# Looking Forward
## Canadian Class Actions in 2016

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# Looking Forward

The last few years have been active for class actions in Canada, and the activity did not slow down in 2015.

This past year, Bennett Jones was involved with some of the most important class actions in the country. Our active and growing class actions practice group continued to earn its reputation as a leader in the Canadian legal market. By leveraging our practical experience, litigation expertise, and unparalleled knowledge of procedure, we helped clients achieve meaningful results that aligned with their business objectives. What follows is our discussion and analysis of trends in Canadian class actions in 2015 and likely developments we anticipate seeing in 2016.

In 2015, we saw the reversal of certain trends that had previously been shifting in a plaintiff-friendly direction. For instance, lower courts had previously articulated a relatively low threshold for granting leave to plaintiffs to commence statutory securities class actions. In 2015, the Supreme Court of Canada increased that threshold, resulting in a more rigorous test for leave. Similarly, while many product liability class actions were previously certified as "quintessential" class actions, several product liability class actions were denied certification in 2015.

We predict this coming year will see:

- more certainty in class actions under the *Securities Act*, particularly as it relates to the leave test for the commencement of statutory secondary market misrepresentation claims;
- greater judicial scrutiny of product liability class actions at the certification stage and an intensified focus by defendants in resisting certification in such actions;
- judicial guidance on competition class actions and, in particular, on the viability of class actions involving tort claims based on breaches of the *Competition Act*;
- greater judicial reluctance to certify global class actions, as well as greater judicial reluctance to certify parallel class actions if a national class action has been certified;
- Supreme Court of Canada clarification on whether provincial judges may sit on national class actions outside of their home province;
- greater judicial scrutiny of expert evidence filed at the certification stage;
- an increased focus on non-party productions, particularly in relation to evidence in regulatory proceedings;
- increased scrutiny of counsel fee arrangements to ensure fairness to class members; and
- more certainty regarding the individual phase of class actions (following the common issues stage).

# Securities

## The Supreme Court Gives the Leave Test Teeth: *Theratechnologies Inc v 121851 Canada Inc*

The Supreme Court of Canada released two class action decisions in 2015, both relating to secondary market misrepresentation claims under securities legislation. One case was *Theratechnologies Inc v 121851 Canada Inc*;[1] the other was *Canadian Imperial Bank of Commerce v Green*.[2]

In *Theratechnologies*, for the first time, the Supreme Court directly addressed the threshold for granting leave for plaintiffs to commence actions regarding statutory causes of action for secondary market misrepresentations. In contrast to prior decisions from several provincial courts of appeal that had set a remarkably low standard, the Supreme Court stated that

the statutory requirement to seek leave before commencing such actions reflects a legislative objective of creating a "robust deterrent screening mechanism" that should be "more than a speed bump".

The Securities Acts across various jurisdictions, including in Ontario and Alberta, provide a cause of action for misrepresentations in the secondary market in which investors are relieved of the burden to prove reliance, which is an element of the common law cause of action for negligent misrepresentation. The test for obtaining leave is substantially the same under all of the provincial statutory causes of action and contains two requirements: (1) the action must be brought in good faith and (2) there must be a reasonable possibility that the action will be resolved in favour of the claimant. The reasonable possibility of success requirement has been considered numerous times by courts in several jurisdictions, and has been the focus of much discussion by the courts.

The majority of earlier cases on this issue from both Quebec and the common law provinces set a very low standard for obtaining leave, creating a plaintiff-friendly regime. The Ontario Court of Appeal, for instance, found that the test for obtaining leave is equivalent to the threshold applied during certification when determining whether the pleadings disclose a cause of action: the purpose is to weed out hopeless claims and only allow those to go forward that have "some chance of success".

In *Theratechnologies*, the Supreme Court considered the case law that has attempted to articulate the appropriate standard, often somewhat conflicting, and articulated a threshold significantly higher than courts in the past.

In endorsing a more rigorous threshold, the Supreme Court noted that the purpose of the leave test is to create an appropriate balance and a meaningful screening mechanism so costly strike suits and unmeritorious claims are prevented. The Supreme Court found that the threshold should be more than a mere "speed bump" and courts must undertake a reasoned consideration of the evidence to ensure that the action has merit. In order to properly give effect to the gatekeeping function, there must be a reasonable or realistic chance that the action will succeed. The Supreme Court found this requires the claimant to: (1) offer a plausible analysis of the applicable legislative provisions and (2) provide some credible evidence to support the claim.

On the facts before it, the Supreme Court found that the plaintiff had not pointed to any evidence that supported its theory. Without such evidence, the action could not have a reasonable possibility of success. The threshold for leave was not met and the appeal was allowed.

