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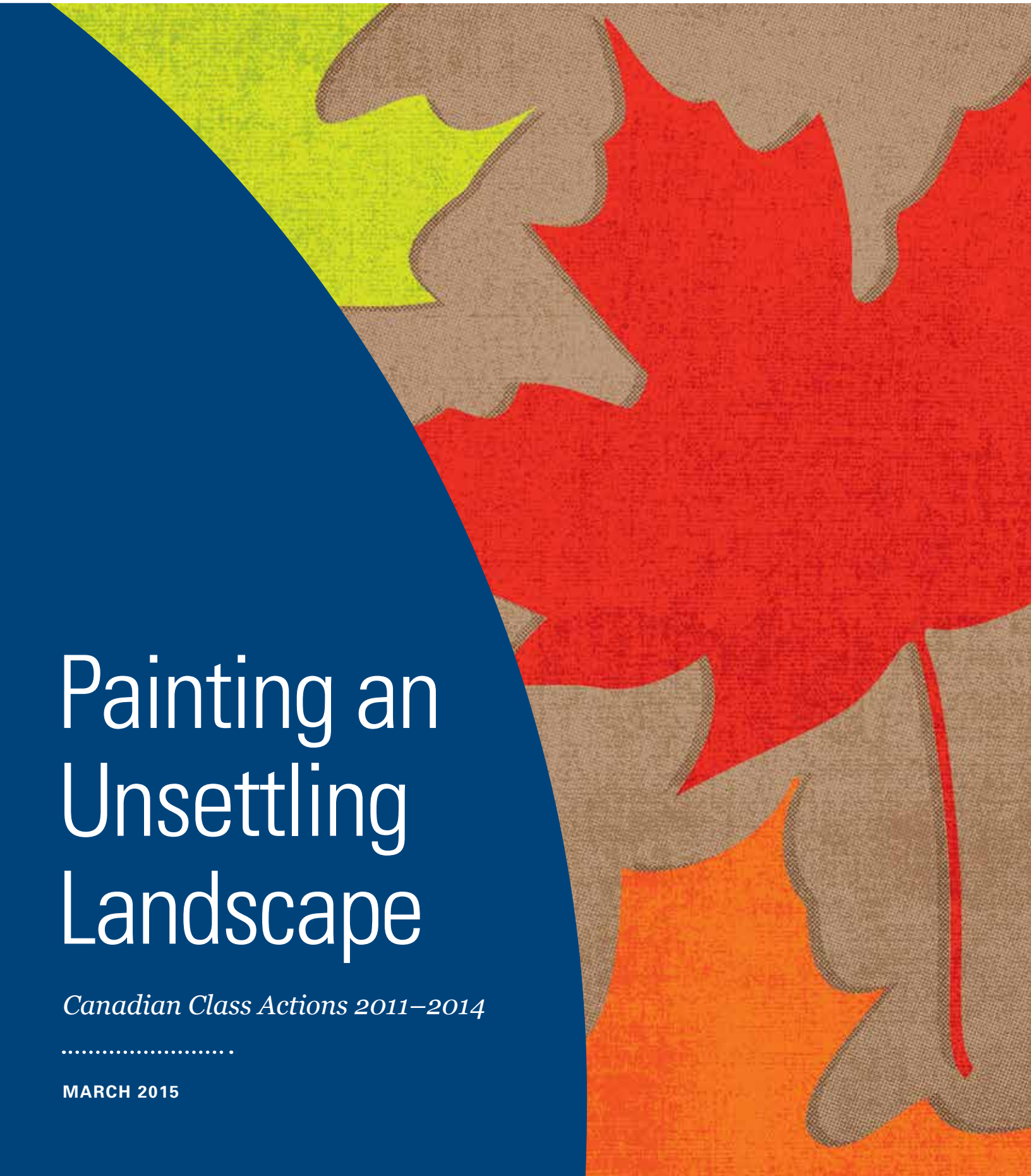

Painting an Unsettling Landscape

Canadian Class Actions 2011–2014

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Executive Summary

Not long ago, there were signals that the Canadian judiciary might be stepping away from its long-standing liberal approach to class actions. Some courts began to more rigorously scrutinize proposed classes, occasionally denying class certification in areas where virtually all had been certified before. This shift was most pronounced in pharmaceutical/medical device and toxic tort litigation.

Over the last few years, however, most indicators of this trend towards more rigorous scrutiny have evaporated. Canadian tribunals have reaffirmed their tradition of consistently lax class certification standards. In short, it is once again a relatively sure bet that a class proposed to a Canadian court will be certified in many areas, if properly framed and presented by plaintiffs' counsel.

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In Canada, there is no federal class action law that applies to claims typically brought in multi-province class actions.[1] Each province and territory establishes its own class action regime, and as is detailed below, the jurisdictions have taken somewhat distinctive approaches. For example, Québec has long been the most popular location for initiating class action litigation because its class certification rules are in most respects the least rigorous. Other jurisdictions have never enacted formal class action rules at all. Notwithstanding these differences, the Supreme Court of Canada has recently confirmed that nationwide class certification is governed by "low" standards that: focus on the form of the action; do not require the court to resolve conflicting facts and evidence; and do not allow for an extensive assessment of the complexities and challenges plaintiffs may face at trial. According to the Court, the burden of proof is minimal, requiring

only "some basis in fact" to establish compliance with the certification criteria. Specifically, with respect to the Québec rules, the Court stated that the class certification inquiry is intended primarily to "filter out frivolous motions" and must be conducted in a manner consistent with the overarching goal of facilitating class actions "as a vehicle for achieving the twin goals of deterrence and victim compensation."

That sentiment has been echoed in two litigation arenas in which only a few years ago, some courts had shown more rigor in evaluating class proposals. In pharmaceutical and medical device class actions, the courts have typically reverted to the practice of loosely applying class certification standards, often embracing what appear to be overbroad class definitions and brushing aside deficiencies in pleading particularity and expert evidence. And in the toxic tort arena, a similar trend is apparent, with a Québec court not long ago authorizing the largest environmental class action in the nation's history in *Deraspe v. Zinc Electrolytique de Canada ltée.*

The increasingly favorable atmosphere for class actions is readily apparent in other substantive law arenas as well. In the antitrust context, the Supreme Court of Canada ruled recently that indirect purchasers of products may bring antitrust class actions under Canada's Competition Act. In a trio of decisions, the Court made clear that such claims are viable and may be afforded class treatment. And in the securities arena, recent rulings have established that the 2005 Ontario Securities Act can be applied extraterritorially in some circumstances, signaling that Canadian courts have not closed the door on handling class actions concerning securities transactions that occurred outside Canada's borders. These developments—coupled with the recent affirmations of lax class certification standards—will certainly invite the filing of more class action litigation in Canadian courts.

Not surprisingly, the high likelihood of class certification is affecting how class actions are being litigated in Canada, generating a number of significant developments for class action practitioners. Some of these developments—for example, the increased usage of summary judgment motions—have inured to the benefit of defendants. However, most are unwelcome changes to Canadian class action practice that will increase the prospect for abuse.

FIRST AND FOREMOST, AN INCREASING NUMBER OF CLASS ACTIONS ARE BEING RESOLVED ON THE MERITS

Class action trials (that is, trials to resolve "common issues" identified for class treatment) are occurring with increasing frequency, with some notable defendant successes. Indeed, class trials (in which a judge—not a lay jury—serves as the fact-finder) seem to be much more likely to occur in Canada than in the U.S. Further, defendants sometimes succeed with summary judgment motions, and they will likely employ such motions more frequently in the wake of recent rules changes allowing their broader use.

SECOND, SETTLEMENTS REMAIN A FREQUENT METHOD FOR RESOLVING CLASS ACTIONS

But as in the U.S., Canadian tribunals are more rigorously assessing whether class members are appropriately benefiting from

settlements, especially where *cy pres* terms are included. Further, some courts are growing increasingly skeptical of class counsel fee applications. They are taking greater care to ensure proportionality between what attorneys receive and the compensation actually delivered to class members. Multijurisdictional class settlements (that is, settlements involving residents of multiple provinces and territories) were once a very complicated process in Canada, but increasingly, they are being facilitated by application of the Canadian Bar Association's (CBA) Protocol for Multijurisdictional Class Actions.

THIRD-PARTY LITIGATION FUNDING (TPLF) IS ALSO GAINING GREATER CURRENCY IN CANADA, PARTICULARLY IN THE CLASS ACTION CONTEXT

The increased use of TPLF threatens to undermine the effectiveness of the "loser pays" policies adopted by some jurisdictions to discourage non-meritorious litigation. Canadian courts have rejected champerty-based arguments to halt the use of TPLF in class actions. However, in some jurisdictions, most notably Ontario, courts have insisted that TPLF arrangements be publicly disclosed and judicially approved (based upon a showing that such funding is necessary to promote access to the courts). The formalization of such transparency and judicial scrutiny in all jurisdictions would lessen the risks posed by TPLF, particularly the prospects that funders will seek to satisfy their own financial goals in derogation of class member interests.

The most significant prospects for change in the Canadian class action environment are presented by the Ontario Ministry of the Attorney General's decision to have the Law Commission of Ontario (LCO) conduct a critical review of experiences with the Ontario Class Proceedings Act over the 20 years it has been on the books. The topics being considered are: (a) the reasons for low class member participation in settlements; (b) the procedural efficiencies of the class litigation process; (c) the funding of class litigation (including issues presented by third-party litigation funding); (d) whether "loser pays" costs rules limit access to the courts; (e) whether class remedies should be more regulatory in nature (particularly by allowing profit disgorgement remedies); (f) the use of *cy pres* and related doctrines; (g) securities class actions; and (h) national class actions. Although the study is just one province's examination of its own class action processes, the findings and recommendations could influence practices nationwide, particularly given the substantial attention the LCO project is receiving.

The purpose of this Article is to expound upon these notable developments in greater detail. In addition, the Article provides commentary on how businesses facing putative class actions in Canada can best defend against these lawsuits and participate in potential opportunities for reform.

Background: Canadian Class Action Law and Procedure

To understand current trends, it is helpful to first understand the fundamentals of Canadian class action law. In Canada, unlike in the United States, there is no federal class action process for the types of claims typically pursued in this manner; rather, the vast majority of class actions are required to be brought in provincial/territorial courts.

Formal class action legislation is currently in force in almost all Canadian provinces, but the Supreme Court of Canada has held that class actions can be commenced even in jurisdictions without formal legislation.[2]

Class actions are brought by a representative plaintiff on behalf of, or for the benefit of, a class of persons having claims with common issues. A September 2014 Supreme Court of Canada decision overruled precedent in Québec requiring that the representative plaintiff be able to state a cause of action against all defendants named in the action.[3] Thus, although a representative plaintiff in Québec (and in a number of other provinces) needs to have standing to bring an action against at least one defendant in an action, standing as to all apparently is no longer required.[4]

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Legislation authorizing class actions in the various provinces generally permits the global resolution of issues common to the class, with individual issues to be separately determined. All provinces have an "opt-out" regime, whereby persons within a class definition will be part of the

class unless they take positive steps to opt-out within a specified period.[5]

The stated objectives of class actions in Canada are to provide judicial economy, to improve access to justice for those whose claims might not otherwise be pursued, and to deter wrongful behavior. However, class actions are not intended to create any new cause of action; a class action is a purely procedural tool designed to address numerous potential claims by allowing one or more persons to bring an action on behalf of many.

Canadian class actions have been commenced in such varied areas as product liability, environmental contamination, consumer protection, pension plans, securities, antitrust, financial services, insurance, residential school abuse, police misconduct and employment disputes.

Certification

Class actions are initiated in the same manner as an ordinary lawsuit. They assert claim(s) on behalf of a defined class of two or more members against the defendants. In most provinces, the plaintiff is required to bring a motion to allow the action to proceed as a class proceeding (a motion to "certify the class") after the action is commenced. In Québec, the application or motion to "authorize" the class proceeding is made before the claim is issued.

Class action cases are most commonly pursued in three Canadian provinces: British Columbia, Ontario, and Québec. The latter, a civil law jurisdiction with linguistic and cultural differences from the rest of Canada, has historically been touted as a haven for class actions because of its low class certification threshold and the inability to file evidence on certification issues without leave of the court.[6]

The specific criteria for certification vary to some extent among the common law Canadian provinces, but the five primary criteria are: (1) the claim asserts a sustainable cause of action; (2) there is an identifiable class of two or more persons; (3) the claims of the class members must raise common issues; (4) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues; and (5) there is a representative plaintiff who would fairly and adequately represent the interests of the class, has produced a workable litigation plan for advancing the proceeding on behalf of the class members, and does not have an interest in the common issues that conflicts with the interests of the other class members. The plaintiff must establish with admissible evidence that there is "some basis in fact" for each of these criteria, except for the requirement of a sustainable cause of action, which is assessed on the pleadings alone.

In Québec, by contrast, class actions are certified, or "authorized," if: (1) the claims of the proposed class members raise identical, similar or related questions of fact or law; (2) the facts alleged seem to justify the conclusions sought; (3) the composition of the proposed class makes it impractical to proceed through representative actions or by joinder of actions, and the underlying question is whether it is appropriate to proceed by way of a class proceeding; and (4) the proposed representative class member is in a position to represent the putative class members adequately.[7] Evidence cannot be adduced at all on the

motion for authorization to institute a class proceeding without leave of court.

Notwithstanding that Québec has at times been perceived as the Canadian class action haven, recent decisions from the province denying certification show a stricter and more thorough analysis of the proposed class representative's personal claim and involvement in the proceedings than is performed in the common law provinces. However, recent decisions from the Supreme Court of Canada may affect the Québec court's overall approach to certification and result in more frequent certifications.[8]

Major differences between Québec's class action threshold test and those of other jurisdictions were highlighted in January 2014 by the Supreme Court of Canada in *Vivendi Canada, Inc. v. Dell'Aniello*.[9] In that case, retired employees challenged the unilateral modification of conditions of Vivendi's health insurance scheme. The retired employees affected by this modification resided in six Canadian provinces. Therefore, this was a "national" class action for which "authorization" (the equivalent to certification) was sought in Québec. The Supreme Court upheld the decision of the Québec Court of Appeal and authorized the class proceeding.

