the class action, but she stated that sufficient evidence must nonetheless be proffered to show that two or more people might actually fall within the proposed class description. The quality of evidence adduced by the plaintiff was therefore found to be insufficient.

The identifiable class requirement is becoming an important battleground between plaintiffs and defendants in class actions. Judges are continuing to explore the degree of gate-keeping that is appropriate at the certification stage. *Keatley* suggests that it may be an error to require any direct evidence of an identifiable class. But leave to appeal from *Keatley* to the Court of Appeal for Ontario was granted in September 2014, and a few decisions after *Sun-Rype* might signal a trend towards a higher evidentiary bar. The Court of Appeal's expected appeal decision in *Keatley* thus has the potential to make 2015 an important year for the identifiable class requirement.

# Employment

### *Misclassification Overtime Claims Require a Narrow Class Definition*

In the latest installment in a series of recent employment class actions, the Court of Appeal for Ontario has dismissed an appeal by class action plaintiffs in *Brown v Canadian Imperial Bank of Commerce ("Brown")*.[9] The Court's decision to uphold the lower court's finding that a proposed misclassification overtime class action was not suitable for class treatment confirms that, for such class actions to be viable in Ontario, class members must demonstrate that their roles and responsibilities are virtually identical.

In *Brown*, a group of the defendant's employees comprising analysts, investment advisors, and associate investment advisors sought to commence class proceedings alleging that their jobs had been misclassified in a way that improperly disentitled them to overtime pay. The putative class members relied on a number of causes of action, including breach of contract and violations of the *Employment Standards Act, 2000*.

At first instance, Justice Strathy of the Ontario Superior Court (now Chief Justice of Ontario) denied certification. This decision came in the wake of two other overtime class actions in the financial sector: *Fulawka v Bank of Nova Scotia ("Fulawka")* and *Fresco v Canadian Imperial Bank of Commerce ("Fresco")*.[10] Although Justice Strathy reiterated a sentiment he expressed in *Fulawka* that misclassification cases may be more suitable to certification than "off-the-clock cases", he accepted in *Brown* that the question of whether individual employees had management responsibilities was an "insurmountable stumbling block". He went on to find the proposed common issues were lacking in commonality and concluded that proposed class members had little in common beyond job titles. These findings were bolstered by an acknowledgment by class counsel that a determination of whether positions had managerial responsibilities might have to be made after a common issues trial.

In response to Justice Strathy's findings, class counsel narrowed the proposed class definition in an attempt to exclude analysts as well as any investment advisors with supervisory or managerial responsibilities in an appeal to the Divisional Court. Nonetheless, the Divisional Court affirmed Justice Strathy's decision and refused to certify the class action on the basis of a finding that eligibility for overtime pay was still an employee-specific inquiry that was not amenable to resolution as a common issue.

The plaintiffs sought and obtained leave to appeal. In a decision released in late 2014, the Court of Appeal affirmed the decision of both lower courts. Specifically, the Court of Appeal found that, given the wide variability in the duties and responsibilities of employees having the same job title and classification, eligibility could not be determined on a class-wide basis. The Court noted that, absent the ability to determine the threshold issue of eligibility for overtime as a common issue, the resolution of other ostensibly common issues would only minimally advance the claim and would surely result in a case of "the tail wagging the dog". As such, the Court found a lack of "core commonality" sufficient to satisfy the common issues requirement and therefore denied certification.

In reaching its decision, the Court of Appeal distinguished *Brown* from another misclassification case called *Rosen v BMO Nesbitt Burns Inc ("Rosen")* in which certification was granted and the subsequent motion for leave to appeal was dismissed. In Rosen, the proposed class had the same (or very similar) functions. The class definition excluded all investment advisors with managerial responsibility. Unlike in *Brown*, the ineligibility of investment advisors for overtime pay was premised on a feature common to all class members—to wit, the employer's policy denied overtime pay to anyone paid by commission.

Although the Court of Appeal denied certification in this instance, its decision does not appear to signal the end of misclassification cases. Rather, in denying certification, the Court of Appeal expressly noted the absence of any rule suggesting that misclassification claims are generally incapable of raising common issues. Thus, while *Rosen* demonstrates that misclassification cases are by no means dead in Canada, *Brown* signals that they may no longer be the fertile ground that some previously thought—and the plaintiff bar hoped—they might be. In what will likely be welcome news for employers, *Brown* suggests that courts will strictly examine the commonality of proposed class definitions and common issues in an effort to ensure a class proceeding is truly the preferable procedure for dealing with overtime claims.