## Significant Headwinds for Securities Class Actions: The Aftermath of *Theratechnologies*

Following *Theratechnologies*, the leave test articulated by the Supreme Court of Canada was applied by the Ontario Superior Court of Justice in *Coffin v Atlantic Power Corp*[3] and affirmed by the Supreme Court once again in *Green*. Both *Atlantic Power* and *Green* exemplify the obstacle posed to plaintiffs by the increased threshold for leave.

### *Coffin v Atlantic Power Corp*

*Atlantic Power* was the first decision to consider the certification bar set by the Supreme Court in *Theratechnologies*. *Atlantic Power* confirmed that courts will consider the strength of the parties' evidence, rather than just their pleadings, before green-lighting these types of class actions.

Effectively, the plaintiffs in *Atlantic Power* alleged that Atlantic Power had made misrepresentations about its ability to sustain its dividend payments. Justice Belobaba of the Superior Court determined that, because of *Theratechnologies*, he had to decide this issue: "… after considering all of the evidence presented by the parties, does any part of the Plaintiffs' case have a reasonable or realistic chance of success at trial? Or is the Plaintiffs' case so weak or has it been so successfully rebutted by the defendants that it has no reasonable possibility of success."

The evidentiary record was robust, primarily because Atlantic Power decided to aggressively rely on internal corporate records to show it had made no misrepresentation, and that the plaintiffs' case could not succeed. Justice Belobaba felt comfortable enough with Atlantic Power's version of events that he not only found that the plaintiffs' case had no reasonable prospect of success, but there were no misrepresentations made and no evidence that management had made any false statements about the future of the dividend payments.

*Canadian Imperial Bank of Commerce v Green*

In December 2015, the Supreme Court released reasons in a highly-anticipated trilogy of securities class action cases. In *Green*, a deeply divided court reached differing conclusions on limitation period issues, which have largely been rendered moot because of amendments to securities legislation.[4] More importantly, the Supreme Court unanimously confirmed that plaintiffs face "rigorous" screening before leave will be granted to commence a statutory cause of action for secondary market misrepresentations. The Supreme Court also held that determining certain common issues arising from common law negligent misrepresentation claims were appropriate for class proceedings.

Although *Theratechnologies* was decided on the basis of Quebec's *Securities Act*, the Supreme Court noted in the trilogy that there is no difference between the language in that Act and Ontario's *Securities Act*. Accordingly, the Supreme Court affirmed *Theratechnologies* and held that the threshold test for granting leave articulated in that case applied to section 138.8 of Ontario's *Securities Act* and, by analogy, to the other common law provinces with similar legislative schemes.

In *Green*, the Supreme Court also addressed the certification of common law claims for negligent misrepresentation. There has been healthy debate about whether common law misrepresentation claims should be certified in addition to statutory causes of action (or in lieu of statutory causes of action when leave is denied). The obvious hurdle to such claims is that absent the statutory provisions, reliance must be proven on an individual basis. This matter is important to plaintiffs and defendants alike given that common law causes of action are free from the stringent caps on damages that apply to the statutory cause of action.

The Supreme Court allowed some common issues to be certified, including those relating to the alleged misconduct by the defendants, but not issues relating to reliance or damages. The practical impact of this finding remains to be seen, however, it does further indicate that the Supreme Court is prepared to put restraints on secondary market securities class actions.

The recent guidance provided by the Supreme Court on the leave test for statutory claims for secondary market misrepresentations, which has been the subject of significant judicial consideration in many jurisdictions in Canada, and particularly in Ontario, is much welcomed and should provide more certainty for cases under the Securities Acts in all provinces going forward. Many had argued that the courts had created a plaintiff-friendly regime that had moved away from the legislative intent in creating the meaningful requirement to obtain leave before proceeding with an action. However, the Supreme Court appears to have given greater effect to the intention of the legislatures and, to a certain extent, reinstated the proper gatekeeper role of the courts.

# Product Liability

## Certification Denied: Product Liability Cases are Not "Quintessential" Class Actions

Frequently referred to as "quintessential" class actions, the majority of product liability actions for which certification has been sought in the last 10 years have been granted certification. However, four decisions released in 2015 denying certification may signal a shift toward greater scrutiny of proposed product liability class actions. Judges have become more willing to refuse certification where it is unclear there is sufficient commonality amongst the class members, an identifiable class or that a class proceeding is the preferable procedure for resolving the dispute.

The British Columbia Court of Appeal heard the first of the four decisions in *Charlton v Abbott Laboratories, Ltd.*[5] The proposed class in *Charlton* comprised patients who took the drug sibutramine, a prescription weight-loss medication that allegedly increased the risk of cardiovascular events such as heart attack and stroke. The evidence adduced on the certification motion suggested there might be an important distinction between class members with pre-existing cardiovascular conditions and those without them. The defendant manufacturers had warned against prescribing the drug to patients with pre-existing conditions. The British Columbia Supreme Court originally granted certification, but the Court of Appeal reversed that decision because the plaintiffs had failed to establish 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".