With respect to the test for authorization, the Supreme Court confirmed in *Vivendi* that the existence of a single "similar" or "related" question of law or fact (not just an "identical" one) that applied to the entirety of the class was sufficient to authorize the class action, so long as that question would advance the resolution of the litigation with respect to all members of the group, and would not play an insignificant role in the outcome of the case. The Supreme Court added that it was not necessary for the question to lead to a common response for all class members.

The Supreme Court observed that the Québec requirement for commonality differs from the analogous requirement

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in common law provinces.[10] As the court explained, "the [commonality] requirement is expressed in broader and more flexible terms in Quebec's C.C.P. than in Ontario's legislation, which requires the existence not merely of similar or related questions, but of 'common issues[.]'"[11] In effect, the Québec approach to commonality is less demanding than that of the other Canadian provinces.[12]

The Supreme Court further confirmed that, unlike the approach taken in the common law Canadian provinces, a judge hearing the application for authorization in Québec must authorize the class action when all of the enumerated criteria are met, and should therefore not address whether the class action is an adequate procedural vehicle. In further contrast to the practice in common law provinces, no evidence may be presented in support of class authorization without leave of court. Nonetheless, Québec courts do undertake some assessment of the merits of the named plaintiff's individual claim as pled.

If a proposed class is certified, notice of the class proceedings must be given to members of the class. The method of providing notice is largely dependent upon the size and nature of the class and can range from notice by mail to known class members to mass media publication. Notice of the certification order is given to all potential class members, and a time period is established to allow the class members to opt-out of the proceeding.

Discovery and Trial

Once a class action is certified, it will proceed through the normal discovery process on the common issues.[13] The defendant has a right to examine, through discovery, the representative plaintiff(s) in the action. With leave of the court, the defendant may also conduct discovery of other class members. Generally, the judge who makes the certification order will hear all of the motions in the class proceeding up to the trial of the common issues. Depending on the province, that same judge may also hear the common issues trial. Judgment on the common issues is binding on all members of the class who have not opted-out of the proceeding, and all consent resolutions of a certified class proceeding, such as settlement or dismissal, are also binding on the class members, provided they are approved by the court.

The resolution of the issues in a class proceeding may require more than one trial. The first trial, on the common issues, will resolve the issues certified as common to the class. In some cases, the common issues trial may include a ruling on the entitlement to, and quantum of, aggregate damages.[14] Once there has been a determination of the common issues, there will, in many cases, be a need for further assessment of individual claims (e.g., issues of causation, damages calculations). The court has broad discretion to establish methods of assessing individual claims, ranging from the filing of proofs of claim to initiating trials on individual issues. The method of assessment chosen by the court will take into consideration the facts of each particular case, the amount of damages and the nature and extent of the issues outstanding. In some cases, courts have ordered a third trial stage to assess punitive damages (if any) after the court has determined compensatory damages through the individual trial phase.

Class Certification Standards

Historically, Canadian provincial courts applied lax standards for class certification. An October 2010 publication from the U.S. Chamber Institute for Legal Reform, however, observed that several rulings denying certification in the pharmaceutical/medical device and toxic tort litigation contexts reflected a more critical approach, suggesting that class certification was becoming less pre-ordained.[15]

While a handful of 2010-2011 rulings continued that trend, more recent certification decisions have reverted to relative laxity. In short, rulings denying class certification have again become an infrequent event in many substantive areas. Below, we discuss recent class certification trends (and substantive rulings affecting those trends) in four realms that have seen substantial class action activity in recent years: pharmaceutical/medical device cases,[16] toxic tort actions, antitrust litigation, and securities suits.

Pharmaceutical/Medical Device Cases

2009-2012: A GLIMMER OF HOPE FOR DEFENDANTS

Historically, Canadian courts have applied loose class certification standards in the pharmaceutical/medical device context. However, in 2009, the Saskatchewan Court of Appeal decided *Wuttunee v. Merck Frosst Canada Ltd.*, which appeared to change this practice—at least for some Canadian courts.[17] In *Wuttunee*, a 2009 case involving the prescription drug Vioxx, the Saskatchewan Court of Appeal reversed the certification of a class that had been based in part on the supposed common issue of "whether Vioxx can cause or exacerbate cardiovascular or gastrointestinal conditions."[18] Critics of the trial court's decision had argued that by accepting as a common issue the question whether Vioxx *could* cause *either* cardiovascular *or* gastrointestinal conditions, the trial court had effectively negated any class certification commonality requirement. The Court of Appeal agreed and reversed the class certification ruling.[19] According to the appellate court, "it seems clear, at least, that the claim for damages for personal injury in relation to gastrointestinal injuries or conditions is completely unrelated to the claim that

Vioxx increased the risk for certain adverse cardiovascular events and, indeed, would have a distinct factual basis."[20] A handful of trial courts subsequently relied on *Wuttunee* to deny class certification in product liability cases.[21]

While a number of product liability cases were certified for class treatment in Canada after *Wuttunee*, defendants' hopes were rekindled in May 2012 when the Ontario Superior Court denied certification of a nationwide class asserting claims against AstraZeneca relating to the anti-psychotic medicine Seroquel, and in February 2013 when the Ontario Divisional Court upheld that ruling in an oral decision from the bench. In *Martin v. AstraZeneca Pharmaceuticals PLC*,[22] the plaintiffs sought to certify a class consisting of "all persons in Canada who were prescribed and who consumed Seroquel."[23] The plaintiffs alleged that AstraZeneca and two other companies negligently designed, manufactured, and marketed Seroquel, and failed to adequately warn of the drug's risks. The Ontario Superior Court had denied the plaintiffs' motion for class certification, finding, among other things, that one of the plaintiffs' core common issues—whether Seroquel can cause weight gain, diabetes, and other injuries—was not susceptible to class-wide proof. The trial court had also deemed the plaintiffs' pharmacology expert evidence inadmissible based on the expert's lack of proper medical qualifications.[24] The Court's refusal to certify the Seroquel case was surprising in light of its certification, a few years earlier, of a similar case involving a drug of the same classification (Zyprexa).[25]

"[R]ecent decisions reflect a loose approach to class certification, giving short shrift to arguments regarding class definition, commonality and expert evidence."

2012 AND BEYOND: A RETURN TO TRADITION

Unfortunately for defendants, Canadian courts, at least in the common law provinces, seem to have reverted to tradition and not embraced the *Wuttunee* and *Martin* line of reasoning. These recent decisions reflect a loose approach to class certification, giving short shrift to arguments regarding class definition, commonality and expert evidence.

There is perhaps no better illustration of this trend than in Ontario, where the *Martin* approach to class certification has not had much sway. In *Parker v. Pfizer Canada, Inc.*,[26] for example, plaintiffs alleged that Pfizer had failed to warn them of possible side effects from using the nicotine-addiction drug Champix. Rather than deny certification outright, as the *Martin* court had done, the trial court remedied myriad defects in plaintiffs' pleadings in order to satisfy Ontario's certification standards. For starters, the court found that the proposed class definition was overbroad because it included consumers who had

not suffered Champix side effects, but amended the proposed class by requiring that class members must have suffered a side effect, instead of merely denying certification. In addition, the court amended plaintiffs' proposed list of common issues rather than deny certification. Although the *Parker* court did not certify the class based upon the pleadings and certification papers as written, the court also did not take the opportunity to follow *Martin*, which had been decided just a few months earlier, and deny certification. In assisting plaintiffs to certify their class action, the *Parker* court established a precedent that could, if followed, result in more classes being certified. *Parker*, which was an intensely watched case in the wake of *Martin*, suggests that the *Martin* approach to class certification would be short-lived.

More recent Ontario decisions have similarly departed from the *Martin* approach to careful scrutiny of class proposals. A prime example of this is *Crisante v. DePuy Orthopaedics Inc.*,[27] where the Ontario Superior Court certified a nationwide class action on behalf of individuals residing in Canada (except British Columbia and Québec) who were implanted with either of two ASR hip replacement systems. The plaintiffs' chief allegation was that the defendants were negligent in designing and manufacturing the devices and failed to adequately warn of their safety risks—namely, that the devices had a higher than normal failure and revision rate.[28] The defendants vigorously contested the plaintiffs' motion for class certification, arguing that the proposed class definition was overbroad, that the plaintiffs' proposed common issues could not be adjudicated on a class-wide basis, and that coordinated case management was a preferable procedure. The court rejected all of these arguments, finding that the plaintiffs had met their burden. With respect to the class definition, the defendants had argued that the class should be limited to those who had been required to undergo revision surgeries—i.e., individuals who had been required to undergo a second surgery to replace their artificial hips.[29] The court disagreed, relying on the fact that "an implant definition (rather than revision surgery)" had been accepted in a number of previous medical device cases.[30] The court also dismissed the defendants' argument with regard to common issues, accepting, with little analysis, that the plaintiffs' expert evidence suggesting "design defects" in the devices and a "generalized failure to warn" provided "some basis in the evidence" to support a common issue regarding the alleged breach of the duty of care.[31]

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These Ontario decisions are consistent with the recent path taken by courts in British Columbia. In particular, the British Columbia Court of Appeal and British Columbia trial courts seem to have concluded that class certification is the norm in these types of cases—not the exception—and have often resisted calls to scrutinize expert evidence at the certification stage.

For example, in June 2012, in *Stanway v. Wyeth Canada Inc.*,[32] the British Columbia Court of Appeal upheld certification of a class of consumers alleging that Wyeth Canada's hormone drug Premarin causes breast cancer. In affirming the lower court's ruling, the appellate court rejected the defendant's arguments that the lower court: (1) ignored certain evidence disproving a link between Premarin and cancer; (2) ordered an unmanageable class period; and (3) allowed a claim under the Business Practices and Consumer Protection Act (BPCPA) that was too broad. The three-judge panel explained that the lower court judge "correctly observed that she was *not* to compare or weigh the differing expert opinions, contrary to Wyeth's submission that she engage in 'exacting scrutiny' of the expert opinions."[33] With respect to the defendant's claim that the 27-year class period was unmanageable due to changes in scientific knowledge, the Court of Appeal explained that "[o]ne obvious potential solution would be the development of subclasses."[34] If that solution ultimately proved "unmanageable," the appellate court reasoned, the class could be decertified.[35] And finally, the Court of Appeal dismissed Wyeth's contention that the question of whether its conduct violated the BPCPA was overbroad and incapable of being resolved on a class-wide basis. In so doing, the court reasoned that plaintiffs had "allege[d] what amounts to a systemic course of deceptive conduct" based in large part on a failure to disclose safety information about the drug, which could be evaluated with common, class-wide evidence.[36]

In December 2012, the British Columbia Supreme Court (a trial court) took a similar approach in *Bartman v. GlaxoSmithKline, Inc.*, certifying a class of individuals whose children suffered birth defects allegedly as a result of their ingestion of the anti-depressant drug Paxil.[37] The plaintiffs alleged that GlaxoSmithKline failed to adequately warn of the risk of birth defects associated with the drug. The court granted plaintiffs' motion for class certification and certified multiple common issues, including whether Paxil can cause or increase the likelihood of birth defects and whether GSK failed to adequately warn consumers of the true risk of birth defects. Throughout its analysis, the court refused to "weigh th[e conflicting] evidence" put forth by the parties or to probe the expert evidence with any degree of scrutiny.[38] As this case proceeds, the courts will have to grapple with how best to address the issues of general and individual causation in a single trial.[39]

The British Columbia Court of Appeal confirmed the low threshold for class certification in January 2013. In *Jones v. Zimmer GMBH*,[40] the British Columbia Court of Appeal affirmed a lower court's decision to certify a class action against the manufacturer and distributor of a hip implant known as the Durom Cup. Among other issues that the lower court had certified as common to all class members was whether the Durom Cup was defective or unfit for its intended use. The Court of Appeal confirmed the lower court's finding that the requirement to show "some basis

in fact" to support proposed common issues was not an onerous one (and had been met),[41] and found that the general causation common issue would advance the litigation significantly.[42]

However, on January 22, 2015, the British Columbia Court of Appeal set aside certification of a class action against Apotex Inc. and Abbott Laboratories Ltd.[43] In that case, the plaintiffs alleged that the medicine sibutramine (sold under the brand name Meridia by Abbott), an antidepressant that is also used for weight loss, had led to an increased risk of cardiovascular events, including heart attack and stroke. The Court of Appeal held that, where plaintiffs propose to certify a common issue regarding causation, there must be some evidence that the question may be resolved on a class-wide basis. Consistent with the B.C. decisions above, the Court noted that, where there is some evidence of a methodology by which general causation may be proven, that is sufficient even if there is conflicting expert evidence regarding the interpretation of that evidence. Conflicting expert evidence ought not to be weighed at certification. However, the court stated that, in this case, there was no evidence of a methodology for establishing that the class as a whole, as opposed to those who were wrongly prescribed sibutramine despite a history of disease, was affected or put at risk by its use of sibutramine.

In contrast to Ontario and British Columbia courts, the Québec courts in more recent years have not certified as high a proportion of pharmaceutical/medical device torts cases. As noted, Québec courts look harder at the putative class representative's personal claim at the authorization stage, but this more recent trend in pharmaceutical/medical device cases represents something of a departure from prior Québec court practice with respect to these kinds of tort cases. This increased scrutiny of the class representative's claim has resulted in several recent judgments denying certification of class actions pertaining to drugs and medical devices on the grounds that: (1) the petitioner was not an appropriate class representative; and (2) the proposed class action did not meet the "color of right" test due to the petitioner's lack of a valid cause of action, among other things.[44]

Toxic Tort Actions

In 2010, there was some hope by defendants that a decision by the Newfoundland and Labrador Court of Appeal would cultivate a more careful approach to class certification in the toxic tort arena. In *Dow Chemical Co. v. Ring*,[45] that court reversed certification of a class consisting of military base residents who claimed that the government's use of herbicides at the base caused lymphoma. Following this decision, some speculated that the *Wuttunee* line of cases might become dominant in the toxic-tort area. That trend, however, has not materialized. Recent decisions from Nova Scotia and Québec have gone in different directions, with Québec reaffirming the certify-all-comers tradition in the toxic-tort area. It remains to be seen whether subsequent decisions from the Supreme Court of Canada will follow the Québec decision over one from Nova Scotia.