Employers should carefully review their overtime pay policies and classification practices. Key facts that resulted in a more employer-friendly outcome in *Brown* include that CIBC did not have a blanket policy denying overtime to employees paid by commission and that CIBC led evidence that it made individual assessments of employees' duties and responsibilities for the purposes of determining eligibility for overtime.

In August 2014, a settlement in *Fulawka* received court approval. The settlement provides for a streamlined claims process, with no cap on total recovery. Class counsel estimated that the overall recovery could be in excess of $95 million. Justice

Belobaba lauded the settlement as a creative solution. The companion case involving CIBC is still ongoing. In late January, Justice Belobaba certified an overtime claim in the trucking industry involving Canada Cartage. In addition, there are high-profile employment class actions working their way towards certification involving Livingston International concerning unpaid overtime and the Canadian Hockey League concerning the minimum wage. Further judicial guidance on employment class actions would thus appear to be on the horizon.

# Summary Judgment

### *Supreme Court Revitalizes Summary Judgment*

On January 23, 2014, the Supreme Court of Canada released its much-anticipated decision in *Hryniak v Maudlin ("Hryniak")*. In its soon-to-be seminal decision, the Court articulated a new approach to summary judgment under Rule 20 of Ontario's *Rules of Civil Procedure*, calling for a culture change across Canada. Although it arose outside of the class action context, *Hryniak* will have significant implications for the availability of summary judgment in class proceedings as litigants test the decision's boundaries in 2015.

*Hryniak* overruled a decision by the Court of Appeal for Ontario that largely restricted summary judgment to straightforward, document-driven cases. By contrast, the Supreme Court re-characterized summary judgment as an alternative mode of adjudication that is no less legitimate than a trial and that should be more widely available to provide litigants with cheaper and swifter access to justice. The Court refused to specify the types of cases that will tend to be appropriate for summary judgment.

In 2010, the Ontario government implemented significant changes to Rule 20 to improve access to justice. Among other things, the amendments give judges on summary judgment motions the power to weigh evidence, make determinations of credibility, and draw reasonable inferences from the evidence. For the purpose of exercising any of these powers, the new Rule also gives judges discretion to direct that oral evidence be presented. Finally, the summary judgment test itself was changed. The old Rule required the moving party to show that the case raised "no genuine issue *for* trial", but the amended Rule allows a motion judge to grant summary judgment if there is "no genuine issue *requiring* a trial".

The first case under the new Rule to reach the Court of Appeal was the lower court decision in *Hryniak*. The Court of Appeal recognized that the amendments were intended to make summary judgment "more accessible to litigants with a view to achieving cost savings and a more efficient resolution of disputes". But it remained reluctant to displace the conventional trial as the gold standard of adjudication due to the "privileged position" it affords judges and a greater assurance of fairness in resolving disputes. As a result, the Court concluded that judges could only wield their new powers under the amended Rule 20 if the benefits of a trial are not required to achieve a "full appreciation" of the evidence.

The Supreme Court deliberately charted a different path. It conceded that the summary judgment process might not equal a trial in some respects, but it found that the expense and delay of protracted trials can also prevent the fair and just resolution of disputes. Citing concerns about access to justice, the Court therefore concluded that proportionality and fairness considerations will dictate that the more limited procedures that are available through summary judgment are just and appropriate in many cases.

The key holdings from the Supreme Court's decision are as follows:

- A conventional trial is no longer the default procedure. Summary judgment should be granted if the process allows the judge to make the necessary findings of fact, allows the judge to apply the law to the facts, and is a proportionate, more expeditious, and less expensive means to achieve a just result.
- Judges' new powers are presumptively available, although the interests of justice may dictate that these powers not be used if trial is preferable given proportionality, timeliness, and affordability considerations.

- The use of the power to hear oral evidence is more likely to be appropriate where the oral evidence required is limited. The Court noted, however, that "there will be cases where extensive oral evidence can be heard on the motion for summary judgment, avoiding the need for a longer, more complex trial and without compromising the fairness of the procedure".
- Since the decision to use the new Rule 20 powers is discretionary, the motion judge's decision should not be disturbed unless the judge "misdirected herself, or came to a decision that is so clearly wrong that it resulted in an injustice".