Although the requirement of a workable "methodology" for establishing harm on a class-wide basis is well established in indirect purchaser class actions where price-fixing is alleged, it is a new development in product liability class actions.

*Charlton* was followed by *Warner v Smith & Nephew Inc.*[6] The product was Smith & Nephew's metal hip resurfacing system, known as "the Birmingham system". After being implanted with the Birmingham system, the representative plaintiff was found to have toxic levels of metal ions in her blood and she had to have the device removed. Certification failed on the issues of identifiable class and preferable procedure.

The judge in *Warner* found that a class of all people with the Birmingham system implanted and their dependants would be appropriate since compensable harm could arise as soon as a defective device is implanted. However, Justice Poelman held that the plaintiff had not established some basis in fact for the existence of at least two class members who experienced complaints similar to those of the representative plaintiff.

In finding that a class action was not the preferable procedure, Justice Poelman noted one significant problem in many medical device class actions: complaints about the device can be caused by a host of patient-specific and surgeon-specific factors unrelated to the device itself. Since those issues require individual assessments, they would not likely be common across class members and, therefore, would more likely be suitable for individual actions.

Finally, certification was denied in two recent proposed multiple-model product liability class actions before the Ontario Superior Court of Justice in *O'Brien v Bard Canada Inc*[7] and *Vester v Boston Scientific*.[8]

These cases concerned several different medical products intended for permanent implantation in the female pelvis to treat various types of pelvic organ prolapse and stress urinary incontinence. The products differed in multiple ways, including their material makeup (in *Bard* only), shape, size, weight, density, weave, porosity, flexibility, configuration, fixation methodology, design purpose and product warnings.

Regarding the proposed common issues, the Ontario Superior Court found that Bard's and Boston Scientific's products had no common design feature that could be extrapolated across the classes. It further found that each of the different products had different risk-benefit profiles.

In *Bard*, the Superior Court endorsed the decision in *Charlton*, noting that where a plaintiff seeks to address questions of causation on a class-wide basis as the foundation for a class action, there must be evidence of a workable methodology that will enable the plaintiff to prove causation on a class-wide basis.

In *Vester*, the Superior Court emphasized that the existence of a common feature cannot establish a common issue unless it is linked to a common defect in manufacture or design. Where the plaintiff fails to establish such a relationship, a common feature is simply "coincidence".

Regarding preferable procedure, the Superior Court found in both *Bard* and *Vester* that where there is no basis in fact for common issues, there is also no basis for a class action satisfying the preferable procedure criterion. In both cases, the Superior Court held that a class action was not the preferable procedure.

These four decisions illustrate that not all product liability cases are suitable for certification. Specifically, in multiple-model product liability class actions, the plaintiffs must put forward enough evidence to show there is a common design feature across all product models tied to a common defect and they must establish a workable methodology that would enable the plaintiffs to prove causation on a class-wide basis. The plaintiffs relied on the common reference in the case law that product liability cases are "quintessential" class actions. The courts disagreed. In the words of Justice Perell, "no type of class action is quintessentially certifiable, even a product liability class action". Bennett Jones acted as defence counsel in *Bard*.

# Competition

## Is the *Competition Act* a Complete Code? Conflicting Decisions Leave More Questions than Answers

Canadian courts continue to disagree whether the *Competition Act* is a complete code that governs civil claims arising from breaches of its provisions. In 2015, conflicting decisions were released in different jurisdictions regarding whether a claim for unlawful means conspiracy may be based on a breach of the *Competition Act*. While the British Columbia Court of Appeal appeared to clarify the issue by certifying a claim for unlawful means conspiracy, the Ontario Superior Court of Justice reached the opposite conclusion less than two months later.

In 2014, the British Columbia Court of Appeal held in *Wakelam v Wyeth Consumer Healthcare/Wyeth Soins de Sante Inc*[9] that the *Competition Act* comprehensively codified the remedies available for a breach of its provisions and, therefore, precluded claims for equitable remedies based solely on a breach of the *Competition Act*. The British Columbia Supreme Court followed *Wakelam* on this point in *Watson v Bank of America Corporation*[10] to deny certification of certain claims, which the plaintiffs appealed. In August 2015, the Court of Appeal rendered its decision.[11]

The plaintiffs in *Watson* alleged that the financial institution defendants breached the *Competition Act* by charging supra-competitive credit card fees to merchants who accept Visa and MasterCard. On appeal, the plaintiffs argued that the lower court erred in relying on *Wakelam* to strike restitutionary claims and claims of unlawful means conspiracy based on contraventions of the *Competition Act*.