QUÉBEC BECOMING A HAVEN FOR ENVIRONMENTAL CLASS ACTIONS

Québec courts have eschewed calls to tighten up certification in the toxic tort context. Most notably, in 2012, the Québec Superior Court certified an environmental class action seeking damages of $900 million arising from an emission of toxic gas from a refinery.[46] The suit, which represents the largest environmental class action ever certified in Canada,[47] was brought on behalf of all persons in certain geographic areas who experienced personal injuries as a result of exposure to the gas. The plaintiff's previous efforts to certify a class had been unsuccessful because the class definition was too vague and because individual issues (e.g., fault, injury and damages) predominated over common issues.[48] Plaintiff subsequently brought a new motion for class certification, which the Québec Superior Court granted, ruling that the new proposed class was sufficiently limited in geographic and temporal scope. The court also found that sufficient common questions existed, while still recognizing the individualized nature of causation and damages. The court's embrace of this mammoth class action suggests that minor tweaks to a deeply flawed class action proposal may suffice to achieve certification, at least in Québec courts. It is thus no surprise that Québec has been called "the place to be for environmental class actions."[49]

NOVA SCOTIA COURT OF APPEAL DERAILS SPRAWLING ENVIRONMENTAL CLASS ACTION

The climate for toxic-tort class actions has been trending differently in Nova Scotia. In 2011, the Nova Scotia Supreme Court (a trial level court) certified a sprawling class action by Sydney residents against the governments of Canada and Nova Scotia arising out of contamination of plaintiffs' properties and health risks caused by emissions from coke ovens and steel mills.[50] The plaintiffs sought remediation and removal of the contaminants, as well as a medical-monitoring program to determine any health effects of the contamination.[51] The court certified claims for negligence, nuisance, trespass, battery, breach of fiduciary duty and strict liability. In permitting class treatment of these claims, the court found that there were common issues pertaining to the existence, source, and effect of contaminant emissions on the persons or properties of the proposed class members.[52] The court reasoned that "[t]he defendants' intense critique of the proposed common issues is inconsistent with the plaintiffs' burden—to identify issues important to each class member which will substantially advance the litigation."[53] In addition, the court also found that property remediation and medical monitoring were amenable to classwide proof.[54] In short, the court held that a class proceeding would be the preferable procedure for the fair

"Québec courts have eschewed calls to tighten up certification in the toxic tort context. Most notably, in 2012, the Québec Superior Court certified an environmental class action seeking damages of $900 million arising from an emission of toxic gas from a refinery."

and efficient resolution of the dispute, and concluded that the plaintiffs had met each of the statutory requirements for certification.[55]

The Nova Scotia court's ruling had significant potential implications for the development of toxic-tort law in that province. The court's certification of a battery claim is particularly noteworthy because it could have paved the way for plaintiffs' attorneys to circumvent prior Canadian precedent questioning the suitability of class actions alleging personal injuries caused by pollutants.[56] The same could be said of the court's treatment of the plaintiffs' request for medical monitoring, a remedy that is traditionally not recognized by Canadian courts.[57] As one Canadian jurist put it, a claim for medical monitoring is "purely speculative" and can "result in 'liability in an indeterminate amount for an indeterminate time to an indeterminate class.'"[58]

However, in December 2013, the Nova Scotia Court of Appeal reversed the decision and set aside the order certifying a class action.[59] The Court of Appeal found that the pleadings did not disclose a valid cause of action with respect to strict liability,[60] trespass,[61] and battery[62] in that case, and found that the three remaining causes of action—negligence, nuisance and breach of fiduciary duty—did not raise common issues sufficient to meet the criteria for certification. It concluded that the only common issue was whether the defendants released contaminants, but that for nuisance claims, liability is necessarily an individual issue that requires an inquiry into how each class member used their property and the extent to which contaminants interfered with their use and enjoyment of the property or substantially caused physical injury to the property itself.[63] As a consequence, the Court of Appeal found that a class proceeding was not the preferable procedure because it would only potentially determine one common issue, which would not significantly advance the class members' claims at trial, and that individual issues overwhelmed the common issue.[64] The Court of Appeal did not address the viability of the medical monitoring claim.

Plaintiffs asked for a re-hearing of the appeal after two class action decisions were later released by the Supreme Court of Canada—*AIC Limited v. Fischer*, addressing the test for preferable procedure, and *Vivendi Canada, Inc. v. Dell'Aniello*, addressing the common issues argument. The Court of Appeal refused the request on the ground that it lacked jurisdiction to hear it, and noted that the plaintiffs had already sought leave to appeal the decision to the Supreme Court of Canada, which remains pending.

Antitrust Litigation

While Canadian class action jurisprudence in the competition area has zigzagged, recent decisions by the Supreme Court

> *"In a highly anticipated series of rulings, the Supreme Court held that antitrust class actions by indirect purchasers are viable under Canada's Competition Act if the plaintiffs can establish that they suffered damages."*

of Canada in a trilogy of antitrust cases portend rough seas for defendants facing competition class actions in Canada. In a highly anticipated series of rulings, the Supreme Court held that antitrust class actions by indirect purchasers are viable under Canada's Competition Act if the plaintiffs can establish that they suffered damages.

In 2011, the British Columbia Court of Appeal issued significant rulings in two antitrust cases brought by plaintiffs seeking to represent classes of indirect purchasers—i.e., class members who were allegedly harmed by purchasing the product through a retailer or a wholesaler rather than directly from the manufacturer. The proposed class in *Sun-Rype Products Ltd. v. Archer Daniels Midland Co.*[65] consisted of both direct and indirect purchasers who claimed they were injured by the defendant's alleged price fixing of high-fructose corn syrup that was included in consumer soft drink and candy products. The class in *Pro-Sys Consultants Ltd. v. Microsoft Corp.*[66] was composed of end-user indirect purchasers alleging that Microsoft engaged in various kinds of anti-competitive conduct that allowed it to overcharge for its products. The trial courts certified the classes, but the British Columbia Court of Appeal reversed, holding that indirect purchasers have no cause of action for damages under the Competition Act.[67]

In both cases, the Court of Appeal reasoned that the indirect-purchaser plaintiffs had failed to assert a viable cause of action, relying on the Supreme Court of Canada's prior decision in *Kingstreet Investments Ltd. v. New Brunswick (Finance)*.[68] *Kingstreet* was a restitution case in which the Supreme Court of Canada had decided that as a matter of law, a defendant could not reduce its liability to those who paid an unlawful charge by establishing that some or all of it was passed on to others.[69] The appellate court concluded that, per *Kingstreet*, indirect purchasers to whom an overcharge was allegedly passed on could not, as a matter of law, maintain a cause of action, since that could result in defendants facing the prospect of double liability—that is, liability to both direct and indirect purchasers.[70]

The same issue was considered by the Québec Court of Appeal, which reached the opposite conclusion in *Option Consommateurs v. Infineon Technologies*.[71] In that case, plaintiffs commenced a proposed price-fixing class action on behalf of Québec class members against foreign manufacturers of dynamic random access memory (DRAM) chips, as used in electronic devices like computers, servers, and cell phones. The putative class encompassed both direct and indirect purchasers, and the Québec Court of Appeal held that indirect purchaser claims were cognizable under the Competition Act.[72] The court endorsed the dissenting opinion in *Pro-Sys* and *Sun-Rype*, reasoning that the defendants in *Option Consommateurs* did not face the risk of double recovery because the proposed class action was limited to a "single aggregate loss notwithstanding the mix of direct and indirect purchasers in the class."[73] While the issue of "passing on" losses from direct to indirect purchasers was "complex" and "not to be underestimated," the Québec Court of Appeal resolved that it should be addressed at trial, not at the class certification stage.[74]

Each of these cases was appealed to the Supreme Court of Canada, which heard oral argument in all of these appeals on October

17, 2012. After a year of deliberations, the Supreme Court finally issued its rulings in all three cases on October 31, 2013, holding that under the Competition Act, indirect purchasers can seek relief on a class-wide basis if they can establish harm.[75] The Supreme Court allowed the class actions in *Pro-Sys* and *Option Consommateurs* to proceed, but it dismissed the *Sun-Rype* case on the ground that there was no objective method for identifying class membership. As the Court explained, "[t]he problem in th[e] [*Sun-Rype*] case lies in the fact that indirect purchasers, even knowing the names of the products affected, will not be able to know whether the particular item that they purchased did in fact contain [high fructose corn syrup.]"[76]

Before addressing the propriety of certifying these types of indirect purchaser cases for class treatment, the Court addressed in great detail the standard for class certification in Canada, making clear that "the threshold . . . is a low one."[77] Under this standard, a court must focus on the form of the action to determine whether it can appropriately go forward as a class action[78] and refrain from delving into the "merits" of the underlying claims.[79] The Canadian approach at certification does not allow for an extensive assessment of the complexities and challenges plaintiffs may face in establishing their case at trial.[80] The Court also confirmed that the evidentiary standard is low, requiring only "some basis in fact" to establish the certification criteria (other than the cause of action requirement); the court is not required to resolve conflicting facts and evidence at the certification stage.[81] Specifically regarding the Québec rules, the Court observed that the court's role is merely to "filter out frivolous motions and grant those that meet the evidentiary and legal threshold requirements" for class certification.[82] According to the Supreme Court, "the burden [on those seeking authorization in Québec] is one of demonstration and not of proof."[83] The Court emphasized that such a standard facilitates "easier access to the class action as a vehicle for achieving the twin goals of deterrence and victim compensation."[84]

The Supreme Court next proceeded to address whether the antitrust claims in these appeals satisfied Canada's requirements for class certification. With respect to commonality, the Court determined that any significant differences—for example, variations between the indirect and direct purchasers in the *Infineon Technologies* case—were not sufficient to destroy the unity of the classes. According to the Court, the common questions of fault and liability outweighed any differences between the types of purchasers pursuing claims in the cases. The high court ruled that while an expert's methodology "must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement,"[85] plaintiffs need not show actual harm at the certification stage. The next requiremen—i.e., that the facts alleged justify the conclusions sought[86]—was also satisfied, the Court concluded. Given the low threshold imposed for obtaining class certification, the allegations set forth in the motions for class certification sufficed to support an inference of fault, liability and injury.

Notably, on the issue of injury, the Supreme Court endorsed the view taken by the British Columbia Court of Appeal in *Infineon* (which, like *Option Consommateurs*, related to price-fixing of DRAM chips),

holding that antitrust class actions are cognizable where alleged price increases are passed on to *indirect* purchasers. In so doing, the Supreme Court declined to follow the U.S. Supreme Court's contrary approach in *Illinois Brick Co. v. Illinois*.[87] According to the Supreme Court, "[i]ndirect purchaser actions may . . . be the only means by which overcharges are claimed and deterrence is promoted."[88] For example, the Court reasoned, direct purchasers may be reluctant to bring their own cases against alleged price-fixers out of fear that such cases will undermine "a valuable business relationship" between the parties.[89] Further, in the Court's view, the defendants in the *Infineon* case, which involved both direct and indirect purchasers, did not face the risk of double recovery "since the direct and indirect purchasers would be combined in a single group that would make a single collective claim of an aggregate loss."[90] Finally, with regard to adequacy of representation, the Supreme Court reasoned that any potential conflict of interest between direct and indirect purchasers was overridden by the class members' distinct, common interest in establishing entitlement to relief.

These rulings will have a profound impact on the Canadian competition class action landscape, opening the courthouse doors to an increasing volume of antitrust class actions. In addition, the rulings may encourage greater cross-border, parallel class action litigation in Canada and the United States. Despite "the differences over both substantive and procedural [antitrust laws in both countries], they have not hindered cross-border cooperation in antitrust damages actions."[91] Unlike in Canada, U.S. courts "allow for a greater range of inquiry in precertification procedure."[92] Accordingly, some Canadian plaintiffs have been successful in obtaining U.S. discovery in the hopes of buttressing claims asserted in Canadian courts.[93]
In light of the Supreme Court of Canada's pronouncement that class certification is to be governed by a "low" standard, it stands to reason that Canadian plaintiffs' attorneys may attempt to exploit the liberal discovery rules in the United States in the hopes of mounting parallel class action litigation in Canadian provinces.

Beyond inviting new antitrust class actions, the Supreme Court's rulings will also undoubtedly be persuasive across the entire spectrum of Canadian class actions by confirming a "low threshold" for class certification prerequisites. Therefore, in addition to inviting a wave of new indirect-purchaser class actions (not to mention renewed motions for class certification in pending cases), defendants facing class actions in Canada can expect continued, if not increased, activity from these precedents.

"In light of the Supreme Court of Canada's pronouncement that class certification is to be governed by a 'low' standard, it stands to reason that Canadian plaintiffs' attorneys may attempt to exploit the liberal discovery rules in the United States in the hopes of mounting parallel class action litigation in Canadian provinces."

Securities Suits

ACTIONS UNDER THE 2005 ONTARIO SECURITIES ACT

In 2009, the legal community gave considerable attention to *Silver v. IMAX Corp.*,[94] the first case brought under Part XXIII.1 of the Ontario Securities Act, which was amended in 2005 to create liability for continuing disclosure misrepresentations in the secondary securities market. In *Silver*, the court certified a class asserting common-law misrepresentation claims, even though the plaintiffs pled reliance only by the representative plaintiffs themselves.[95] In *McKenna v. Gammon Gold, Inc.*,[96] another closely watched case involving claims under the Securities Act, the court refused to certify common-law misrepresentation claims, holding that reliance is an essential element of such a claim, and that "courts have usually concluded that negligent misrepresentation claims give rise to such individual inquiries as to reliance that they are unsuitable for certification."[97]

Since 2012, the Ontario courts have further established the contours of the Ontario Securities Act. In particular, the Ontario courts have considered the territorial limits of the statute and also addressed its leave-to-sue requirements.

