

UPDATE ON CLASS ACTIONS: SUBTLE SHIFTS OR THE SAME OLD ISSUES?

Canadian defendants often face parallel proceedings in more than one province, producing uncertainty for both plaintiffs and defendants. While class actions continue to thrive, Canadian courts remain reluctant to provide guidance on some of the more challenging issues

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Introduction

New and interesting issues dealt with in notable Canadian class actions of the past year included:

- overlapping multi-jurisdictional classes;
- certification in competition class actions; and
- the extent of the courts' supervisory jurisdiction in class proceedings and evidentiary requirements on certification.

Despite the potential significance of rulings on these important issues, however, the incremental approach traditionally adopted by Canadian courts ensured that much remained unchanged in the Canadian class-action landscape.

Overlapping Multi-jurisdictional Class Actions

Because Canada has no national class-action legislation, defendants are often faced with parallel proceedings based on the same claims in two or

more provinces (nine provinces – all except Prince Edward Island – now have legislation permitting class actions). Such claims frequently “overlap” by purporting to bind class members outside the provinces in which they originate. This produces uncertainty, for plaintiffs and defendants alike, with respect to settlement and other important issues. Several developments occurred in this area over the past year.

Canada Post Corp. v. Lépine

In *Canada Post Corp. v. Lépine*, 2009 SCC 16, the Supreme Court of Canada was expected to address the overlapping classes issue. Many hoped that the long-awaited ruling would provide guidance to the provincial courts for determining the appropriate court in which a class action should continue when parallel proceedings have been launched in different provinces.

Lépine arose when Canada Post cancelled its lifetime Internet service. Actions were commenced in Ontario, BC and Québec. While Ontario and BC

plaintiffs attempted to settle, the Québec plaintiff opposed the settlement offer. Nevertheless, when the Ontario action was certified by the Ontario court (for the purpose of approving the settlement) it included a class definition that encompassed Québec residents. The definition was accepted by the Ontario court despite the parallel Québec proceeding and the objections of Québec plaintiffs' counsel. The Québec court also declined Canada Post's request to stay the Québec proceedings: the day after the Ontario settlement was approved, in fact, the Québec Superior Court authorized the Québec class action. Efforts to have the Ontario settlement recognized and enforced in Québec predictably failed, creating what the Supreme Court termed "an unavoidable legal conflict."

The Supreme Court of Canada upheld the decision of the Québec court, refusing to enforce the Ontario settlement in Québec. While agreeing that the Ontario court had jurisdiction to approve a settlement that included residents of Québec, the Supreme Court also found that the inadequacy of the notice provided in Québec (namely the lack of explanation to Québec class members of the effect the Ontario judgment would have on their rights in respect of the action commenced in Québec) offended the "fundamental principles of procedure." For this reason the Ontario settlement could not be enforced.

The Supreme Court also considered whether the Québec courts could decline to enforce the Ontario judgment on the ground that an action was already pending in Québec, holding that because in this case the Québec Superior Court was seized of the dispute before the Ontario Superior Court was, the Québec court had priority and was therefore precluded from recognizing and enforcing the judgment of the Ontario Superior Court.

As this suggests, the Supreme Court approached the issue of national classes cautiously, emphasizing the duty to ensure that the process considers the interests of all class members and that clear information is provided to the class. Acknowledging that the multiplicity of superior courts in a federal state "may sometimes cause friction between courts in different provinces," the court expressed the hope that the provincial legislatures would work to provide more effective means of managing these conflicts in a "spirit of mutual comity" (2009 SCC 16, at para. 57).

Saskatchewan Court of Appeal Takes an Equally Cautious Approach

The Saskatchewan Court of Appeal's ruling in

Merck Frosst Canada Ltd. v. Wuttunee, 2009 SKCA 43, was highly anticipated because it seemed likely to include useful guidance on the overlapping proceedings issue, the problematic nature of which is well illustrated by a review of the course of the litigation.