The British Columbia Court of Appeal found that *Wakelam* was dispositive on the issue of whether a plaintiff could ground a restitutionary claim for unjust enrichment or waiver of tort on a simple breach of the *Competition Act*. However, the Court decided that *Wakelam* did not directly address the claim for unlawful means conspiracy. It embarked on its own analysis regarding whether a breach of the *Competition Act* could provide the "unlawful means" foundation for a civil claim of conspiracy.

The Court of Appeal found that the legislative regime did not replace the common law action for unlawful means conspiracy, pointing out differences such as the broader remedies available for the tort, that it allows for punitive damages

and the different limitation periods applicable to the tort and the statutory provision. It allowed the plaintiffs' appeal and certified their claim for unlawful means conspiracy based on a breach of the *Competition Act*. In essence, the Court held that the *Competition Act* provided a complete code for restitutionary claims but not for tort claims based on breaches of its provisions.

The Ontario Superior Court reached the opposite conclusion in *Shah v LG Chem, Ltd.*[12] In *Shah*, the plaintiffs alleged that the defendants conspired to fix the price of lithium ion battery cells, bringing statutory, tort and restitutionary claims based on breaches of the *Competition Act*. Although the plaintiffs argued that *Watson* settled the matter, the Superior Court examined the issue from first principles and held that the statutory cause of action precluded the civil conspiracy claim. The British Columbia Court of Appeal's reasoning in *Watson* did not persuade the Ontario Superior Court. In its view, *Watson* asked the wrong questions in determining whether section 36 of the *Competition Act* precluded the tort claim.

The Superior Court found that Parliament intended to create a comprehensive regime that could be enforced exclusively through its statutory cause of action. It also found this was a matter of sound legal policy, believing that Parliament did not want alternative remedies, penalties or limitation periods to disturb its legislative regime.

It remains to be seen how Canadian courts will respond to the conflicting decisions in *Watson* and *Shah*. A ruling from the Supreme Court of Canada or a legislative amendment will ultimately be required to clarify and provide certainty about whether the *Competition Act* provides a complete remedial code or whether tort claims for unlawful conspiracy can be based on a breach of the *Competition Act*. Until then, defendants may have to continue defending such claims because of the conflicting jurisprudence.

# Jurisdiction

### Ontario Courts May Be Hesitant to "Go Global"

In the recent case of *Excalibur Special Opportunities LP v Schwartz Levitsky Feldman LLP*,[13] a majority of the Ontario Divisional Court upheld the Superior Court of Justice's decision denying certification of a global class action.

The proceedings involved the audit of a Chinese hog producer, South China Livestock ("SCL"). The defendant accounting firm, Schwartz Levitsky Feldman LLP ("SLF"), issued a clean audit report, which was distributed to potential investors. SCL went out of business and the investors lost all their money. The only Canadian investment firm that invested in SCL, Excalibur Special Opportunities, commenced a class proceeding against SLF in Ontario, alleging that SLF's audit report misrepresented the financial situation of SCL.

The Divisional Court agreed with the Superior Court that a class action was not the preferable procedure as there were no significant economic barriers that stood in the way of individual investors asserting their claims. The Superior Court noted, and the Divisional Court agreed, that any claims that might be uneconomical to litigate individually could be carried forward by co-plaintiffs without the formality and expense of a certification motion. The size of the representative plaintiff's claim, being $950,000, demonstrated that it needed no class action to make its claim economical.

Both levels of court agreed that joinder of the actions would be more appropriate than a class proceeding. The Divisional Court emphasized that joinder is not simply an alternative to class proceedings; it is the default position when considering whether a class proceeding is the preferable procedure.

Although the Superior Court appropriately refused certification on its determination of the preferable procedure, the Divisional Court also agreed with its findings on the identifiable class criterion. This was not an appropriate case for Ontario to "go global" by certifying a global class. Here, the 57 members of the proposed class were already known, and 55 of the

putative class members had already been contacted about the Ontario proceeding. Twenty percent of the class members had communicated with the plaintiff and were content to have the class action proceed in Ontario. Although SLF's head office was in Toronto and the work was completed in Toronto, the Courts noted that only one plaintiff was resident in Ontario. SCL was also an American corporation and the investments were made in American dollars through a transaction governed by American corporate and securities laws. Both the Divisional and Superior Courts ultimately held there was no substantial connection to Ontario.

The Divisional Court's decision illustrates the limitations imposed on national and global class actions. It was not sufficient for the defendant and the defendant's impugned conduct to have occurred in Ontario because the investment transaction was of an American nature and the majority of the putative class members were not from Ontario.