EXTRATERRITORIAL APPLICATION OF THE ACT

Recent decisions from Ontario courts have made clear that the Ontario Securities Act may be applied extraterritorially. In *Abdula v. Canadian Solar Inc.*, for example, an Ontario resident initiated a securities misrepresentation class action in Canada against a Canadian company and two of its officers and directors, even though the shares of the company were listed on the NASDAQ exchange in the United States.[98] The trial court denied the defendant's motion to dismiss, finding that the company qualified as a "responsible issuer" under section 138.1 of the Ontario Securities Act. The court reached this conclusion in part because the company was incorporated in Canada and conducted some business in Ontario. The Ontario Court of Appeal affirmed the ruling, holding that "[e]xtra-territorial application is specifically envisaged by . . . the definition of 'responsible issuer,' with its reference to issuers with a 'real and substantial connection' to Ontario."[99] Notably, this approach to Ontario securities law stands in stark contrast to the U.S. Supreme Court's holding in *Morrison v. National Australian Bank Ltd.*, that the provisions of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 do not extend to securities transactions outside the United States.[100] While some predicted that *Abdula* would spur more class action filings against foreign issuers of stock, a more recent decision of the Ontario Court of Appeal may have the opposite effect.[101]

The Ontario Court of Appeal subsequently reaffirmed the extraterritorial reach of the Ontario Securities Act. However, in the process, the appellate court gave defendants a powerful tool for dismissing these types of class actions. In *Kaynes v. BP*, the Ontario Court of Appeal ruled that a putative class action involving securities that were purchased over a foreign exchange should have been stayed on *forum non conveniens* grounds.[102] There, the plaintiff brought a purported class action on behalf of Canadian residents who purchased BP securities between 2007 and 2010—irrespective of where those securities were

acquired.[103] The named plaintiff purchased his stock on a U.S. exchange. The Ontario Superior Court dismissed BP's jurisdictional challenge.[104] On appeal, relying on *Abdula* and declining to follow the approach taken in the United States, the Ontario Court of Appeal agreed that the trial court had jurisdiction over the class action.[105] Nonetheless, the appellate court resolved that the trial court should have declined to exercise jurisdiction based on *forum non conveniens*. According to the court, more appropriate jurisdictions existed in which to proceed against the defendant—namely, the United Kingdom and the United States.[106] As part of its analysis, the Court of Appeal explained that "[i]n the US, there is a well-established regime governing class actions for secondary market misrepresentation. . . . [T]here is a pending class action in the US based upon very similar allegations, covering substantially the same period, and embracing the claims of all BP shareholders, including the plaintiff, who purchased their shares on a US exchange."[107] Applying principles of comity and recognizing the wisdom "of avoiding a multiplicity of proceedings," the Court of Appeal ruled that the lawsuit should have been stayed on *forum non conveniens* grounds.[108]

The Court of Appeal's decision is consistent with the outcome of a 2013 decision of the Ontario Superior Court in *Silver v. IMAX*,[109] a class proceeding involving shares purchased on both Canadian and U.S. exchanges. In that case, the Superior Court narrowed a previously certified class to include only those investors who purchased their shares on the Canadian exchange, thereby excluding those shareholders who had used NASDAQ to purchase their shares, and for whom a settlement had been approved by a New York court in a similar class action commenced in the United States. The Superior Court determined that removing these NASDAQ purchasers from the Canadian class accorded with the "preferable procedure" requirement in the Ontario Class Proceedings Act, and found that it would not have a negative impact on access to justice for those who had purchased on the Canadian exchange, as they had been offered a settlement proportionate with what was offered to the NASDAQ purchasers in the United States.

The *Abdula* and *Kaynes* rulings undoubtedly establish the extraterritorial reach of the Ontario Securities Act, marking a

> *"The* Abdula *and* Kaynes *rulings undoubtedly establish the extraterritorial reach of the Ontario Securities Act, marking a fundamental departure from the more narrow approach to securities laws followed in the United States. However, the more recent decision in* Kaynes *equips defendants with a powerful tool for fending off these types of proceedings where there are more convenient forums in which to litigate the claims at issue."*

fundamental departure from the more narrow approach to securities laws followed in the United States. However, the more recent decision in *Kaynes* equips defendants with a powerful tool for fending off these types of proceedings where there are more convenient forums in which to litigate the claims at issue. It remains to be seen if leave to the Supreme Court of Canada will be granted in *Kaynes*, and if the Court of Appeal's decision will survive if it is.

LOOSE INTERPRETATION OF ONTARIO SECURITIES ACT'S LEAVE-TO-SUE REQUIREMENTS

Ontario courts have also grappled with the Ontario Securities Act's leave-to-sue requirements over the past three years. Several 2012 decisions had given defendants hope that courts would rigorously review requests for leave to pursue class claims under the Ontario Securities Act. That hope was short-lived, however, as more recent decisions have confirmed that leave to pursue class claims under the Ontario Securities Act is evaluated with minimal scrutiny. The leave requirement may be considered by the Supreme Court of Canada in an appeal discussed more fully below.

In *Gould v. Western Coal Corporation*, the plaintiffs commenced a putative class action against the defendant, alleging that it fabricated a financial crisis to artificially deflate its stock prices so that the company could increase its shareholdings at a fraction of what the shares were actually worth.[110] The suit was brought under Part XXIII.1 of the Ontario Securities Act. In order to prevent frivolous claims, plaintiffs are required to obtain leave of court to pursue claims under Part XXIII.1. Up until 2012, plaintiffs faced a low threshold for obtaining leave, with the Ontario courts in most cases routinely granting such requests.[111] That approach changed dramatically in *Gould*, in which the Ontario Supreme Court rejected the plaintiffs' request for leave on the ground that they could not demonstrate a reasonable possibility of success.

Despite recognizing a low threshold for obtaining leave under Part XXIII, the *Gould* court nonetheless determined that this standard imposes a meaningful burden on plaintiffs. The parties in *Gould* had provided competing expert evidence, which the court analyzed carefully. According to the court, there was "no reasonable possibility" that a trial judge would accept the plaintiffs' expert evidence rather than the defendant's.[112] The court also refused to certify the plaintiffs' conspiracy claim, reasoning that while "[a] certification motion is a procedural step and not a merits-based analysis," it could not "ignore the fact that the cornerstone of the claim has been assessed and found wanting."[113]

The Ontario Superior Court issued a similar decision in *Green v. Canadian Imperial Bank of Commerce*, in which the plaintiffs asserted secondary market liability claims and common-law claims against the Canadian Imperial Bank of Commerce (CIBC).[114] The plaintiffs, shareholders of CIBC, alleged that between 2007 and 2008, CIBC and four of its senior officers misrepresented and/or failed to disclose CIBC's exposure to the U.S. residential mortgage market, including its exposure to subprime mortgages, which artificially inflated the price of the bank's stock. The court denied the plaintiffs' request for leave with respect to statutory claims, finding that they were barred by the three-year limitation period set forth in Part XXIII.1 of the Ontario Securities Act. The court based this portion of the ruling on a decision from the Ontario Court of Appeal,

which interpreted the limitation period for bringing claims under Part XXIII.1.[115] Under that interpretation, claims must be brought within three years of the date the alleged misrepresentation was made (or in the case of a failure to disclose, within three years of the date on which the disclosure was required to be made). In *Green*, the court also ended the plaintiffs' bid to certify the common-law misrepresentation claims, reasoning that such claims required proof of reliance, which could not be addressed on a class-wide basis. The court explained that "there is no authority to support the proposition that 'fraud on the market' or the 'efficient market' theory can supplant the need to prove *individual* reliance."[116]

The *Gould* decision appears to be the first time a court has denied leave under the Ontario Securities Act because the plaintiffs were unable to demonstrate a reasonable possibility of success on their claims.[117] The decisions in that case and in *Green* at the lower court level emboldened defendants in securities class actions to challenge requests for leave to sue. However, on appeal in *Green*, and in two companion cases, the Ontario Court of Appeal determined that its earlier decision interpreting the statutory limitation period was incorrect, and overturned the lower court's decision denying leave to sue.[118] In so doing, the Ontario Court of Appeal also considered in passing the test for granting leave under the Ontario Securities Act. The Court of Appeal commented that the "reasonable possibility" of success standard for granting leave required by the Act is the same standard as is applied in assessing whether the pleadings disclose a cause of action in the certification test under the *Class Proceedings Act*. The Court of Appeal recognized, however, that the evidentiary records informing the leave and certification tests are not the same.[119] The Supreme Court of Canada granted leave to appeal the Ontario appellate court's decision in August 2014,[120] and that appeal was heard in early 2015. While, more recently in 2014 decisions, the Ontario courts have reiterated that the test for leave to sue in securities misrepresentation class actions is not difficult for plaintiffs to meet, the Court of Appeal also upheld a denial of leave. In its decision on the plaintiffs' motion for leave and certification in *Trustees of the Millwright Regional Council of Ontario Pension Trust Fund v. Celestica Inc.,*[121] the Ontario Superior Court stated that "[t]he test for leave under the Ontario Securities Act is low, and the associated evidentiary burden is also low."[122] However, in *Bayens v. Kinros Gold Corporation,*[123] the Ontario Court of Appeal held that the motions judge had correctly applied the leave test from *Green v. CIBC* when denying leave to proceed with a statutory secondary market misrepresentation claim.[124]

SECURITIES DECISIONS IN OTHER JURISDICTIONS

Ontario is not the only Canadian province to see significant recent developments in the securities class action realm. For example, in July 2013, the Québec Court of Appeal had considered the test for granting leave under the Québec Securities Act in *Theratechnologies Inc. v. 121851 Canada Inc.*[125] Following the trend developed in British Columbia, the Court of Appeal confirmed that this leave test imposes a higher threshold than the test for certification of a class action. The test for authorization articulated by the Québec Court of Appeal requires real and sufficient evidence to demonstrate the reasonable possibility of the plaintiff's success. In February 2014, the Supreme Court of

Canada granted leave to appeal the Québec Court of Appeal's decision and may provide some guidance on the test for leave to sue.

Finally, any summary of recent developments in Canadian securities class action law would not be complete without a discussion of the Supreme Court of Canada's December 2013 decision in *AIC Limited v. Fischer*.[126] In that case, the Supreme Court determined that the settlement of regulatory proceedings by the Ontario Securities Commission (OSC)—which included a large restitutionary payment by the defendants to investors based on the OSC's assessment of the defendants' unlawful gain—did not insulate the defendants from a securities class action.

The *Fischer* decision focused on a single branch of the common law provinces' five-part test for certification: whether a class proceeding would be the preferable procedure for the resolution of the common issues. Canadian courts have long held that this question must be considered in light of the three primary purposes of class proceedings: judicial economy, behavior modification, and access to justice.

In *Fischer*, the Supreme Court clarified that "access to justice" includes both a substantive and a procedural component, and it set out a five-part test to assess whether a class action will serve the goal of access to justice when alternative procedures are or have been available: (1) What are the barriers to access to justice? (2) What is the potential of the class proceedings to address those barriers? (3) Are there any alternative procedures to a class proceeding? (4) To what extent do the alternative procedures address the barriers to access to justice? (5) How do the two procedures compare?

The comparison of the two procedures considers whether, on the evidence, the class action has been demonstrated to be the preferable procedure to address both procedural and substantive barriers to access to justice. On this final question, a court must also consider the costs and benefits of the proposed class proceeding in relation to those of the proposed alternative procedure.

This precedent may have significant consequences for class actions involving parallel regulatory proceedings (such as securities, pensions and competition suits). The Supreme Court has outlined a framework for analyzing whether and when these regulatory proceedings may provide an adequate dispute resolution mechanism that will foreclose class proceedings. The outcome of the decision in that case does not bode well for similar arguments in other cases.

"*[I]n* AIC Limited v. Fischer *... the Supreme Court determined that the settlement of regulatory proceedings by the Ontario Securities Commission (OSC)—which included a large restitutionary payment by the defendants to investors based on the OSC's assessment of the defendants' unlawful gain—did not insulate the defendants from a securities class action.*"

Common Issues Trials

While (as elsewhere) the vast majority of class actions certified in Canada ultimately settle (albeit usually for significantly smaller amounts than in the U.S.), a number of class actions have proceeded to the common issues trial stage in Canada.[127] The realistic prospect of trials in class actions heightens the importance of focused argument and careful judicial analysis of the precise wording of any common issues to be certified.

The purported common issues must be framed fairly and in a manner consistent with the proper legal elements of the underlying cause of action; that is, in a manner that will not unfairly predetermine the outcome of the trial.

According to the best available statistics on class action trials, in excess of 90 common issues trials have taken place across the country.[128] The vast majority have been in Québec, the province that has had formal class action rules for the longest period of time. One of the largest class trials in that province has been underway since March 2012. That class action, brought on behalf of approximately one million Québec tobacco smokers, is seeking upwards of $17 billion from three major Canadian tobacco manufacturers.[129] The class is defined to include individuals who have allegedly sustained personal injuries as a result of their use of the tobacco products, as well as persons who claim to be addicted to the products. "More than 27,000 documents were presented and 78 witnesses were called to testify [in] over 234 days of trial."[130] Court observers throughout Canada anticipate that the verdict, which is not expected anytime soon, will be appealed to the Québec Court of Appeal.[131]

"According to the best available statistics on class action trials, in excess of 90 common issues trials have taken place across the country. The vast majority have been in Québec, the province that has had formal class action rules for the longest period of time."

Seventeen class action common issues trials have occurred in Ontario, lasting from three to 146 days. Of the common issues trials decided in Ontario, the highest profile cases include:

(a) *Kerr v. Danier Leather*, a 44-day trial involving allegations of securities misrepresentation; the plaintiffs were successful at trial but the trial decision was reversed on appeal. The reversal did not relate to the propriety of class certification. Rather, the Supreme Court of Canada held, *inter alia*, that there is no continuing obligation to update a prospectus for changes of material facts occurring during the course of the distribution of securities. For this and other reasons, the defendants could not be held liable.[132]

(b) *Smith v. Inco,* a 45-day trial alleging nuisance in an environmental contamination case; the plaintiffs were successful at trial but the trial decision was reversed on appeal. The Ontario Court of Appeal concluded that the defendant was not liable for the type of harm alleged by the plaintiffs, and the class had suffered no harm.[133]

(c) *Jeffrey v. London Life*, a 44-day trial involving a claim by former London Life policyholders for alleged improper use of funds by the company acquiring London Life; the plaintiffs were partly successful at trial, but many of the findings against the defendants were reversed on appeal, and remedial orders made at trial were reversed or substantially reduced.[134]

(d) *Andersen v. St. Jude Medical*, a 146-day trial involving a claim by patients implanted with Silzone coated heart valves alleging negligence in the defendants' design, manufacturing and warnings with the product; the defendants were successful at trial, and a later appeal was dismissed on consent following court approval of a resolution of the defendants' claim for costs of the trial.[135]

(e) *Mandeville v. Manufacturer's Life Insurance Company*, a 29-day trial claiming damages for persons who owned participating policies of life insurance issued or assumed by the Barbados branch of Manulife, as a result of their ownership rights being terminated upon demutualization of the parent company; the plaintiffs' claim was dismissed at trial, and the result was upheld on appeal.[136]

As an aside, only two class actions in the common law provinces appear to have proceeded to the individual issues stage, and each avoided a common issues trial.[137] In both cases, the remaining individual issues involved relatively simple damages questions. Neither involved significant individual liability or causation issues.