Initially, the Saskatchewan Court of Queen's Bench certified a class proceeding against Merck (relating to the drug Vioxx, which had been voluntarily withdrawn after studies suggested some serious side effects). The certified class included all Canadians (outside Québec) who had purchased or taken Vioxx and who fell within certain enumerated subclasses. Meanwhile, another similar action, excluding Saskatchewan residents, had been proposed in Ontario. The Court of Queen's Bench denied a motion by the Ontario counsel to stay the Saskatchewan proceeding (holding that the Saskatchewan action was framed on broader grounds and had already been certified). The Saskatchewan proceeding continued as a multi-jurisdictional class action that included residents of Ontario on an opt-out basis. Merck's subsequent motion to stay the Ontario action was denied by Justice Maurice Cullity, who proceeded to certify the Ontario action as a national class proceeding, except residents of Québec and Saskatchewan. Merck's appeal of that ruling was unsuccessful.

As this case came before the Saskatchewan Court of Appeal, therefore, all Canadians with Vioxx-related claims (other than residents of Québec and Saskatchewan) could have been members of two overlapping class actions against Merck. It was therefore anticipated that the court's ruling would provide some guidance on the multiplicity of proceedings issue. Like the Supreme Court in *Lépine*, the court acknowledged "the potential for chaos and confusion" (*Merck Frosst Canada Ltd. v. Wuttunee*, 2009 SKCA 43 at para. 16) but ultimately did not decide whether the Court of Queen's Bench had been correct to allow the action to proceed as a multi-jurisdictional class action in light of the parallel proceedings in Ontario. Instead, the Court of Appeal decided the matter on a narrower ground, avoiding the multiplicity of proceedings issue altogether by determining that the certification order should be quashed because the test for certification had not been met.

National Class-action Legislation

Advocates from both plaintiff and defendant class-action Bars would likely agree that there is some merit to having national classes as, at a minimum, they prevent inconsistent findings and duplicative proceedings from province to province. Yet the issue

that seems most pertinent to addressing the issue of national classes is how to decide which jurisdiction is best seized of a given matter. Some suggest that the provincial courts should apply the “real and substantial connection” test applied in jurisdictional cases, while others prefer a “first to file” approach.

The Uniform Law Conference of Canada (ULCC) has advocated that, when dealing with certification issues, courts consider the issues of forum and jurisdiction to determine the most appropriate way for the class action to proceed. In the event multiple national classes are certified, the ULCC recommends the creation of a committee of judges from each province who would be charged with determining which jurisdiction should have carriage of the matter. In light of the very limited guidance given by the Supreme Court in *Lépine*, it would appear that unless the provincial legislatures decide to pursue this idea the courts are unlikely to adopt it independently. As such, it seems that uncertainty on the multi-jurisdictional national class issue will persist until legislators decide to act.

Competition Class Actions

Few competition class actions had reached the certification motion stage until this year, undoubtedly because of the 2003 Court of Appeal for Ontario decision in *Chadha v. Bayer Inc.* (2003), O.J. No. 27 (C.A.), holding that the fact of harm in indirect purchaser competition cases is a part of liability analysis and distinct from damages. *Chadha* made it extremely difficult to prove harm on a class-wide basis where the proposed plaintiff class was substantially composed of indirect purchasers – those who purchased goods from distributors rather than directly from the manufacturer – and was therefore at least one step removed from any direct causal harm. However, the Divisional Court’s recent decision to overturn Justice Paul Perell’s denial of certification in *2038724 Ontario Ltd. v. Quizno’s Canada Restaurant Corp.* may provide new impetus for competition class actions.

Establishing Proof of Fact of Harm: Lowering the Bar in Quizno’s

In *Quizno’s*, the plaintiffs sought to represent a class of franchisees for claims of civil conspiracy and price fixing against the franchisor. The defendant, Gordon Food Service, was alleged to have entered into agreements with unnamed food manufacturers to artificially inflate the price paid for food and other supplies.