In *Airia Brands Inc v Air Canada*,[14] another Ontario decision from 2015, the Superior Court also refused to assume jurisdiction over foreign class members. In *Airia Brands*, the plaintiffs commenced a putative class action in Ontario alleging that the defendants had conspired to fix prices of airfreight cargo shipping services. The representative plaintiffs sought to certify a global class of purchasers of these services. The class members would include claimants from over 30 countries.

The defendants sought an order staying the proposed class action because the court lacked jurisdiction over absent foreign claimants. The defendants argued that foreign claimants who were not present in Canada and had neither consented nor submitted to Ontario's jurisdiction could not be bound by an Ontario class action judgment. They suggested that the keystone principles of order and fairness would not be served by applying the common law jurisdiction test in Canada—the "real and substantial connection" test—because, if the court assumed jurisdiction over foreign claimants using that test, the resulting judgment may not be recognized or enforced abroad. This would expose the defendants to future litigation in those jurisdictions and the risk of double recovery by proposed class members.

Justice Leitch held that the court should not assume jurisdiction where conflict of laws principles in foreign jurisdictions prevent the recognition of an Ontario judgment. She accepted that the real and substantial connection test is a radical departure from traditional rules in other jurisdictions and concluded that relevant foreign jurisdictions would not recognize an Ontario judgment by a court with assumed jurisdiction over foreign claimants under the real and substantial connection test. Further, the constitutional limits on the court's jurisdiction prevented the court from assuming jurisdiction over foreign claimants unless they were present in Canada or had consented or submitted to Ontario's jurisdiction. Justice Leitch therefore stayed the claim in relation to these absent foreign claimants.

Justice Leitch's decision may have broad implications where it signals a shift toward greater scrutiny of the jurisdictional basis for class actions with foreign claimants, at least regarding certain foreign jurisdictions. It is notable that the absent foreign claimants in *Airia Brands* were mostly (but not exclusively) in Europe and Asia.

It remains to be seen how this decision—and the wider legal framework it describes—will be applied to specific foreign jurisdictions. It also remains to be seen whether the decision will be successfully appealed or, if not, gain acceptance in the case law. For now, the decision should placate defendants concerned about multiple class action judgments and the attendant risk of multiple recoveries by plaintiffs. When read together, the *Airia Brands* case and the Divisional Court's decision in *Excalibur* indicate that Ontario courts may become more reluctant to certify global class actions going forward.

## Recent Guidance on National Class Actions

### *Parallel Class Actions Constitute an Abuse of Process if a National Class Action is Certified*

In two recent decisions, *Turner v Bell Mobility*[15] and *BCE Inc v Gillis*,[16] the Alberta Court of Appeal and the Nova Scotia Court of Appeal have respectively concluded that it is an abuse of process to file the same class proceeding in multiple jurisdictions.

Both cases were filed by the same firm and concerned the same allegations related to system access fees charged to

cell phone owners. Proposed class actions were filed in nine jurisdictions across Canada. A class action was certified in Saskatchewan and the defendants in Alberta and Nova Scotia sought to strike out or stay the actions in those jurisdictions, arguing these duplicative actions were an abuse of process.

In Alberta, Justice Rooke originally denied the application to permanently stay or strike the action. The proposed class action in Alberta would be an "opt-out" class, meaning that class members would be automatically included in the class with the option to opt-out and pursue their own individual actions. In order to participate in the Saskatchewan action, non-Saskatchewan residents must take the active step of opting in. These findings caused Justice Rooke to conclude that opt-in provisions for non-residents are a significant detriment to the non-resident class members, which in certain circumstances will justify the multiplicity of proceedings.

The Court of Appeal overturned Justice Rooke's ruling and criticized his reasons as "unsound". They did not agree that the opt-in/opt-out distinction would disadvantage Albertan class members, and held that the court in Saskatchewan had determined that Alberta residents would be adequately protected by the Saskatchewan action. The Court of Appeal found *Turner* was an obvious attempt by the defendant to "get around the rulings in the Saskatchewan Courts". The case was an "abuse not just of the courts of Alberta but is also a trammeling of the reputation of class proceedings legislation, which serves important social goals". The Court of Appeal stayed the Alberta action.

The Alberta Court of Appeal followed the decision of the Nova Scotia Court of Appeal in *BCE*, which was released just one month after Justice Rooke's decision. Justice Scanlan, writing for the Nova Scotia Court of Appeal in *BCE*, also disagreed with Justice Rooke's analysis and found it was "not consistent with the weight of jurisprudence and inevitably ignore[d] the choices and actions of representative parties and their counsel". Further, it was held that Justice Rooke's reasoning would "virtually always result in a multiplicity of actions where there is a perceived advantage to the residents of the province in which the motion is brought". The Court of Appeal stayed the action in Nova Scotia.