In certifying class actions, Canadian courts have frequently expressed the view that a class proceeding would be manageable and would achieve the objectives of class actions. However, that view is tested only where a case proceeds through all stages of trial, particularly when the court attempts to apply answers to common issues at the individual issues stage. It is there that the court and parties will finally see if

class actions are truly manageable, and if the answers to common issues do in fact meaningfully advance individual claims, increase access to justice, and reduce the burden on judicial resources. That test will be most challenging in cases in which aggregate damages assessments are not appropriate and significant individual liability and causation issues remain.

> *"In certifying class actions, Canadian courts have frequently expressed the view that a class proceeding would be manageable and would achieve the objectives of class actions. However, that view is tested only where a case proceeds through all stages of trial, particularly when the court attempts to apply answers to common issues at the individual issues stage. It is there that the court and parties will finally see if class actions are truly manageable ...."*

Summary Judgment

Going forward, defendants in Canadian class actions may seek to use summary judgment motions more frequently for two reasons: (1) recent rules changes expand the opportunities for doing so; and (2) some recent defense motions have been successful.

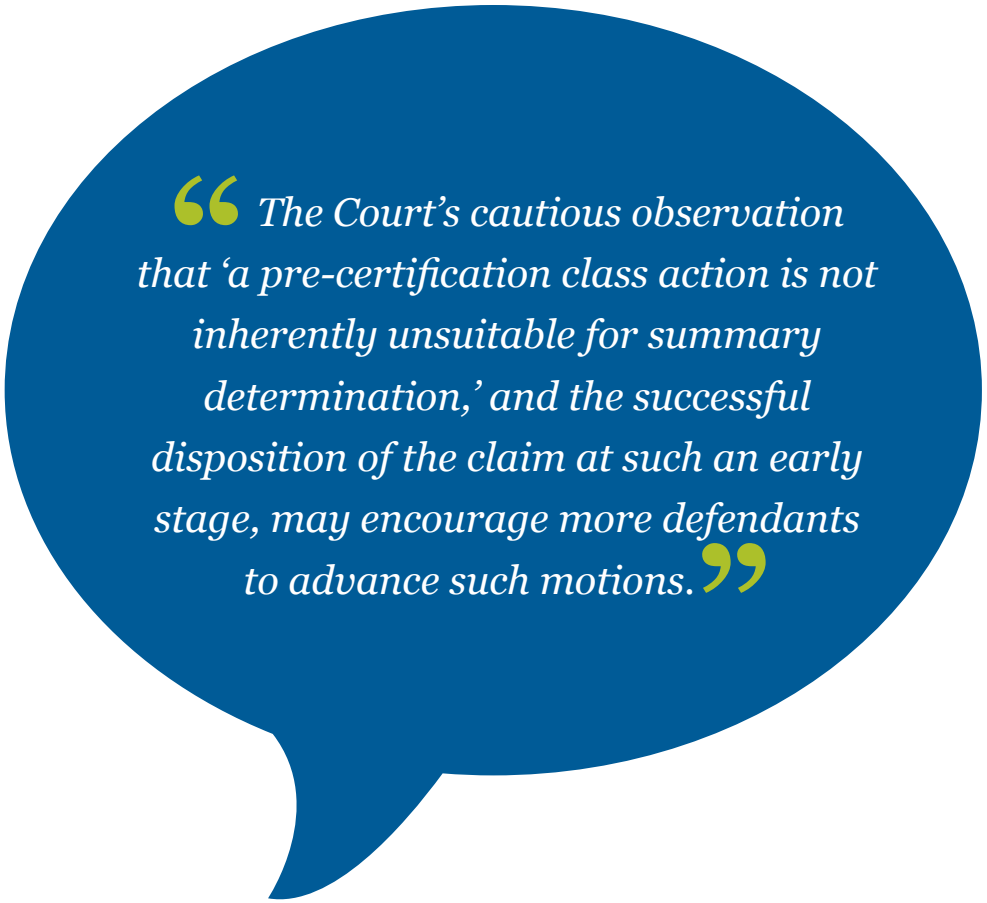
In 2010, the Ontario Rules of Civil Procedure were amended to allow summary judgment to be granted where there was no genuine issue requiring a trial.[138] Motions judges were also given additional discretionary fact-finding powers as compared to the prior, more limited summary judgment procedure, including the ability to weigh evidence, evaluate credibility of deponents, consider oral evidence, and draw reasonable inferences from the evidence. In *Hryniak v. Mauldin*,[139] the Supreme Court of Canada confirmed that the new summary judgment rules "must be interpreted broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims." The plaintiffs in *Hryniak*, as well as in a companion case against the same defendant, brought summary judgment motions that included voluminous documentary evidence and lengthy cross-examinations. The motions judge granted summary judgment.

On appeal, the Supreme Court considered the impact of the 2010 amendments and confirmed that motions judges no longer need to have the same "full appreciation of evidence" as they would at trial in order to make a final determination on a summary judgment motion.[140] Now, a motions judge must grant summary judgment where he or she "is able to reach a fair and just determination on the merits."[141] The Supreme Court articulated the standard of fairness as "not whether the procedure is as exhaustive as a trial, but whether it gives the judge confidence that she can find the necessary facts and apply the relevant legal principles so as to resolve the dispute."[142] The Supreme Court's decision makes clear that the trial is no longer the default procedural vehicle to resolve all civil disputes, and that, where possible, courts should use their powers on summary judgment to make determinations on the record before them.

The British Columbia Supreme Court recently applied this reinvigorated summary judgment approach in *Player v. Janssen-Ortho Inc., et al,*[143] a pharmaceutical product-liability class action. The proposed representative plaintiffs were the widows of two men who had died while using transdermal patches containing a prescription pain medication. They commenced a claim against various manufacturers, alleging

negligence, negligent misrepresentation, breach of warranty, breach of fiduciary duty, and breaches of a variety of federal and provincial statutes. Two of the defendant producers applied for a summary trial (the British Columbia equivalent of a motion for summary judgment, in this context), with evidentiary records developed through affidavits (including expert reports) and cross-examinations of the affiants, before the proposed plaintiffs' motion for certification had been heard. Those defendants argued that there was an absence of any credible evidence to support the plaintiffs' claims against them.

The court determined that the summary trial procedure was appropriate in light of the Supreme Court's guidance in *Hryniak*. The court rejected much of the plaintiffs' expert evidence as inadmissible or not sufficiently credible, and found that, based on the lack of merit in the claim, it would be prejudicial to the moving defendants and to users of the product to allow the class action to proceed to certification.[144] The Court's cautious observation that "a pre-certification class action is not inherently unsuitable for summary determination," and the successful disposition of the claim at such an early stage, may encourage more defendants to advance such motions.[145]



Class Settlements

In Canada, class action settlements are subject to court review and approval. The court must determine that the settlement is fair, reasonable, and otherwise in the best interests of the class. Once class counsel and the defendants have reached agreement on a fair resolution, their interests become aligned in having the settlement approved.

Two recent decisions by the Ontario Superior Court demonstrate a possible trend towards greater scrutiny of class action settlements.

In *Waldman v. Thomson Reuters Canada*,[146] Justice Paul M. Perell ruled that a proposed settlement was not fair, reasonable or in the best interests of the class. The suit was brought on behalf of lawyers and paralegals whose documents had been published by Thomson Reuters Canada Limited.[147] The plaintiff alleged that the company infringed the copyrights of class members under the Canadian Copyright Act by making lawyers' court documents available to subscribers without the lawyers' permission.[148]

"Two recent decisions by the Ontario Superior Court demonstrate a possible trend towards greater scrutiny of class action settlements."

The parties reached a settlement under which Thomson agreed to: (1) pay $350,000 to create a trust to support public interest litigation; (2) amend its copyright notices; (3) notify counsel named as authors on court documents before they are included on the company's electronic database for a ten-year period; and (4) pay $825,000 to class counsel as costs.[149] In return, the class members would release their claims for breach of copyright for past copying and grant to Thomson a non-exclusive license in respect of their court documents on its electronic database.[150]

Justice Perell denied the motion for approval of the class settlement on the grounds that it was not "fair, reasonable, and in the best interests of the Class Members."[151] In so doing, the court placed great emphasis on the fact that the class members did not receive any direct benefit from the agreement.[152] Indeed, Justice Perell reasoned that the agreement was "more beneficial to Class Counsel than it [was] to Class Members" and had the "practical effect" of "expropriat[ing]

the Class Members' property rights in exchange for a charitable donation from Thomson."[153] While the "cy-pres trust fund is a public good," the court concluded that "it does not justify approving" a class settlement that offers no direct benefit to the allegedly harmed class members.[154] The court therefore rejected the proposed class settlement. Interestingly, in a decision ruling that it had no jurisdiction to hear an appeal of the decision, the Ontario Court of Appeal stated that it would have adjourned the appeal to permit the appointment of *amicus* if it had concluded the appeal was properly before it.[155]

The *Waldman* decision followed another ruling by Justice Perell in which he declined to approve an amendment to a previously approved class settlement. In *Kidd v. The Canada Life Assurance Co.*,[156] the Action concerned the ownership of surplus assets in The Canada Life Canadian Employees' Pension Plan (the "Plan") in connection with the partial wind-up of the Plan and the use of such assets to pay Plan administrative expenses.[157] The parties reached an original settlement approved by the court under which approximately 70% of the partial wind-up surplus was to be paid to certain Plan members and approximately 30% payable to Canada Life.[158] However, a decline in interest rates resulted in substantially increased liabilities for the partial wind-up members which in part greatly diminished the anticipated surplus.[159] The parties subsequently negotiated an amendment to the proposed settlement agreement. The amended settlement resulted in a surplus allocation of approximately $4 million for one group of class members in the first round of distribution.[160] The amended settlement provided that this group would get a shot at a second potential distribution of surplus as at December 31, 2014, but capped the amount at $15 million.[161]

Justice Perell rejected the proposed amendment, finding it "substantively, procedurally, circumstantially, and institutionally unfair."[162] According to the court, imposing a $15-million cap was "a disguised way for Canada Life to increase its share of the surplus from the 30.34 percent originally allocated to it."[163] In addition, the court found that the 2014 deadline to recalculate the surplus was also arbitrary and unfair.[164] Critical to his analysis was the fact that class settlements are presented to the court outside the adversarial process, where the parties put on a "united front" to promote the settlement agreement.[165] Therefore, judges must "compensate for the adversarial void by being diligent in testing the one-sided arguments of the proponents of the settlement and by being attentive to the views of objectors who may provide cogent counterarguments."[166] Applyzing this approach, Justice Perell refused to allow the proposed amendment to go forward. He later approved a further amendment to the settlement agreement which he found to be substantively, procedurally, institutionally and circumstantially fair.

The extent (if any) to which the recent *Waldman* and *Kidd* decisions will impact broader class settlement jurisprudence in Canada remains to be seen. The *Waldman* court's focus on *cy pres*—the practice of awarding class funds to uninjured third-party charities—echoes the increased scrutiny placed on the practice by courts in the United States and could be a sign that in this context, Canadian courts may be influenced by American class action trends.

Class Counsel Fees

In considering the incentives for counsel to commence class actions, perhaps the issue of greatest significance for defendants is how much plaintiffs' counsel will be paid out of any settlement.

Canadian provinces differ on the question whether a successful party in a class action can recover costs from the other party. In Ontario and Alberta, for example, costs may be awarded against the losing party in a class proceeding (that is, the representative plaintiffs or the defendants) in the same manner as in any other action, subject to a "public interest" exception.[167] In British Columbia (and Newfoundland and Labrador), on the other hand, costs are not normally awarded in a class proceeding, although the courts do have some discretion to award costs where the court considers a party's conduct to be vexatious, frivolous or abusive. With regard to costs between plaintiffs' counsel and the class, contingency fees are permitted in all provinces. An agreement between the representative class member and plaintiffs' counsel regarding counsel fees and disbursements must be in writing and, among other things, state the terms under which the fees and disbursements are to be paid and state whether that fee is contingent on success. In most provinces, the agreement concerning fees and disbursements between a lawyer and the representative plaintiff is not enforceable unless approved by the court. Amounts owing under an enforceable agreement are a first charge upon any settlement funds or monetary award.

Fee awards have come under increased scrutiny in recent years. Several Ontario judges have recently issued key decisions commenting on the fairness and reasonableness of percentage-based amounts being claimed by class

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counsel rather than amounts calculated using a multiplier of hours-times-rates approach. In a 2013 decision of the Ontario Superior Court, *Cannon v. Funds for Canada Foundation*, Justice Belobaba held that "contingency fee arrangements that are fully understood and accepted by the representative plaintiffs should be presumptively valid and enforceable, whatever the amounts involved." In that case, he found that legal fees in the amount of one-third of the settlement amount were presumptively valid because that was agreed to in the retainer agreement with the representative plaintiff.[168] In other recent decisions, counsel fees of 20-30 percent have been accepted.[169]

The Ontario Court of Appeal also recently considered class counsel fee approvals. In *Lavier v. MyTravel Canada Holidays Inc.*,[170] the Court of Appeal ruled that the trial court below had erred in awarding class counsel a fee that was grossly disproportionate to the benefit and access to justice obtained by the class, which had only taken up a very small portion of the settlement funds, the balance of which reverted to the defendant.[171] The decision instructs that the take-up rate of a settlement will be highly relevant to the determination of what counsel fees are fair and reasonable, and that proportionality will be the guiding principle.