At the certification motion, Justice Perell found

that the plaintiffs had not established injury from the alleged price maintenance agreements, such injury being an element of liability in both the civil conspiracy claim and the claims under the *Competition Act*. Nor did he accept that the plaintiffs’ expert’s methodology was a reliable way to attempt to determine harm on a class-wide basis. Consequently, Justice Perell held that absent proof of harm on a class-wide basis, what would remain was an “avalanche that buries the proposed common issues with an absence of commonality and a proliferation of individual issues” (*2038724 Ontario Ltd. v. Quizno’s Canada Restaurant Corp.* (2008), 89 O.R. (3d) 252 (S.C.J.)). In his opinion, the plaintiffs had failed to satisfy the common issues and preferable procedure aspects of the certification

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test. Their motion was accordingly denied.

In April 2009, the Ontario Divisional Court overturned this decision, holding by a 2–1 majority that the court below had erred in its consideration of the proposed common issues, of the expert evidence and of the issue of preferable procedure. With respect to the common issues, the majority held that because the claims were based on the same contract, pricing, structure and distribution system, there could be a finding of liability on the basis of systemic actions by the defendants. Similarly, the majority held that the issues of whether there had been breaches of the *Competition Act* and the alleged unlawful contracts were common issues. On the issue of the expert evidence,

the majority stated that “it is setting the bar too high to require that evidence be led to support the factual foundation of the proposed methodology” (*2038724 Ontario Ltd. v. Quizno’s Canada Restaurant Corp.* (2009), 70 C.P.C. (6th) 27 at para. 104 (Div. Ct.)).

As Justice Katherine Swinton noted in dissent, however, the lack of a reliable methodology for assessing damages and its consequent inability to determine the existence of harm on a class-wide basis was indeed the basis upon which courts had previously refused to certify price maintenance, price fixing and civil conspiracy claims. While the majority decision may therefore arguably alter the standard previously adhered to by the courts by certifying competition class proceeding even where there is no demonstrative proof that fact of harm can be proven on a class-wide basis, it may just as easily be said that this case is distinguishable and unique, turning as it did on the existence of identical contracts. Not surprisingly, leave to appeal of the Divisional Court ruling has been sought. As of the date of writing no decision on leave has been made.

Challenging Conspiracy: Pro-Sys Appealed

A second significant competition class-action ruling, currently under appeal, is the 2008 BC Supreme Court decision in *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, [2008] B.C.W.L.D. 5650 (S.C.). In that case, certification was denied in a proposed class proceeding against the manufacturers of silicon memory chips known as DRAM (dynamic random access memory). The plaintiff alleged that the defendant manufacturers of DRAM engaged in an international conspiracy to fix the price of DRAM and that purchasers of DRAM and products containing DRAM suffered harm by way of overcharges for the DRAM contained in products purchased by the class members. This case is notable as the first in which the courts considered and denied the certification of a class action in Canada arising from a multi-jurisdictional competition case and also the first contested certification decision in a class action in British Columbia involving allegations of competition law violations.

As in *Quizno’s*, a major issue considered by the court was whether the fact of harm could be calculated on a class-wide basis. The defendants argued that the plaintiff had failed to provide a workable method to demonstrate that there was an overcharge by reason of the alleged price-fixing agreement, and whether and in what amount any overcharge would have passed along the various chains of distribution. Proving harm was particularly complicated in this

case, as the proposed class included both direct and indirect purchasers of DRAM, amounting to millions of BC residents, and because the range of products containing DRAM was so large, there were many manufacturers and numerous chains of distribution by which the allegedly price-fixed DRAM could have reached BC residents.