Both these decisions indicate that the residents of any province do not have an absolute right to bring a class proceeding in their own province. Although an application for leave to appeal has been filed regarding the *BCE* decision, without the conflicting decision of Justice Rooke, the Supreme Court may not be inclined to intervene. Going forward, defendants can have greater confidence that a plaintiff class cannot maintain duplicative proceedings after a national class has been certified.

### *The Supreme Court Will Determine if Judges May Sit on National Class Actions Outside Their Home Province*

In the split decision of *Parsons v Ontario*,[17] the Ontario Court of Appeal held that a judge of Ontario's Superior Court, acting as a supervisory judge under a national class action settlement agreement, can participate in a joint hearing with non-Ontario judges either inside or outside the province. This decision accords with the British Columbia Court of Appeal's ruling on the same issue in *Endean v British Columbia*.[18] Both have been granted leave to appeal to the Supreme Court of Canada. They will be heard on an expedited basis in May 2016.

If the Supreme Court's decision is released in 2016, it will undoubtedly be one of the most significant class action decisions of the year because it will shape the scope of inter-jurisdictional coordination for national class actions in Canada. If the Court of Appeals' decisions are affirmed, it should expedite recovery of national settlement funds and may open the door to other types of inter-jurisdictional motions, which may ultimately reduce litigation costs for plaintiffs and defendants.

# Evidence

This past year, Ontario courts ruled on certain evidentiary matters that clarified the admissibility of expert evidence at certification hearings and determined when privilege applies to documents gathered through a regulatory investigation.

## Admissibility of Expert Evidence

In *Bard* (discussed above), the Ontario Superior Court of Justice denied certification to a proposed class action that involved over 15 different medical products. These products were designed to treat various types of pelvic organ prolapse and stress urinary incontinence by permanently implanting them in the female pelvis. The decision turned partially on the finding that the majority of the plaintiffs' evidence, including most of the plaintiffs' expert affidavit, was inadmissible.

In their attempt to display the alleged safety issues of Bard's pelvic mesh products, the plaintiffs entered into evidence the affidavit of a physician and surgeon who the plaintiffs retained to opine on the products' safety, effectiveness and reliability. Even in light of the Superior Court's acknowledgment that the "some basis in fact" test sets a low evidentiary standard for plaintiffs, it held that much of the plaintiffs' evidence was inadmissible.

The Superior Court found that the plaintiffs' expert evidence was of limited use. In certain paragraphs of his affidavit, the plaintiffs' expert had relied on allegations about Bard's products he found on the webpage of a plaintiff law firm in the U.S. suing Bard, and on information from a Bloomberg news article. Justice Perell gave this information no weight. He further found that since the plaintiffs' expert did not review the documents where Bard provided its warnings and did not attend Bard training sessions, he did not have the factual basis to comment on whether the warnings provided by Bard were adequate.

The defendants also sought to discredit the expert because he gave evidence regarding the industry in general instead of evidence about the defendants specifically. The Superior Court, however, did not find it inappropriate for the expert to give evidence on what Bard knew or ought to have known based on its participation in the medical device industry.

While the plaintiffs' evidence was not entirely excluded, the Superior Court found they did not put enough evidence forward to show there was a common design feature across all of the defendants' product models. The defendants pointed out that the products treated different medical ailments and came in various shapes and sizes. The plaintiffs and their expert could not overcome this hurdle, which proved fatal to the plaintiffs' motion for certification.

Going forward, counsel can look to *Bard* to help determine what evidence a court will accept at a certification motion. Based on this decision, a court should give no weight to allegations found on a partisan website that involves related litigation, and is unlikely to admit expert evidence at the certification stage that relies on news articles. However, the Superior Court saw value in the expert's evidence about the industry in general, so counsel should know that they cannot discredit an expert based solely on the evidence not being specific to the defendant's product.

## Case-by-Case Privilege and Non-Party Production

In the billion dollar class action *Philip Services Corp v Deloitte & Touche*,[19] the plaintiffs alleged that Deloitte negligently prepared the annual statements of Philip Services Corp., a publically traded company. In 2014, the plaintiffs sought an order requiring the Institute of Chartered Accountants of Ontario (the "Institute") to produce its files relating to a disciplinary investigation of the Deloitte partner responsible for the audits. In disciplinary proceedings that followed the investigation, the Institute found the partner guilty of professional misconduct. The Ontario Superior Court of Justice dismissed the application for production, and the plaintiffs appealed that decision arguing it would be unfair to proceed to trial without the documents. The plaintiffs also argued that the motion judge erred by finding that case-by-case privilege protected the documents.