This decision appears to endorse a practice that has emerged in the Ontario courts in recent years, whereby a portion of counsel's fee is determined on an interim basis at the time of settlement approval, with the final determination of the fee award reserved until the results of the claims process are known.[172] The courts have looked to balance the importance of compensating class counsel for the litigation risk they have undertaken with the importance of protecting class members by ensuring that there is an adequate fund available to pay their claims. The deferral of a final determination provides the opportunity to take into account information on the real value of the settlement (including the actual number of eligible claimants, the take-up rate, the level of compensation each claimant receives, and the amount of reversion to the defendant). On the other hand, it creates incentives for plaintiffs' counsel to make greater efforts to find class members, potentially resulting in more expensive notice programs, with a resulting increase in negative publicity and demands that defendants pay the increased costs of notice.

The Canadian Bar Association's Protocol for Multijurisdictional Class Actions

As Canada's class action jurisprudence has become more settled, practical mechanisms for prosecuting and settling these controversies involving class members and/or class actions in multiple provinces have emerged. In 2010, the Canadian Bar Association (CBA) created a task force to draft a "protocol" for managing multijurisdictional class actions in Canada.[173]

The task force was particularly concerned with addressing the potential for inconsistent and duplicative judgments in parallel class actions (that is, class actions asserting similar claims against the same defendant(s) pending simultaneously in the courts of multiple provinces).[174] Although it has not yet developed any protocol for dealing with contested class actions (other than a notice protocol), the CBA ultimately developed a protocol that focused on multijurisdictional class action settlements. The CBA adopted the settlement protocol, known as the Class Actions Judicial Protocol, in August 2011. It provides guidance regarding notice (to allow counsel in various overlapping actions to be given notice of developments in all the actions) and settlement approval.[175] Under the Protocol, a party seeking approval of a class settlement that would resolve class actions pending in multiple provinces may file a motion before each provincial court in which a class action is pending to adopt the Protocol. If the motion is granted, the courts involved may then communicate with each other regarding approval of the settlement. The Protocol specifically contemplates joint settlement hearings, as well as coordination regarding the content and manner of notice to class members.

Courts first employed the Protocol in 2012 in a complex settlement involving price-fixing class actions filed against Hershey and other chocolate manufacturers in the courts of Ontario, British Columbia and Québec.[176] Each of the courts applied the Protocol to coordinate the certification and settlement hearings. Observers noted that "the streamlined process facilitated the approval of the settlement through a single appearance" that included video conferencing among the different courtrooms.[177] The judges subsequently discussed the certification and settlement

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motions among themselves by conference call and promptly granted the motions.

While use of the Protocol is still in its infancy, its use so far suggests that it will facilitate more efficient settlements of multijurisdictional class actions in Canada. The Protocol can be expected to have both positive and negative consequences for the business community. By reducing the likelihood of duplicative and inconsistent settlement rulings, continued use of the Protocol could benefit both plaintiffs and defendants and promote judicial economy. On the other hand, by making multijurisdictional class action settlements easier to achieve, the Protocol may create incentives for filing more multijurisdictional litigation.

What the Protocol does not do, however, is provide a mechanism akin to the U.S. MDL process that would allow for coordination of overlapping class actions in multiple provinces. This is left to the discretion of the individual judges in each province managing the parallel class actions who may or may not have the same views of the matter. Given the benefits afforded in the class action context by the U.S. MDL regime—namely, the reduction of duplicative and expensive discovery and inconsistent rulings—lawmakers in Canada might have wanted to consider establishing a similar system for class actions. However, because of the limited jurisdiction of the Federal Court, the solution cannot be found there.[178] Such a solution would require cooperative legislative change in each of the provinces of Canada for most of the types of claims that are brought as class actions nationally.

Third-Party Litigation Funding

Private third-party litigation funding, or TPLF—the practice of providing money to a party to fund the pursuit of a potential or pending lawsuit—arrived in Canada approximately 10 years ago. Initially, it was limited to the funding of individual plaintiff personal injury claims.[179] Because private TPLF (unlike other financial products) is essentially unregulated, parties have largely relied on the courts for guidance in determining the legal boundaries of this practice.

In Ontario, a Class Proceedings Fund (CPF) has been available since 1993 to provide indemnity for disbursements incurred by class counsel, and to assume responsibility to pay any adverse cost award made against a representative plaintiff in cases that it has approved for funding.[180] In return, the CPF is entitled to a statutory 10 percent levy on any awards or settlement in favor of the class in funded actions. Given the quantum of the costs awards that have been made in favor of defendants in certain class proceedings (in some cases hundreds of thousands of dollars for the certification hearing alone), concerns have been raised about the financial viability of the CPF.[181]

In 2009, the Court of Queen's Bench in Alberta became the first Canadian court to consider a private third-party funding agreement in a class action. In *Hobshawn v. Atco*,[182] the court approved an agreement to fund a representative plaintiff's legal fees in a class proceeding.[183] In light of the court's decision, BridgePoint Financial Services Inc., the funding company in *Hobshawn*, has explored numerous other funding opportunities in Canada. Since *Hobshawn*, TPLF has extended into complex commercial litigation and class actions.[184] Troublingly for the business community, its spread in the class action area "is publicly known and judicially approved."[185]

Several recent class action decisions offer insights about the types of funding agreements Canadian courts will approve and the protections for litigants the judiciary will require.[186] While these decisions rejected arguments that TPLF agreements are *per se* illegal, they established important requirements—most notably, that the terms of the agreements must be disclosed to the defendant and the court.

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For example, in *Fehr v. Sun Life Assurance Company of Canada*,[187] the court denied plaintiffs' motion to approve a secret TPLF agreement without notice to the defendant in a non-public hearing and to seal any documents related to the motion.[188] While first determining that TPLF agreements are not *per se* champertous, the court ultimately denied the plaintiffs' motion, stressing that "third party funding agreements [are] controversial and problematic," and accordingly, "should not be allowed to operate clandestinely."[189] The court held that approval of TPLF agreements should take place in open court with notice to the defendant because the defendant is "affected by a third party funding agreement and fairness demands that any privilege associated with the agreement [be] waived."[190]

Similarly, in *Metzler Investment GmbH v. Gildan Activewear Inc.*, the Ontario Superior Court held that TPLF agreements were not *per se* champertous or otherwise against public policy, but rejected the agreement before it because the funder's recovery would have been a fixed percentage of any damages award, regardless of the amount of money advanced to plaintiffs, the risk to the funder, or the amount of time the lawsuit was pending.[191] The court suggested that a litigation funding arrangement that calculated the funder's recovery based on these specified factors would be permissible.

More recently, the Ontario Superior Court offered perhaps the most fulsome explanation of the factors a court should consider when assessing the validity of a TPLF arrangement. In *Musicians' Pension Fund of Canada v. Kinross Gold Corp*,[192] class counsel represented the class on a contingency basis, but counsel refused to indemnify the representative-plaintiff pension fund against any adverse cost award.[193] As a result, class counsel approached a TPLF company, Harbour Litigation Funding Limited (headquartered in London), to provide funding for any adverse costs awarded in the action. Harbour agreed to indemnify the pension fund against adverse costs imposed in connection with certain motions up to $1 million and in connection with any common-issues trial up to $5 million.[194] In approving the TPLF agreement, the court emphasized that the Ontario Class Proceedings Act of 1992 was "designed to enhance access to justice"—a goal the court found was frustrated by the prospect of adverse cost awards under the province's loser pays regime.[195] In approving the TPLF agreement, the court articulated several key conditions that guided its decision:

- Third-party funding agreements are not categorically champertous, but a third-party funding agreement might be unlawful for other reasons.
- Plaintiffs must obtain court approval to enter into a third-party funding agreement.
- Such an agreement must be disclosed to the court promptly, and the agreement cannot come into force without court approval. Third-party funding in class proceedings must be transparent and must not interfere with the administration of justice. The third-party agreement itself is not a privileged document.
- To be approved, the third-party funding agreement must not compromise or impair the lawyer-client relationship, the lawyer's duties of loyalty and confidentiality, or the lawyer's duties to prosecute the litigation (appropriately exercising professional judgment) on behalf of the representative plaintiff and the class members.
- To be approved, the third-party funding agreement must not diminish the representative plaintiff's rights to instruct and control the litigation.
- Before approving a third-party funding agreement, the court must determine that the agreement is necessary in order to provide the plaintiff and class members with access to justice.

The recent decisions approving particular TPLF agreements, or approving of TPLF in general, may diminish the salutary effect that "loser pays" cost regimes in some Canadian provinces have had in deterring non-meritorious lawsuits, as plaintiffs and their attorneys turn to well-financed TPLF companies willing to invest in litigation. However, recent judicial safeguards—like those articulated in the *Musicians' Pension Fund* case—will protect plaintiff class members and shine much needed light on TPLF arrangements. Nonetheless, Canada's growing acceptance of TPLF can be expected to increase the frequency with which class actions are filed in Canadian courts, further taxing judicial resources and increasing defendants' litigation costs.

Waiver of Tort and Disgorgement

Waiver of tort is a restitutionary doctrine that plaintiffs' counsel in the common law provinces have argued permits a class to elect to recover the benefits that a defendant has obtained by doing wrong instead of damages measured by the class members' losses. The nature and scope of the doctrine are very controversial and have generated much judicial and academic debate. The doctrine is routinely pleaded in class actions in an attempt to present damages as a common issue.

Courts have often certified common issues related to claims for waiver of tort reasoning that it is not "plain and obvious that there is no reasonable cause of action" and that a court should permit the litigants to develop a full evidentiary record before the court determines the nature and scope of the doctrine.

It was widely anticipated that the trial decision of the Ontario Superior Court in *Andersen v. St. Jude Medical* would address the doctrine on its merits for the first time, and provide much needed guidance on the scope and nature of the doctrine. However, given that the trial judge concluded that the defendants exercised reasonable care and there was no wrongdoing, it was not necessary for her to decide whether the doctrine of waiver of tort was available in a product liability negligence case. However, the trial judge did note that it was time to decide the questions of whether and when waiver of tort should be available, and disagreed with the line of cases that had previously concluded that a full evidentiary record would be necessary to determine the availability of waiver of tort.[196]

Drawing support from the *Andersen* decision and, specifically, the observation in that case that a full factual record after a common issues trial did not assist to illuminate the legal issues regarding waiver of tort, the British Columbia Court of Appeal held that alleged breaches of provincial consumer protection and sale of goods statutes could not provide the requisite "wrongdoing" for a claim in waiver of tort, and overturned the lower court's certification of a proposed class action in *Koubi v. Mazda Canada Inc.*[197]

The British Columbia Court of Appeal applied a similarly narrow approach to waiver of tort in *Wakelam v. Wyeth Consumer Healthcare/Wyeth Soins de Sante Inc*.[198] There, the appellate court overturned the lower court's decision to certify a class action against the manufacturers of children's cold medicines, in which the plaintiffs alleged that the defendants engaged in deceptive acts or practices under provincial consumer protection legislation and had made misleading representations to the public contrary to the federal Competition Act. The plaintiffs sought restitutionary remedies, including waiver of tort, unjust enrichment, disgorgement and constructive trust, from the benefits the defendants had received from the sales of their products. The Court of Appeal struck these claims for want of any cause of action, given that the statutes provided exhaustive remedies.[199]

Defendants have reason to be optimistic about the fate of waiver of tort in Ontario as well. In *Arora v. Whirlpool Canada LP*,[200] the Ontario Court of Appeal in October 2013 upheld a decision by the lower court, holding that the putative plaintiffs' waiver of tort claim was not a sustainable cause of action because there was no predicate wrongdoing upon which to base a plea of waiver of tort, be it a remedy or a cause of action.[201]

On the other hand, the Supreme Court of Canada declined to strike a claim for waiver of tort in one of the trilogy of antitrust class action decisions mentioned earlier, finding that it was not plain and obvious that such a cause of action would not succeed. In *Pro-Sys Consultants Ltd. v. Microsoft Corporation*,[202] the Supreme Court acknowledged that there is contradictory law as to the question of whether the underlying tort needs to be established in order to sustain an action in waiver of tort. However, the Court found that the appeal before it was not the proper place to resolve the details of the law of waiver of tort, nor the particular circumstances in which it can be pleaded.[203] It should be noted, however, that the Supreme Court also allowed a variety of other tort claims to proceed in that case, unlike in *Koubi*, *Arora* and *Wakelam*.

In short, there is much uncertainty about the viability of waiver of tort within Canadian case law. The waiver of tort debate continues and further developments remain uncertain.

Law Commission Review of Ontario's Class Action Experience

At the request of the Ontario government, the Law Commission of Ontario (LCO) is currently engaged in a comprehensive review of the Ontario Class Proceedings Act and experiences with that legislation in the 20 years since enactment. In November 2013, the LCO released a scoping document establishing a framework for the review and a preliminary list of issues to be addressed.[204]

They include: (a) the reasons for minimal class member participation in settlements and judgments (e.g., the adequacy of notice programs, the significance of take-up rates); (b) the procedural efficiencies of the class litigation process (e.g., the propriety of current class certification standards); (c) the funding of class litigation (e.g., the sustainability of the Class Proceedings Fund, issues presented by third-party litigation funding); (d) whether "loser pays" costs rules limit access to the courts; (e) whether class remedies should be expanded to be more regulatory in nature (particularly by allowing "waiver of tort" or other disgorgement devices); (f) settlement issues (e.g., the use of *cy pres* distributions, whether undistributed monies should revert to defendants); (g) securities class actions; and (h) national class actions.