Hryniak releases judges from the restrictions placed on the summary judgment process by the Court of Appeal. It will also likely make summary judgment available in a broader spectrum of cases, including class actions. The benefit for many litigants will be cheaper and sometimes quicker access to justice, especially in light of recent initiatives from the Ontario Superior Court of Justice to reduce motion scheduling delays. The full effects of Hryniak will nonetheless fall to be worked out in subsequent cases, particularly in the class action context where judges may exercise more caution in resolving claims against plaintiffs on comparatively thin records and in complex cases.

### *Expedia Obtains Summary Judgment of a Class Action*

On April 2, 2014, Justice Perell of the Ontario Superior Court of Justice released his decision in *Magill v Expedia Inc ("Expedia")*.[11] It was the first decision on summary judgment in the class action context after *Hryniak*. In this case, a customer of Expedia sought to commence class proceedings alleging that charges for hotel reservations and custom vacation packages breached the terms of Expedia's reservation contracts with customers who booked online. The alleged breaches related to two charges—a tax recovery charge and a services fee—which the plaintiff claimed were falsely described or characterized and not adequately disclosed. Expedia denied that the charges breached the reservation contracts. Justice Perell certified the class action in 2013. Expedia then moved for summary judgment.

Justice Perell found that there was no genuine issue requiring a trial and, therefore, dismissed the class action. Justice Perell did not review the summary judgment case law, but he cited *Hryniak* and concluded that "the evidentiary record before the court was more than adequate to decide whether there are any genuine issues for a trial". Justice Perell found that, as a matter of contract interpretation, Expedia did not breach its reservation contracts because there were no words in those contracts expressing a promise by Expedia to:

- disclose that the tax fee is charged on the Retail Rate or Wholesale Rate;
- charge the tax fee on the Wholesale Rate;
- disclose the tax fee and the service charge separately; and
- not include a profit element in the services charge.

The evidentiary record showed that Expedia bundled the impugned fees for a business reason—namely, to comply with confidentiality provisions in its agreements with suppliers and to prevent the reverse-engineering of its trade secrets.

As Justice Perell himself remarked in a subsequent decision, *Expedia* shows "the utility of a summary judgment motion after certification".[12] In combination with the Supreme Court's clarion call for a culture shift in *Hryniak*, *Expedia* may represent the first instance of a new trend of defendants turning to summary judgment to resist class actions, especially given the trend away from meaningful judicial scrutiny of claims at the certification stage.

In a class action context, summary judgment motions may represent a viable alternative to resisting certification, waiting for trial, or settling in some circumstances. The advantages spelled out by the Supreme Court in *Hryniak* apply equally to class actions. With that said, plaintiffs might also view *Hryniak* as opening a door to greater access to justice, and so defendants can anticipate an increase in the number of class actions subject to summary judgment motions by plaintiffs. This could increase the costs of resisting class actions and might create yet another reason to consider settling early in the litigation process.

# Competition

*Uncertainty lingers in the wake of the Supreme Court trilogy*

A flurry of certification decisions has followed in the wake of the Supreme Court of Canada's trilogy of "indirect purchaser" class action decisions released in late 2013. The trilogy validated the ability of indirect purchasers to participate in class actions. But it left one key issue ambiguous: what kind of claims can they bring? More specifically, are plaintiffs who allege a breach of the *Competition Act* ("Act") limited to remedies expressly codified in the Act, or can they also make derivative claims based in tort or equity?

The Supreme Court's silence on this issue has led to conflicting decisions in British Columbia. In *Wakelam v Wyeth Consumer Healthcare/Wyeth Soins de Sante Inc ("Wakelam")*,[13] the British Columbia Court of Appeal held that the Act comprehensively codifies the remedies available for a breach of its provisions and that, therefore, it is not possible to claim equitable remedies (such as restitution) based solely on a breach of the Act. This is a significant decision because plaintiffs have previously tried to use restitutionary remedies to side-step the possibility of individual loss-based inquiries.

In *Wakelam*, the Court of Appeal also suggested that breaches of the Act would be incapable of supporting claims based in tort as distinct from the statutory remedy available under the Act. In *Watson v Bank of American Corporation ("Watson"*), the British Columbia Supreme Court followed Wakelam on this point, finding it was plain and obvious that tort claims based solely on breaches of the Act would fail. But in *Fairhurst v Anglo American PLC ("Fairhurst")*, another decision by the same court, Madam Justice Brown held the opposite, certifying tort claims based mainly on breaches of the Act.