Justice David Masuhara of the BC Supreme Court denied certification, finding that the absence of a class-wide means of proving liability to the class members made the proposed class action unmanageable, that resolution of common issues (such as the existence of a conspiracy) would not move the litigation forward in a meaningful way, and that the individualized inquiries required to establish harm passed on to the consumer would not promote access to justice or judicial economy. The court held that there was no workable class-wide method for determining whether any overcharge was passed through to the class members. The plaintiff’s appeal, argued before the BC Court of Appeal in February 2009, has not yet been decided. When a decision is released, it – along with the *Quizno’s* decision – will have a strong impact on the future of competition class actions in Canada.

Amendments to the Competition Act

Recent amendments to the criminal conspiracy provision of the *Competition Act* (R.S.C., 1985, c. C-34, s. 45) could affect the Court of Appeal’s decision in *Pro-Sys* and – together with the ruling in *Quizno’s* with respect to proof of harm on a class-wide basis – may produce an increase in competition class actions. As the “undue prevention or lessening of competition” previously required by the *Competition Act* need no longer be established under s. 45, class-action plaintiffs proposing an action based on the criminal provisions of the *Competition Act* will now only have to prove that an agreement was entered into between competitors or potential competitors and that the private parties suffered a resulting loss.

Other Significant Jurisprudence in the Last Year

Supervisory Role of the Courts: *Fantl v. Transamerica*

The Court of Appeal for Ontario’s recent ruling in *Fantl v. Transamerica Life Canada* may prove influential. In his reasons, Chief Justice Warren Winkler discussed the supervisory role of the courts in terms that are broadly applicable in the class-action context and not restricted to the carriage issues that were the focus of *Fantl*.

Fantl was a carriage motion arising from the dissolution of the firm Roy Elliott Kim O'Connor LLP (REKO). Joseph Fantl, the representative plaintiff, opted to proceed with Roy Elliott O'Connor LLP (REO), one of the two firms that resulted from REKO's break-up, because one of REO's principals was a personal friend. He took this decision even though his lead counsel at REKO had been Won Kim, who had formed a second successor firm, Kim Orr Barristers P.C. (KO), rather than joining REO. Kim sought to have Fantl's choice overturned on the basis that his past involvement with the action and his past positive relationship with the defendant solicitors meant that it was in the best interest of the class members that KO have carriage of the proceeding. He argued that if Fantl did not agree to appoint KO as solicitors in the action, he should be replaced as representative plaintiff with another class member.

In addressing the issues on the motion, Justice Perell held that where the court is asked to interfere with the choice of counsel of one party in the context of a class proceeding, the test is not what is in the best interests of the class or the proposed class, but rather, the test is one of adequacy of representation for the class. In his view, Fantl had satisfied his duty of representation by appointing adequate and competent counsel in Kim's place. Kim was then granted leave to appeal and simultaneously brought another action against Transamerica, with Kang as the proposed representative plaintiff, that overlapped significantly with the Fantl action. At the time of the appeal, Fantl's action had progressed to the point of settlement.

In dismissing the appeal and staying the Kang action, Chief Justice Winkler (for the Court of Appeal) stated:

Unless this inquiry [the choice of counsel] reveals something unsatisfactory to the court, it ought not to interfere with the choice of counsel made by the plaintiff. The court is not a substitute decision-maker for the plaintiff in the litigation. Accordingly, any intervention based on its supervisory jurisdiction must be limited to situations where there is cogent evidence that steps taken may have an adverse impact on the absent class members. (*Fantl v. Transamerica Canada Life*, 2009 CarswellOnt 2383, at para. 50 (C.A.))

The Court of Appeal added that Kim sought to elevate the court's supervisory jurisdiction in class proceedings to one of "mandatory intervention" (at para. 44). Chief Justice Winkler found that while the court need not be called on to approve every decision taken on behalf of the class, the case management

judge ought to be informed of decisions such as a change in solicitor. Where there is a dispute, the court is well within its jurisdiction to review the decision.