Two of the most important issues the LCO intends to address are related: (1) the existing class certification prerequisites, including the burden of proof and evidentiary requirements on a motion for certification; and (2) the "loser pays" costs regime. In 1982, the LCO's predecessor, the Ontario Law Reform Commission (OLRC), engaged in a detailed consideration of class actions. It discussed both a merits-based test for certification and a "loser pays" costs system as means to discourage meritless and extortionate class action claims. It ultimately recommended adoption of a preliminary merits test to achieve that objective; a no-costs regime was advanced.[205] However, when the Ontario government finally enacted legislation in 1992, it chose to adopt a "loser pays" costs system and did not include a merits test in the class certification process. Recently, Ontario plaintiffs' counsel and some judges (including the current class action case management team leader in Toronto) have

suggested that the "loser pays" costs system should be reconsidered, without commenting on whether a merits test for certification should replace it.[206]

In two recent decisions, Justice Perell of the Ontario Superior Court voiced concerns about the "loser pays" costs regime. In *Holley v. The Northern Trust Company*,[207] he stated: "My own observation is that the exposure of an adverse costs award does have a deterrent effect beyond discouraging meritless and extortionate claims but whether the adverse costs regime of the Act goes too far in deterring access to justice for meritorious claims is something that the Legislature will have to decide."[208] And in *Magill v. Expedia, Inc.*,[209] he stated that "[t]he 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."[210]

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It is not clear from Justice Perell's comments what cases form the basis for his observations. Further, it is unclear whether his observations are of general application across the spectrum of class actions over the past 20 years (or, more broadly, across the spectrum of class actions in Canada to date). Further, one would need to know something about the class actions that have been considered but never commenced, and never before a judge, to have a complete picture of the impact of the "loser pays" cost regime.

If the "loser pays" costs regime is changed without making the certification test more rigorous, there will be no effective mechanism to discourage meritless and extortionate class actions in Canada. This is especially true given Canadian courts' growing acceptance of TPLF. While motions for summary judgment may be available to try to dispose of meritless claims, there may be practical or tactical reasons why they cannot be brought before certification, and many judges will insist that the class certification motion be the first to be considered in the proceeding. Trials on the merits are always an option, and defendants have had some success in such trials, but they are very costly and burdensome. Additionally, negative trial-related publicity could adversely affect a company's sales or other shareholder interests, regardless of the ultimate outcome of the trial and subsequent appeals.

Without question, plaintiffs' attorneys are fully engaged in the LCO review, which could have a significant impact on defendants in class actions. As the LCO review progresses, there will be opportunities for input from various stakeholders regarding the issues set

out in the scoping document as well as additional issues that may be identified as a result of further consultations. Because the LCO review will be watched by all provinces, any revisions have the potential to impact class action law far beyond Ontario. In other words, improvements to Ontario's class action practices may prompt similar reforms in other provinces, while misguided changes to Ontario's law may be repeated outside that province. For this reason, it is critical that the LCO review receive extensive input from the defense community. This includes companies that have been—or may become—defendants in class proceedings in Ontario, as well as their industry organizations and their insurers. It will be important for the LCO review to take into account the class action defense perspective if there is to be any hope of stemming the tide of jurisprudence favoring class action plaintiffs.

> *"If the 'loser pays' costs regime is changed without making the certification test more rigorous, there will be no effective mechanism to discourage meritless and extortionate class actions in Canada. While motions for summary judgment may be available to try to dispose of meritless claims, there may be practical or tactical reasons why they cannot be brought before certification."*

Conclusion

While some Canadian courts issued decisions several years ago that might have changed Canada's reputation as a haven for loose class certification standards, this movement appears to have receded. Recent class action case law forcefully reaffirms Canada's tradition of lax certification standards, particularly in the area of pharmaceutical/medical device and toxic torts.

This affirmation of the low standards, as well as the convergence of other factors favorable to class actions, will likely increase its use in Canada. In short, unless the environment changes, many more class actions should be expected.

Given the recent trends in favor of certifying class actions and the increasing frequency of class action trials, defendants must focus some of their arguments on the precise wording of common issues to ensure that common issues trials are conducted fairly. Defendants must also develop effective strategies for disposing of class actions at the earliest possible stage. One important practice point is to employ motions for summary judgment, which can be a powerful tool to eliminate a putative class action before or after a motion for class certification is brought. In the securities context, defendants should consider moving to dismiss class actions on *forum non conveniens* grounds where more convenient forums exist in which to litigate the claims at issue.

> *"[T]he litigation defense community (both practitioners and their clients) should speak in favor of more meaningful class certification prerequisites. It should stress the need for disincentives to the filing of non-meritorious actions that could unfairly force settlements on defendants and adversely affect innovation, price of goods and/or shareholder value, notwithstanding the lack of merit in the claim."*

Beyond these practice points, defendants should advocate for meaningful legal reform throughout the Canadian provinces. For example, the litigation defense community (both practitioners and their clients) should speak in favor of more meaningful class certification prerequisites. It should stress the need for disincentives to the filing of non-meritorious actions that could unfairly force settlements on defendants and adversely affect innovation, price of goods and/or shareholder value, notwithstanding the lack of merit in the claim. It should strenuously oppose the adoption of "waiver of tort" and other concepts that would change substantive laws and transform class actions into enforcement (not remedial) devices. And it should encourage lawmakers to formalize TPLF safeguards (at a minimum, requirements for disclosure and judicial approval).

A prime opportunity for raising these points is the LCO review process, which is examining many important aspects of Ontario's class action regime. If that review process is to be thorough and fair, the defense community must play an active role and ensure that the effort is not dominated by plaintiffs' counsel perspectives. Additionally, the proactive defense community involvement is all the more important given the attention that other Canadian provinces can be expected to give to the review. In short, the outcome of the LCO is likely to influence legislative and judicial efforts on class actions not only in Ontario but beyond.

Endnotes

1 The Federal Court of Canada has class action rules, but they apply only to a limited array of claims related to federal legislation, such as the *Income Tax Act* and the *Trade-marks Act*, and federally administered boards, commissions and tribunals.

2 Prince Edward Island is the only province that does not have legislation authorizing class actions. The three Canadian territories also do not have any class action legislation.

3 *Bank of Montreal v. Marcotte*, 2014 SCC 55 ¶¶ 29-47. This ruling may allow a single plaintiff to bring a class action in some provinces asserting similar claims against an entire industry, even though that person has claims against only one defendant in that industry.

4 The Ontario Court of Appeal previously held that in Ontario there must be a named plaintiff who has a cause of action against a defendant for that defendant to be included in the suit. *Hughes v. Sunbeam Corp. (Canada) Ltd.* (2002), 61 O.R. (3d) 433 (C.A.). That case was not mentioned by the Supreme Court of Canada in *Marcotte, supra*, and it remains to be seen whether the latter will have any impact on the former.

5 Some provinces—most notably British Columbia—have an opt-in regime for class members who reside outside the province.

6 *See* Julius Melnitzer, *Focus: Is Québec or B.C. Canada's class actions haven?*, Law Times, Apr. 7, 2014, http://www.lawtimesnews.com/201404073893/focus-on/focus-is-Québec -or-b-c-canada-s-class-actions-haven.

7 Code of Civil Procedure, R.S.Q., c. C-25, art. 1003; *Infineon Technologies AG v. Option Consommateurs*, 2013 SCC 59.

8 *Infineon, supra; Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1.

9 *Ibid.*

10 *Id.* ¶ 52.

11 *Id.*

12 *Id.* ¶¶ 52, 54.

13 There is typically no pre-certification discovery.

14 This is true only if all aspects of liability can be established at the common issues trial for some or all individual class members. An aggregate damage award can only be made if the only issue remaining is assessment of damages: *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 ¶¶ 131-133.

15 "*The Canadian Class Action Landscape: Getting Greener?*" October 15, 2010, http://www.instituteforlegalreform.com/upload/sites/1/canadaclassactionwhitepaper1015.pdf.

16 "Product liability cases" may be a better title for this category, although in recent years, many such cases have involved pharmaceutical and medical device products. A notable exception is a multi-billion-dollar class action trial against multiple tobacco manufacturers that has been underway in the Québec Superior Court since March 2012.

17 [2008] SKQB 78 (Sask. Q.B.). Prior to *Wuttunee*, a case involving the prescription drug Zyprexa was certified as a class action by the Ontario Superior Court. *Heward v. Eli Lilly & Co.*, [2007] O.J. No. 404 (Ont. Sup. Ct.), *aff'd*, [2008] O.J. No. 2610 (Ont. Div. Ct.).

18 *Id.* ¶ 64, *rev'd*, [2009] SKCA 43 (Sask. C.A.).

19 *Id.*

20 *Id.* ¶ 129.

21 *See, e.g., Goyette v. GlaxoSmithKline Inc.*, [2009] QCCS 3745 (Que. Sup. Ct.); *Bear v. Merck Frosst Canada & Co.*, 2010 SKQB 284 (Sask. Q.B.).

22 2012 ONSC 2744 (SCJ), *aff'd*, 2013 ONSC 1169 (Div. Ct.) (CanLII).

23 2012 ONSC 2744, ¶ 5 (Ont. Sup. Ct.).

24 *Id.* ¶¶ 50, 233.

25 *Heward v. Eli Lilly & Co.*, [2007] O.J. No. 404 (Ont. Sup. Ct.), *aff'd* [2008] O.J. No. 2610 (Ont. Div. Ct.).

26 2012 ONSC 3681 (Can.).

27 2013 ONSC 5186 (Ont. Sup. Ct.).

28 *Id.* ¶ 8. A revision surgery is one that removes and replaces the previous implant.

29 2013 ONSC 5186, ¶¶ 34-36.

30 *Id.* ¶ 36.

31 *Id.* ¶ 44.

32 2012 BCCA 260 (B.C. Ct. App.).

33 *Id.* ¶ 47 (emphasis added).

34 *Id.* ¶ 61.

35 *Id.*

36 *Id.* ¶¶ 77, 82.

37 2012 BCSC 1804 (B.C. Sup. Ct.).

38 *Id.* ¶ 29.

39 In *Andersen v. St. Jude Medical Inc.*, 2012 ONSC 3660 (Ont. Sup. Ct.) ¶¶ 561-562, the Ontario Superior Court considered this question in *obiter*, having found no negligence on the part of the defendants. The trial judge expressed the view in that case that a potential finding of general causation—that the product could double the risk of harm—could significantly advance individual issues (specific causation) in the litigation. However, the trial judge had available in that case evidence from a randomized controlled trial that all experts agreed was the best scientific evidence available to assess the risks of the product and that allowed her to calculate specific rates. Further, she did not go on to individual hearings to assess whether that would in fact work in practice, given that she decided the common issues trial in the defendants' favor.

40 2013 BCCA 21 (B.C.).

41 *Id.* ¶ 25.

42 *Id.* ¶ 36.

43 *Charlton v. Abbott Laboratories Ltd.,* 2015 BCCA 26

44 *See, e.g.*, *F.L. v. AstraZeneca Pharmaceuticals, p.l.c.*, 2010 QCCS 470; *Perreault v. McNeil PDI*, 2012 QCCA 713; *Option Consommateurs v. Merck*, 2011 QCCS 3447, *aff'd*, 2013 QCCA 57; *MacMillan v. Abbott Laboratories*, 2012 QCCS 1684, *aff'd*, 2013 QCCA 906; *Leclerc c. Merck Canada Inc.*, 2012 QCCS 7100 (Que. Sup. Ct.); *Lebrasseur c. Hoffmann-La Roche ltée*, 2013 QCCS 3024 (Que. Sup. Ct.).

45 [2010] NCLA 20 (Nfld.).

46 See *Deraspe v. Zinc Electrolytique de Canada ltée*, 2012 QCCS 1043 (Que. Sup. Ct.).

47 *See* Sinziana Tugulea, *Québec Court Authorizes Canada's Largest Environmental Class Action to Date*, Canadian Class Actions Law, Apr. 10, 2012, http://www.canadianclassactionslaw.com/environmental/Québec -court-authorizes-canadas-largest-environmental-class-action-to-date/.

48 *See id.*

49 *See* Dianne Saxe, *Québec is still the place to be for environmental class actions*, Environmental Law and Litigation, Jan. 29, 2013, http://envirolaw.com/Québec -place-environmental-class-actions/.

50 *See MacQueen v. Ispat Sidbec Inc.*, 2011 NSSC 484 (N.S. Sup. Ct.).

51 *Id.* ¶ 3.

52 *Id.* ¶ 35.

53 *Id.*

54 *Id.* ¶ 61.

55 *Id.* ¶ 60.

56 *See* Dianne Saxe, *MacQueen v. Canada Class Action*, Environmental Law and Litigation, July 25, 2011, http://envirolaw.com/macqueen-canada/.

57 *See* Keith Luft, Thomas O'Leary & Ian Laing, *Regulatory and Liability Issues in Horizontal Multi-stage Fracturing*, 50 Alberta L. Rev. 403, 430 (2012) ("The need for future medical monitoring does not appear to be sufficient to establish an independent tortious cause of action in Canada, nor has it been explicitly recognized in Canadian jurisprudence as a separate remedy or head of damages.").

58 *Id.* at 430-31 (quoting 2009 SKQB 509, [2010] 6 WWR 81 [Brooks]).

59 2013 NSCA 143 (N.S. Ct. App.); request for reconsideration denied 2014 NSCA 73 (N.S. Ct. App.).

60 *Id.* ¶ 83.

61 *Id.* ¶ 93.

62 *Id.* ¶¶ 99-100.

63 *Id.* ¶ 143.

64 *Id.* ¶¶ 179-181.

65 2011 BCCA 187 (B.C. Ct. App.).

66 2011 BCCA 186 (B.C. Ct. App.).

67 *See* Drew Hasselback, *Consumers' Power Tested in Supreme Court Appeals on Price Fixing*, Legal Post, Oct. 16, 2012, http://business.financialpost.com/2012/10/16/consumers-power-to-be-tested-as-supreme-court-set-to-hear-appeals-on-price-fixing/.

68 2011 BCCA 187, ¶ 80.

69 [2007] 1 S.C.R. 3.

70 [2011] B.C.J. No. 688, ¶ 28.

71 *See Option Consommateurs v. Infineon Technologies*, 2011 QCCA 2116 (Que. Sup. Ct.).

72 *Id.* ¶ 120.

73 *Id.* ¶ 109.

74 *Id.*

75 *See Infineon Technologies AG v. Option consommateurs*, 2013 SCC 59 (S.C.C.); *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 (S.C.C.); *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2013 SCC 58 (S.C.C.).

76 *Sun-Rype*, 2013 SCC 58, ¶ 65.