In *Fairhurst*, the plaintiff was an indirect purchaser who alleged price-fixing and bid-rigging of diamonds. Among other things, the plaintiff claimed damages based on the torts of unlawful means and unlawful means conspiracy, relying mainly on breaches of the Act as constituting the "unlawful means". Citing *Wakelam*, the defendants argued that the plaintiffs could not rely on breaches of the Act as the "unlawful means" for either tort because Parliament intended that section 36 of the Act would be the exclusive civil remedy for plaintiffs harmed by anti-competitive conduct.

Justice Brown rejected this argument. She relied primarily on two decisions by the Supreme Court of Canada in *Pro-Sys* and *Al Enterprises Ltd v Bram Enterprises Ltd ("Bram")*. In *Pro-Sys*, the Court declined to strike claims for unlawful means and unlawful means conspiracy, despite the fact that—as in *Fairhurst*—they were based on breaches of the Act. In Bram, the Court dealt with the elements of the unlawful means tort and suggested that a statutory breach could constitute "unlawful means" for the purpose of the unlawful means conspiracy tort. In this context, the Court favourably cited a decision involving a breach of the Act's predecessor statute. In Fairhurst, Justice Brown described these decisions as in conflict with *Wakelam* and expressed the view that she was bound by the higher authority of the Supreme Court of Canada.

The viability of tort claims based on breaches of the Act is an open question. While the Supreme Court declined to strike the tort claims in *Pro-Sys*, it did so solely on the basis that the elements of the unlawful means torts were in flux, pending the release of the decision in *Bram* (which at the time was still under reserve). The Supreme Court did not give detailed reasons for declining to strike the claims. Nor did it accept or reject the codification argument from *Wakelam*, since that decision had not yet been released. *Bram* was released after *Wakelam* but only by one day, and it does not engage with the codification issue either.

We expect a more definitive answer in 2015. The issue was recently before the British Columbia Court of Appeal in *Watson*. That appeal decision is under reserve and will be released this year. It remains to be seen what approach courts in Ontario and other provinces will take, although it is likely they will follow British Columbia's lead.

### *Plaintiffs can Compel Production of Competition Bureau's Evidence*

Plaintiffs in class actions can now compel production of Competition Bureau wiretap evidence, according to the Supreme Court of Canada's recent decision in *Imperial Oil v Jacques ("Imperial Oil")* released in late 2014.[14] Under the *Criminal Code*, the Bureau can collect wiretap evidence in the course of its antitrust investigations. Of course, civil claimants do not have this power. But the majority decision of the Supreme Court concluded that neither the Act nor the *Criminal Code* prohibit disclosure of the Bureau's wiretap information for use in civil proceedings. It qualified its decision, however, by noting that judges may refuse to order disclosure or impose conditions on disclosure to protect the privacy of third parties or to safeguard other important goals (such as ensuring that a criminal accused receives a fair trial).

*Imperial Oil* arose in the aftermath of a Bureau investigation of gas pump pricing in Québec. Between 2004 and 2008, the Bureau intercepted and recorded 220,000 private communications among individuals suspected of fixing the price of retail gasoline. Charges, guilty pleas, convictions, and eventually a civil class action ensued. To advance their case, the class action plaintiffs requested disclosure of the Bureau's wiretaps.

Class actions in the competition law sphere are often preceded by Bureau investigations into the impugned conduct, although most cases do not involve wiretaps. In *Imperial Oil*, the Court did not decide whether non-wiretap evidence collected by the Bureau would be similarly subject to disclosure. For example, the decision leaves open the question of whether information proffered to the Bureau by participants in the Immunity and Leniency Programs could be produced for use in civil proceedings.

Section 29 of the Act prohibits disclosure of five types of information—including information provided voluntarily under the Act—but also contains a blanket exemption covering disclosure that is "for the purposes of the administration or enforcement of" the Act. In *Imperial Oil*, the lower court had partially relied on this exemption to permit disclosure of the wiretaps to the civil plaintiffs. But does the exemption similarly permit disclosure of information that was voluntarily proffered to the Bureau? If so, it could hamstring the effectiveness of the Immunity and Leniency Programs. The specter of increased civil liability might cause applicants to think twice about cooperating with the Bureau if information they provide could later be ordered to be produced to civil plaintiffs.