Chief Justice Winkler set out the test for determining the supervisory role of the court in class proceedings and noted that unless this inquiry reveals something unsatisfactory to the court, it ought not to interfere with the choice of counsel made by the plaintiff. The Court of Appeal affirmed that despite the unique supervisory role of the court in class actions, the court is not a substitute decision-maker for the plaintiff. In this instance there was no evidence that Fantl's choice of counsel was made for an improper purpose or that it would prejudice the class. The Court of Appeal upheld the motions judge's decision and dismissed the appeal, staying the Kang action as an "abuse of process."

Interestingly, in the Court of Appeal's discussion of the supervisory jurisdiction of the courts, the unique relationship between class members and class counsel is acknowledged. In responding to Kim's position that if plaintiffs are permitted to switch counsel at any time it will act as a strong disincentive to class counsel to take on cases and put in a large amount of time and effort, Chief Justice Winkler agreed that class proceedings are entrepreneurial in nature, however stated that this is not a goal of class proceedings:

Were it otherwise, one of the criticisms of the CPA, that it promulgates plaintiff-less litigation benefiting only the lawyers involved, would be well founded. Such is not the case. [...] The CPA does not, nor was it ever intended to, provide lawyers with a vested interest in the subject matter of the lawsuit entitling them to override the choices of the representative plaintiff in the litigation, including the choice of counsel (at paras. 66-67) .

Ultimately, the Court of Appeal reaffirmed its supervisory role of the courts with respect to the absent class members while taking a restrained view of when they should interfere with representative plaintiffs' decisions (i.e. where prejudice might otherwise result).

Evidentiary Requirements on Certification — Lambert v. Guidant Corporation

In *Lambert v. Guidant Corp.*, [2009] O.J. No. 1910 (S.C.J.), Justice Cullity provided further guidance with respect to evidentiary requirements on certification. (In *Risorto et al. v. State Farm Mutual Automobile Insurance Co.*, Justice Cullity carefully reviewed the evidentiary requirements on certification and refused

to certify the proceeding. However, following the dismissal of certification by Justice Cullity, he permitted additional evidence to be filed. That ruling was subsequently overturned on appeal.)

Lambert is a product liability class action related to the allegedly defective pacemakers manufactured and sold by the defendants. Given *Lambert's* similarity to the defibrillator cases *Peter v. Medtronic* and *LeFrancois v. Guidant*, which were certified, it was expected that *Lambert* would also be certified — as in fact it was. Nevertheless, because the defendants put forward five expert affidavits for the court's consideration, Justice Cullity devoted a significant portion of his discussion to the evidentiary requirements on certification, reaffirming the basic principle that motions for certification are procedural in nature and not intended to provide for an "exhaustive inquiry into factual questions that would fall to be determined at a trial when the merits of the claims of class members are at issue" (at para. 82). The lack of discovery on certification was among the reasons he gave.

Justice Cullity held, therefore, that it was unreasonable to require the plaintiffs to "embark on the inquiries and investigations necessary to test the methodology and grounds on which the defendants' numerous and unqualified assertions of fact were

based" (at para. 64). However, he also left the evidentiary door open, finding that evidence bearing on the merits can also be relevant to determining the litigation's manageability. This reflects the difficulty most defence counsel face in defending certification motions and grappling with whether the evidence is sufficient to dispute the preferability of certification without going into the merits of the decision. Justice Cullity appears to have attempted to balance the statutory intent of certification motions with the practical reality of what they have become.

Conclusion

While we have seen incremental developments in certain areas as described above, Canadian courts continue to be somewhat reluctant to provide guidance on some of the more challenging issues, particularly those surrounding multi-jurisdictional overlapping classes. Similarly, while there appears to be a new found toe-hold for indirect purchaser claims in competition class actions, until appellate courts weigh in on the subject, what is required in respect of proof of harm in these cases will continue to be uncertain. One thing that certainly hasn't changed, and is unlikely to change, is that class actions continue to flourish.

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