77 *Infineon*, 2013 SCC 59, ¶ 59.

78 *Pro Sys*, 2013 SCC 57, ¶ 102; *Infineon*, 2013 SCC 59, ¶ 65.

79 *Pro Sys*, 2013 SCC 57, ¶ 102; *Infineon*, ¶¶ 68, 101.

80 *Pro Sys*, 2013 SCC 57, ¶ 105.

81 *Pro Sys*, 2013 SCC 57, ¶ 101, 102.

82 *Infineon*, 2013 SCC 59, ¶ 61.

83 *Id.* ¶ 61 (internal quotation marks and citation omitted).

84 *Id.* ¶ 60.

85 *Pro-Sys*, 2013 SCC 57, ¶ 118.

86 This is only a requirement in Québec. *See* Code of Civil Procedure, R.S.Q., c. C-25, art. 1003.

87 *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

88 *Id.* ¶ 49.

89 *Id.*

90 *Id.* ¶ 115.

91 Ryan Marth, *Canadian Antitrust Class Actions – A Business Opportunity*, Law 360, Apr. 7, 2014, http://www.law360.com/articles/525775.

92 *Id.*

93 *Id.*

94 [2009] O.J. (Ont. Sup. Ct.) and [2009] O.J. No. 5585; leave to appeal dismissed, 2011 ONSC 1035 (Ont. Sup. Ct.).

95 [2009] O.J. No. 5585 (Ont. Sup. Ct.); leave to appeal dismissed 2011 ONSC 1035 (Ont. Sup. Ct.).

96 [2010] ONSC 1591 (Ont. S.C.J.).

97 [2010] ONSC 1591 (Ont. S.C.J.), ¶ 135.

98 *See Abdula v. Canadian Solar Inc.*, 2011 ONSC 5105 (Ont. Sup. Ct.).

99 *Abdula v. Canadian Solar Inc.*, 2012 ONCA 211, ¶ 88 (Ont. Ct. App.).

100 *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2881-83 (2010).

101 *See* Wulf A. Kaal & Richard W. Painter, *Forum Competition and Choice of Law Competition in Securities Law After Morrison v. National Australia Bank*, 97 Minn. L. Rev. 132, 188 (2012).

102 *See Kaynes v. BP*, 2014 ONCA 580 (Ont. Ct. App.).

103 *Id.* ¶ 2.

104 *Id.* ¶ 4.

105 *Id.* ¶¶ 32-34, 41.

106 *Id.* ¶ 54.

107 *Id.* ¶ 40.

108 *Id.* ¶¶ 45, 54.

109 2013 ONSC 1667 (Ont. Sup. Ct.).

110 *See Gould v. W. Coal Corp.*, 2012 ONSC 5184 (Ont. Sup. Ct.).

111 *See* Drew Hasselback, *Western Coal Changes Thinking on Threshold for Securities Class Actions*, Legal Post, Mar. 12, 2012, http://business.financialpost.com/2012/12/03/western-coal-changes-thinking-on-threshold-for-securities-class-actions/.

112 *Gould*, 2012 ONSC 5184, ¶¶ 96, 239.

113 *Id.* ¶ 309.

114 *See Green v. Can. Imperial Bank of Commerce*, 2012 ONSC 3637 (Ont. Sup. Ct.).

115 *See Sharma v. Timminco Ltd.*, 2012 ONCA 107 (Ont. Ct. Appeal).

116 *Id.* ¶ 600 (emphasis added).

117 *See* Hasselback, *supra* note 67.

118 2014 ONCA 90.

119 *Id.* ¶¶ 88, 89.

120 2014 CanLII 45835 (S.C.C.); 2014 CanLII 45836 (S.C.C.); 2014 CanLII 45838 (S.C.C.).

121 2014 ONSC 1057.

122 *Id.* ¶ 11.

123 2014 ONCA 901

124 The Court of Appeal also upheld the lower court's refusal to certify stand-alone common law misrepresentation claims.

125 2013 QCCA 1256 (Que. Ct. App.).

126 2013 SCC 69.

127 Some have estimated that as many as approximately eight to ten percent of class actions go to trial in Ontario. *See* Julius Melnitzer, *Are Class Actions Going to Trial More Often*?, Law Times, Sept. 2, 2013, http://www.lawtimesnews.com/201309023419/focus-on/focus-are-class-actions-going-to-trial-more-often.

128 Jon Foreman, Sarah Graham, Genevieve Meisenheimer and Lauren Nielsen "Class Action Trial Decisions in Canada," http://harrisonpensa.com/wp/content/uploads/2012/07/updated-trial-list-JUL-11-12-final-2.pdf. Since those data were published, additional class actions trials have commenced, including the tobacco class action trial in Québec. As of June 2014, that trial was into its 234th day, with closing arguments scheduled to be heard on various days between September and December 2014. http://tobaccotrial.blogspot.ca/2014/06/day/234-proof-grudging-closed.html.

129 *See* Jordan Chittley, *Quebec Smokers v. "Big Tobacco": $17.8B Class Action Wrapping Up*, Sept. 22, 2014, CTV News, http://www.ctvnews.ca/business/quebec-smokers-v-big-tobacco-17-8b-class-action-wrapping-up-1.2018342.

130 *Id.*

131 *Id.*

132 *Kerr v. Danier Leather Inc.*, [2004] 46 B.L.R. (3d) 167 (Ont. Sup. Ct.), reversed (2005), 77 O.R. (3d) 321 (Ont. Ct. App.), affirmed 2007 SCC 44.

133 *Smith v. Inco Ltd.*, 2010 ONSC 3790 (Ont. Sup. Ct.), reversed 2011 ONCA 628 (Ont. Ct. App.), leave to appeal to SCC refused, [2011] S.C.C.A. No. 539.

134 *Jeffery v. London Life Insurance Co.*, 2010 ONSC 4938 (Ont. Sup. Ct.), varied 2011 ONCA 683 (Ont. Ct. App.), leave to appeal to SCC refused, [2012] S.C.C.A. No. 1.

135 *Andersen v. St. Jude Medical Inc.*, 2012 ONSC 2660 (Ont. Sup. Ct.).

136 *Mandeville v. Manufacturers Life Insurance Co.*, 2012 ONSC 4316 (Ont. Sup. Ct.), affirmed 2014 ONCA 417.

137 In *Webb v. K-Mart*, 45 O.R. (3d) 389 (Ont. Sup. Ct.), leave to appeal refused, 45 O.R. (3d) 638 (Ont. Div. Ct.), the certification judge granted summary judgment on the common issues, based on an admission of liability, and directed the matter to proceed to individual assessment of damages. In *Kotai v. Queen of the North* , 2010 BCSC 1180 (B.C. Sup. Ct.), all common issues except damages settled before trial. The court conducted six mini-trials to assess the claims of class members and assist the parties in settling the issue of damages.

138 *Rules of Civil Procedure*, Rule 20.04.

139 2014 SCC 7.

140 *Id.* ¶ 57.

141 *Id.* ¶ 49.

142 *Id.* ¶ 50.

143 2014 BCSC 1122 (B.C. Sup. Ct.).

144 *Id.* ¶¶ 181-84.

145 Two class actions in Alberta were dismissed on motions for summary judgment – one before and one after certification – and the dismissal of both cases was upheld by the Alberta Court of Appeal in 2014: W.P. v. Alberta, 2014 ABCA 404 and Windsor v. Canadian Pacific Railway Ltd., [2014] A.J. No. 256 (C.A.)

146 2014 ONSC 1288 (Ont. Sup. Ct.).

147 *Id.* ¶ 1.

148 *Id.* ¶ 3.

149 *Id.* ¶¶ 57-58.

150 *Id.* ¶ 58.

151 *Id.* ¶ 90.

152 *Id.* ¶ 95.

153 *Id.*

154 *Id.* ¶ 100.

155 2015 ONCA 53 at para. 3

156 2013 ONSC 1868 (Ont. Sup. Ct.).

157 *Id.* ¶ 5.

158 *Id.* ¶ 7.

159 *Id.* ¶ 11.

160 *Id.* ¶ 48.

161 *Id.* ¶ 19.

162 *Id.* ¶ 23.

163 *Id.* ¶ 4.

164 *Id.* ¶ 157.

165 *Id.* ¶ 122.

166 *Id.*

167 *See* CPA s. 31.

168 *Cannon v. Funds for Canada Foundation*, 2013 ONSC 7686.

169 *See, e.g., Slark v. Ontario*, 2014 ONSC 1283 (Ont. Sup. Ct.); *Labourer's Pension Fund of Central and Eastern Canada (Trustees of) v. Sino-Forest Corp.*, 2014 ONSC 62 (Ont. Sup. Ct.); *Baker (Estate) v. Sony BMG Music (Canada) Inc.*, 2011 ONSC 7105 (Ont. Sup. Ct.).

170 2013 ONCA 92 (Ont. Ct. App.).

171 The CPA provides that funds not distributed in the context of a settlement (e.g., as a result of low take-up) should revert to the defendant by default (absent some other express agreement).

172 *See, e.g., Ainslie v. Afexa Life Sciences Inc.*, 2010 ONSC 4294 (Ont. Sup. Ct.); *Boulanger v. Johnson & Johnson Corp.*, 2010 ONSC 2359 (Ont. Sup. Ct.); *Wilson v. Servier Canada Inc.*, [2005] O.J. No. 1039 (Ont. Sup. Ct.).

173 *See* CBA National Task Force on Class Actions, http://www.cba.org/CBA/ClassActionsTaskForce/Main/.

174 *See id.*

175 *See* Barry Glaspell, *Canada's Judicial Protocol for Multijurisdictional Class Actions*, Aug. 5, 2011, http://www.lexology.com/library/detail.aspx?g=ca1c60ee-2324-4aff-bf99-c91898861270.

176 *See Osmun v. Cadbury Adams Canada Inc.*, 2012 ONSC 3837 (Ont. Sup. Ct.).

177 *See* Chris Naudie & Gerard Kennedy, *Facilitating Settlement in Multi-Jurisdictional Class Actions: The CBA's Protocol*, Aug. 21, 2013, Canadian Class Action Defence, http://www.canadianclassactiondefence.com/2013/08/facilitating-settlement-in-multi-jurisdictional-class-actions-the-cbas-protocol/; Louise Moher & Rory Wasserman, *First Use of the Multijurisdictional Class Action Protocol in a Settlement*, Lerners Class Action Blog, June 29, 2012, http://lernersclassactiondefence.ca/blog/post/first-use-of-the-multijurisdictional-class-action-protocol-in-a-settlement.

178 Peter Hogg and Gordon McKee, "*Are National Class Actions Constitutional?*" (2010) 26 N.J.C.L. 279 at pages 283-284; on the general topic, *see also* "*Are National Class Actions Constitutional? – A Reply To Walker*" 31 N.J.C.L. 183.

179 Jasminka Kalajdzic, Peter Cashman & Alana Longmoore, Justice for Profit: A Comparative Analysis of Australian, Canadian and U.S. Third Party Litigation Funding, 61 Am. J. Comp. L. 93, 113 (2013).

180 In Québec, a similar public fund called the "Fonds d'aide aux recours collectifs" is available.

181 Review Of Class Actions In Ontario: Issues to be Considered, Law Commission of Ontario, November 2013, at pages 6- 7, http://www.lco-cdo.org/class-actions-issues-to-be-considered.pdf. The CPF is administered by the Law Foundation for Ontario (LFO), a non-profit organization created by statute in 1974. The LFO and the Attorney General each appoint one member of the Class Proceedings Committee and jointly appoint the other three. The Committee determines whether an application receives financial support from the fund based on various criteria, including, *inter alia*, strength of the case and scope of the public interests involved. *See* The Law Foundation for Ontario, http://www.lawfoundation.on.ca/class-proceedings-fund.

182 An unreported order without reasons made May 14, 2009, Alberta Court of Queen's Bench Action Number 0101-04999, mentioned in *Dugal et al. v. Manulife Financial Corporation et al.* (2011), 105 O.R. (3d) 364 at page 371. *See also* Julius Melnitzer, *Courts Pave Way for More Class Actions*; 3rd-Party Help, Legal Post, FP10 (Oct. 7, 2009).

183 *See* Kalajdzic, Cashman & Longmoore, *supra* note 172, at 113.

184 *See id.*

185 *Id.* at 114.

186 Judicial approval of TPLF agreements is generally only required in class actions. *See id.* at 113 (highlighting that judicial scrutiny of TPLF arrangements was precipitated by the growth of class actions).

187 2012 ONSC 2715 (Ont. Sup. Ct.).

188 *Id.* ¶ 2.

189 *Id.* ¶ 90.

190 *Id.* ¶ 140.

191 [2009] CanLII 41540 (Ont. Sup. Ct.).

192 2013 ONSC 4974 (Ont. Sup. Ct.).

193 *Id.* ¶ 12.

194 *Id.* ¶ 15.

195 *Id.* ¶ 20.

196 *Andersen v. St. Jude Medical Inc.*, 2012 ONSC 3660 (Ont. Sup. Ct.).

197 2012 BCCA 310 (B.C. Ct. App.), leave to appeal dismissed [2012] S.C.C.A. No. 398.

198 2014 BCCA 36 (B.C. Ct. App.).

199 An application for leave to appeal this decision to the Supreme Court of Canada is pending.

200 2013 ONCA 657 (Ont. Ct. App.), leave to appeal dismissed [2013] S.C.C.A. No. 498 (Sup. Ct. Can.).

201 *Id.* ¶¶ 117-121.

202 2013 SCC 57.

203 *Id.* ¶ 97.

204 Review of Class Actions in Ontario: Issues to be Considered by the Law Commission of Ontario, http://www.lco-cdo.org/class-actions-issues-to-be-considered.pdf.

205 Ontario Law Reform Commission, *Report on Class Actions*. Toronto, ON: Ministry of the Attorney General, 1982, at 323-24, 749-52.

206 *See* Jordan Fletcher, *Access to Justice "Is Becoming too Expensive"*, The Globe and Mail (Canada), Nov. 21, 2013.

207 2014 ONSC 3057 (Ont. Sup. Ct.).

208 *Id.* ¶ 24.

209 2014 ONSC 2073.

210 *Id.* ¶ 106.

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