Because the Supreme Court left this important question unanswered, it will fall to lower courts to determine the scope of the exemption in section 29. No doubt, defendants and the Bureau alike will urge the court to refuse disclosure in these circumstances given the key goal of ensuring an effective investigatory regime through the Immunity and Leniency Programs. In particular, the Bureau will likely assert public interest and perhaps settlement privilege over any information received from immunity and leniency applicants. How a larger fight around these issues will play out remains to be seen.

# Funding and Fees

### *"Loser pays" is still the law in Ontario*

In 2013, a line of costs decisions—including five decisions by Justice Belobaba of the Ontario Superior Court of Justice—cast doubt on the continued applicability of the "loser pays" costs principle in Ontario. These plaintiff-friendly decisions expressed worry about discouraging class actions by awarding successful defendants significant costs awards. This trend, however, may have slowed or even reversed in 2014 with the release of costs decisions reaffirming that unsuccessful plaintiffs must still pay costs in the class actions context, notwithstanding access to justice considerations.

For example, in *Holley v The Northern Trust Company ("Holley")*, the plaintiff was an employee on long-term disability.[15] The employer, The Northern Trust Company, became an applicant in proceedings under the CCAA. Because of these CCAA proceedings, the plaintiff would receive a modest payment from the winding up of the trust, but she would no longer receive long-term disability benefits.

The plaintiff sought to commence a class action against Northern and its trustee, The Royal Trust Company, for fraud on behalf of beneficiaries of the health and welfare trust through which the benefits had been provided. The alleged fraud related to the removal of certain assets from the trust. Northern moved to strike out the statement of claim as disclosing no reasonable cause of action or, in the alternative, for a judgment dismissing the action as statute-barred under the *Limitations Act*, 2002.

Justice Perell granted the motions. He entertained costs submissions from Royal and Northern which both sought their costs on a substantial indemnity scale. In contrast, the plaintiff argued that no costs award or, in the alternative, a small award of only $5,000 per defendant would be appropriate because she had sought access to justice for a disadvantaged group, the litigation had a strong public interest component, and the amounts claimed were out of proportion to a two-day motion hearing. The plaintiff cited 11 cases in which no costs were awarded against unsuccessful plaintiffs as well as a handful of other cases in which only modest costs awards were deemed to be appropriate, all in Ontario.

Justice Perell rejected the plaintiff's arguments. Despite the conflicting cases in Ontario, he noted that Ontario remains a "loser pays" province, and the plaintiff essentially sought an asymmetrical costs regime. Justice Perell characterized such a regime as "heads I win, tails you lose". He noted that the court has discretion to consider features of a case that would justify awarding no or modest costs, but he cautioned that it "is not inevitably exercised so as to create an asymmetrical costs regime". Justice Perell therefore awarded each defendant its partial indemnity costs in the amount of $110,000.

*Holley* reaffirms that loser-pays is the law in Ontario, which is good news for defendants that are weighing the risks of resisting class actions in Ontario. It not clear, however, that courts will consistently apply the loser-pays principle in future cases, especially where they accept that the class action in question was a test case, raised a novel point of law, or involved a matter of true public interest, as anticipated in section 31 of the CPA. Other case-specific factors might also militate for lower or no costs.

For example, in the *Expedia* decision, Justice Perell expressed his "tentative view" (less than two months after *Holley*) that, although Expedia had succeeded on its summary judgment motion, any costs awarded to Expedia should be "temperate". He reasoned as follows:

> The adverse costs consequences of class proceedings have spiraled out of control and threaten the access to justice goals of the legislation, particularly in the context of consumer claims, and because Expedia might have avoided this class action if having decided to explain why it charged for taxes and for a service fee, it had gone on to be modestly more fulsome in its explanation.

In 2015, litigants can expect the tension between the loser-pays principle and access to justice concerns to continue generating inconsistent jurisprudence in Ontario on costs in class actions. This tension may be particularly acute where vulnerable groups (such as consumers) form the proposed class. With that said, *Holley* should give defendants comfort that loser pays remains the law in Ontario—at least for now.