The Ontario Court of Appeal declined to interfere with the motion judge's finding that it was not unfair for the plaintiffs to proceed to trial without the documents. Although this disposed of the plaintiffs' appeal, the Court of Appeal disagreed with the motion judge's finding that the documents were subject to case-by-case privilege and offered its own analysis on the issue.

Case-by-case privilege involves four elements:

1. the communication must originate in confidence it will not be disclosed;
2. the confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties;
3. the relation must be one which in the opinion of the community ought to be sedulously fostered; and
4. the injury that would inure to the relation by disclosing the communications must be greater than the benefit gained for the correct disposal of litigation.

The Court of Appeal held that the lower court erred in cloaking the documents with such privilege, finding that the Institute's policies removed the privilege when it charged the auditor with misconduct. The Institute's practice was to provide the subject of an investigation with disclosure once it laid charges. What made this case unique was that the partner negotiated an agreement with the Institute in circumstances where he would not accept disclosure, the Institute would call only one witness before the disciplinary counsel, and the partner would lead no evidence respecting his guilt or innocence. The Court of Appeal recognized this as a tactical decision, as the material would have been compellable on discovery in the related civil actions against the partner and Deloitte.

Despite this unique agreement, the Court of Appeal held that none of the factors required to invoke case-by-case privilege applied. It concluded that the agreement was reached after the Institute decided to lay charges, and, therefore, the documents did not originate in confidence. Further, since the Institute's policy was to disclose its files once it laid charges, the Court found that confidentiality was not essential to the parties' relationship. Finally, it did not accept the partner's tactical ploy to avoid disclosure as something the community needed to sedulously foster, or that the injury to the partner's relationship with the Institute would be greater than the benefit gained for the correct disposal of the litigation.

Although some regulatory frameworks provide that materials gathered during disciplinary investigations are privileged, an individual subject to a regulatory investigation should not assume that privilege will protect the information they provide the regulator. Counsel should therefore consult the appropriate legislative scheme should they have to challenge a non-party production order.

The Court of Appeal's decision in *Philip* also displays its unwillingness to follow tactical ploys that seek to avoid disclosure. Although it did not interfere with the motion judge's decision to deny the production order, its ruling on case-by-case privilege shows that the courts will pay attention to the normal confidentiality practices of regulators instead of any specific agreement reached between a regulator and one of its members.

# Fees and Settlement

### Increasing Scrutiny of Counsel Fee Arrangements

Over the past two years, we have identified a trend of courts exercising greater scrutiny of class counsel fees awarded in settled proceedings. This trend intensified in 2015 with the Ontario Superior Court of Justice discounting a counsel fee arrangement because of a fee splitting agreement reached between class counsel. The Superior Court's reasons for discounting the costs conflict with the orders of judges managing related proceedings in four other Canadian jurisdictions. These conflicting orders have created uncertainty regarding the scope of section 32 of Ontario's *Class Proceedings Act, 1992*, which governs fee agreements between counsel and representative plaintiffs. The plaintiffs have appealed the discounted order, and the Ontario Court of Appeal is expected to rule on the matter this year. We expect that the Court of Appeal's ruling will address the conflicting orders and provide guidance on fee arrangements covered by section 32.

## Individual Settlements in Certified Class Actions

Despite over 20 years having passed since Ontario's enactment of the *Class Proceedings Act, 1992*, there is limited jurisprudence on post-certification procedures. In a recent decision in *Lundy v Via Rail Canada Inc*,[20] the Ontario Superior Court of Justice addressed a series of novel issues that arise when a defendant attempts to offer individual settlements to class members of a certified class proceeding. This decision will be relevant for future class actions that pass the common issues stage, but remain deadlocked on individual issues.

The Superior Court ultimately held in *Lundy* that:

1. individual settlement offers cannot be communicated to class members until after the close of the common issues stage of the proceeding, and (if there are individual issues) the issuance of an individual issues litigation plan;
2. individual settlement offers can be accepted without court approval, but should not include any allocation for costs or legal fees; and
3. costs for class counsel must be assessed at the end of the common issues stage, to "wipe" the "litigation slate" clean at the commencement of the individual issues stage.

The plaintiff in *Lundy* claimed against the defendant for negligence and breach of contract for a train derailment that occurred in February 2012. The class proceeding was certified on consent, with a class size of 45 passengers (after opt-outs). The defendant admitted most of the proposed common issues, leaving mainly individual issues of causation and damages to be determined. After negotiations with class counsel for a class-wide settlement failed, the defendant formulated individual settlement offers. However, class counsel refused to distribute these offers to the class members, because there had not yet been any judgment on the common issues.