### *Increasing scrutiny of class action settlements*

In 2013, we identified a trend of courts exercising greater scrutiny of class counsel fees awarded in settled class proceedings to ensure that class members were truly benefiting from these settlements. This past year, the trend towards greater scrutiny continued with judges aggressively reviewing settlements to ensure that they were fair, reasonable, and in the best interests of class members—not merely class counsel.

Arguably, the most significant decision in 2014 on the approval of settlements was *Waldman v Thomson Reuters Canada Limited ("Waldman")*.[16] This proposed class action involved alleged copyright infringement with respect to court documents, authored by the proposed class of lawyers, which the defendant made available without permission and for a fee. After adversarial and arm's length negotiations, the parties agreed to a settlement, subject to court approval. The proposed

settlement required the defendant to settle a $350,000 cy-près trust fund to support public interest litigation and to change its copyright notices and the terms of its contract with subscribers. For their part, the individual class members would receive no monetary award, but they would sign a release and grant a non-exclusive license of their copyrights in court documents to the defendant. Finally, the defendant would pay class counsel's fee in the all-inclusive sum of $825,000 as a term of the proposed settlement.

Justice Perell rejected the proposed settlement outright. Although he accepted that the settlement was fair as between the immediate parties, he concluded that a settlement must equally be fair to class members.

Justice Perell noted several factors that indicated the proposed settlement was not substantively, circumstantially, or institutionally fair to class members and, thus, brought the administration of justice and class actions into disrepute. First, he observed that the proposed settlement was more beneficial to class counsel than to members of the proposed class. Then, he accepted that its practical effect was to expropriate the class members' property rights in exchange for a charitable donation from the defendant. In short, the proposed settlement would not provide class members with access to substantive justice. Nor would it provide any meaningful behaviour modification for the defendant. Justice Perell also observed that the "optics" of the settlement were bad from an institutional perspective. The amount of class counsel's fee compared to the notional benefit to class members of the cy-près trust fund payment revealed the essential unfairness and unreasonableness of the proposed settlement.

Justice Perell took the view that parties should not make the payment of class counsel's fee a precondition to a settlement's approval. It would have been preferable, Justice Perell continued, if the court had been granted the ability to reduce the fee, as appropriate, or to re-allocate a portion of the fee to enhance the benefits flowing to class members. But even if these options had been worked into the proposed settlement in Waldman, Justice Perell stated that he would not have approved it due to essential unfairness to class members.

In 2015, the growing body of decisions evidencing a close scrutiny of settlements for fairness may encourage judges facing proposed settlements in class actions to dig deeper than in the past. For example, one can envision cases with more vulnerable class members (for example, individual consumers instead of lawyers, as in Waldman) impelling judges to conduct a careful analysis of the substantive, circumstantial, and institutional fairness of the settlement to members of the class and to exercise more discretion in rejecting proposed settlements where bad "optics" could bring the administration of justice into disrepute.

1 Sharma v Timminco Ltd, 2012 ONCA 107, 109 OR (3d) 569.
2 2014 ONCA 90, 118 O.R. (3d) 641
3 2014 ONCA 901, 2014 CarswellOnt 17766.
4 2013 SCC 57, [2013] 3 SCR 477.
5 2014 ABCA 177, 241 ACWS (3d) 33.
6 2013 SCC 58, [2013] 3 SCR 545.
7 2014 ONSC 1677, 119 OR (3d) 497.
8 2014 BCSC 1821, 245 ACWS (3d) 779.
9 2014 ONCA 677, 245 ACWS (3d) 525.
10 Fulawka v Bank of Nova Scotia, 2011 ONSC 530, 203 ACWS (3d) 699 (Div Ct), aff'g 2010 ONSC 1148, 101 OR (3d) 93; and Fresco v Canadian Imperial Bank of Commerce, 2010 ONSC 4724, 103 OR (3d) 659 (Div Ct), aff'g 178 ACWS (3d) 593, 2009 CarswellOnt 3481.
11 2014 ONSC 2073, 239 ACWS (3d) 362.
12 Fehr v Sun Life Assurance Company of Canada, 2014 ONSC 2183.
13 2014 BCCA 36, 54 BCLR (5th) 7.
14 2014 SCC 66, 377 DLR (4th) 573.
15 2014 ONSC 3057, 240 ACWS (3d) 824.
16 2014 ONSC 1288, 238 ACWS (3d) 303.

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