The Superior Court held that before individual settlement offers can be distributed to class members, the individual issues stage of the litigation must have been formally commenced. Specifically, section 25 of the *Class Proceedings Act, 1992* requires the court to carry out a series of steps once the common issues have been determined, including:

1. defining the remaining individual issues;
2. deciding who will determine the individual issues (e.g., a judge or a referee);
3. giving directions for the procedure to resolve the individual issues; and
4. setting a time limit for individual claims.

While class-wide settlements require court approval, the Superior Court held this was unnecessary for individual settlements and would be a "waste of the court's resources". The Superior Court's supervision of class-wide settlements protects unrepresented class members from being prejudiced by the settlement, but this is not a concern where the class member personally accepts the settlement.

A related issue was whether contingency fees should be allocated within the individual settlement offer. While these are again subject to scrutiny within a class-wide settlement, the Superior Court held that fee allocation in an individual settlement is "not the defendant's concern". Including a fee allocation that might differ from the class member's retainer agreement would "just stir up trouble".

It further held that class counsel are entitled to costs for "successfully stewarding the class proceeding" through the common issues stage, irrespective of potential failure at the individual issues stage. It held that the slate should be wiped clean before the individual issues stage begins, as the class members will not necessarily be represented by the same counsel.

In *Lundy*, plaintiffs' counsel sought over $632,000 in costs for the common issues trial, after having agreed to costs of only $16,950 for the certification motion. Addressing the possibility that class counsel might ultimately receive more than the class members themselves in costs and contingency fees, the Superior Court observed that "from time to time the optics of a particular class action are not pretty but quite ugly". It deferred awarding costs to a later date and eventually ordered costs of $214,624.41, emphasizing that costs should only be awarded for work done at the particular stage of the proceeding. The plaintiffs' request for medical and psychological assessments was denied as it was found these disbursements should be reserved for the individual issues stage of the class action.

The Superior Court's advocacy for a clear line between the different stages of the proceedings for costs issues is helpful for parties that reach the late stages of a class action. This decision limits a party's claims for fees and disbursements to the costs incurred during a particular stage, which can provide defence counsel with arguments to defer certain disbursements. *Lundy* also reinforces that individual plaintiffs face cost consequences at the individual issues stage of the proceeding. Defendants should therefore make Rule 49 offers once the proceedings reach this stage, as these offers can assist in recovering or reducing costs that might otherwise be payable.

*Lundy* also shows that the courts will allow parties a great deal of flexibility in structuring the individual phase of the class action. The decision sets out a general framework that intends to give parties the tools to resolve issues that arise at the individual issues phase of class action litigation. This adds welcomed clarity, which should help guide parties who reach this phase.

Despite this framework, the parties in *Lundy* could not agree on a litigation plan. In November, they moved to approve their individual issues plans, and the Superior Court's reasons reveal that contentious issues remained despite the advanced stage of the class action.[21] Going forward, parties that reach this stage may look to *Lundy* for guidance, but should expect to face disagreements on how best to implement a litigation plan to resolve individual issues.

1 2015 SCC 18, [2015] 2 SCR 106.
2 2015 SCC 60, 391 DLR (4th) 567.
3 2015 ONSC 3686, 127 OR (3d) 199.
4 A divided Supreme Court held that section 28 of the *Class Proceedings Act, 1992* only operates to suspend the three-year limitation period once leave has been granted. While this issue was significant for the parties, it has largely been rendered moot given that relevant securities legislation has been amended to provide that the limitation period is suspended on the date a notice of motion for leave to commence the action is filed with the court.
5 2015 BCCA 26, 381 DLR (4th) 575.
6 2015 ABQB 139, 65 CPC (7th) 382.
7 2015 ONSC 2470, 19 CCLT (4th) 47.
8 2015 ONSC 7950, 2015 CarswellOnt 19420.
9 2014 BCCA 36, [2014] 5 WWR 7.
10 2014 BCSC 532, 242 ACWS (3d) 775.
11 *Watson v Bank of America Corporation*, 2015 BCCA 362, 389 DLR (4th) 577.
12 2015 ONSC 6148, 390 DLR (4th) 87.
13 2015 ONSC 1634, 386 DLR (4th) 313.
14 2015 ONSC 5332, 126 OR (3d) 756.
15 2016 ABCA 21, 2016 CarswellAlta 94.
16 2015 NSCA 32, 358 NSR (2d) 39.
17 2015 ONCA 158, 125 OR (3d) 168.
18 2014 BCCA 61, [2014] 5 WWR 481.
19 2015 ONCA 60, 330 OAC 148.
20 2015 ONSC 1879, 250 ACWS (3d) 563.
21 2015 ONSC 7063, 260 ACWS (3d) 451.

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