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Canadian Class Action Update 2010-2011: Mixed Messages From Canada's Courts[1]

In their formative years, Canadian class actions produced little news to defendants' liking, as case after case was certified for class treatment. Over the past three years, the environment has manifested change — but not all in the same direction. Some tribunals have become more circumspect about the wisdom and efficacy of aggregate litigation in the products liability and toxic tort contexts. At the same time, however, other elements of the Canadian judiciary have issued groundbreaking precedents that open the door to more class litigation. Despite pockets of positive developments, the overarching trend is an increased volume of class actions being filed in Canadian courts and a broadening of the subject matter of those actions.

Below, we summarize several recent developments in Canadian class action law and consider what they might mean for the future of class action practice in Canada:

A. Class-Certification Standards: More Rigor In Some Areas, Less In Others

Historically, Canadian provincial courts have applied very low thresholds for class certification. Several recent decisions, however, suggest that courts are applying more stringent certification standards to product liability cases, especially pharmaceutical tort cases, toxic tort cases and competition cases. At the same time, however, the hurdles in securities fraud cases are becoming more flexible.

1. Pharmaceutical Torts

In 2007, an Ontario court handed down *Boulanger v. Johnson & Johnson*,[2] a case addressing safety-related allegations regarding the drug Propulsid. In that case, the court certified a class to determine generic causation, even though proof about individual injuries still would be required. The court viewed generic causation as an appropriate common issue for class certification because it would "significantly move the litigation forward."[3] Not long thereafter, a Saskatchewan court handed down *Wuttunee v. Merck Frosst Canada Ltd.*,[4] in which it certified a class based on supposed common issues, including "whether Vioxx can cause or exacerbate cardiovascular or gastrointestinal conditions."[5] Merck had argued that generic causation was not a common issue, but the court overruled the objection, relying in part on the *Boulanger* decision.

Critics argued that by accepting the question whether Vioxx *could* cause either cardiovascular *or* gastrointestinal conditions as a common issue, the *Wuttunee* court effectively had negated any class certification commonality requirement. In 2009, those critics were heard, and the Saskatchewan Court of Appeal reversed the class

1 The authors are not admitted to practice in Canada. This article is intended to provide a general overview of the subject matter.

2 [2007] 40 CPC (6th) 170.

3 *Id.* ¶ 53.

4 [2008] SKQB 78 (Sask. Q.B.).

5 *Id.* ¶ 64.

certification ruling.[6] In rejecting certification, the court held 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."[7] The *Wuttunee* decision recently was followed in the 2010 case *Bear v. Merck Frosst Canada & Co.*,[8] where plaintiffs brought similar Vioxx claims. The Saskatchewan trial court granted the defendant's motion to strike those parts of plaintiffs' statements of claim describing it as a class action, but allowed them to proceed as individual actions on the basis that "[t]he Court of Appeal has ruled that attempts to certify such claims in a class action are finished. Any attempt to certify such actions stands no chance of success."[9]

The Quebec Superior Court followed the *Wuttunee* trend in August 2009, rejecting a similar proposed class — a rare occurrence in that court. In the Quebec case, *Goyette v. GlaxoSmithKline Inc.*,[10] the plaintiff brought a class action on behalf of persons who allegedly suffered withdrawal symptoms after discontinuing use of the drug Paxil. The court rejected the class on two primary grounds. First, the court held that a class proceeding would not conserve judicial resources because the court would have to separately determine what symptoms each individual experienced and what warnings each individual received. Second, the court found that the merits of the plaintiffs' claims simply were too weak to justify the judicial resources necessary for a class trial. This was so because the warning label on the named plaintiff's Paxil explicitly warned of the withdrawal symptoms she later suffered. For similar reasons, the court also found that the named plaintiff was not an adequate class representative.

While *Wuttunee* and its progeny suggest that Canadian courts are more rigorously scrutinizing pharmaceutical class actions, *Mignacca v. Merck Frosst Canada Ltd.*,[11] a Vioxx case in Ontario, is cause for concern. The *Mignacca* class was defined as "all persons in Canada ... who were prescribed and ingested Vioxx," with no further subclasses.[12] The trial judge certified the case despite Merck's arguments that it was vastly overbroad and unmanageable, and a second judge denied leave to appeal (per Ontario procedure). After the *Wuttunee* decision, Merck asked the second judge to reconsider his denial of leave to appeal the certification order on the basis that the decision was in conflict with *Wuttunee*, but the judge denied leave again. Virtually ignoring the obvious similarities between the two cases, the court essentially held that the *Mignacca* class was preferable to *Wuttunee* because the *Wuttunee* plaintiffs' efforts to create subclasses for various categories of allegedly injured individuals made the class action too complicated.[13] Notably, the court brushed aside as mere "dicta" the *Wuttunee* court's comment that *Mignacca*'s broader class definition was problematic as well, because it "includes many members who were not injured as a result of ingesting Vioxx."[14] Thus, *Mignacca* sends a troubling message to plaintiffs that overbroad classes are welcome in Ontario courts — and arguably more welcome than class definitions that attempt to address differences among class members with subclassing.

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6 [2009] SKCA 43 (Sask. C.A.).

7 *Id.* ¶ 129.

8 2010 SKQB 284 (Sask. Q.B.).

9 *Id.* ¶¶ 45, 58.

10 [2009] QCCS 3745 (Que. Sup. Ct.).

11 [2009] O.J. No. 5233 (Ont. Sup. Ct.).

12 *Id.* ¶¶ 20, 22.

13 *Id.* ¶ 25.

14 *Id.* ¶ 27.

More recently, the Ontario Superior Court also certified a class in *Schick v. Boehringer Ingelheim (Canada) Ltd.*,[15] against the pharmaceutical manufacturer of a drug used to treat Parkinson's disease. The court found that certification was proper because the general causation question — *i.e.*, whether the drug Mirapex caused Impulse Control Disorders — was a common issue.[16] The court expressed the opinion that a "class action is well-suited to the resolution of products liability cases" and listed a number of drug cases that previously has been certified as class actions in Canadian courts.[17] The court narrowed the class definition to include only patients who had taken the drug for treatment of Parkinson's disease and exclude patients who took it to treat Restless Leg Syndrome (RLS) on the basis that there was no evidence before the court to establish a relationship between the use of Mirapex for the treatment of RLS and the injury alleged.[18] Importantly, the *Schick* court noted that the defendant had "acknowledged that a class action is the preferable procedure for the resolution of the common issues agreed."[19] Thus, it appears for whatever reason (perhaps recognizing that certification was inevitable) that the defendant did not vigorously oppose certification.

It remains to be seen whether courts outside Ontario will adopt the liberal attitude toward pharmaceutical class actions reflected in *Mignacca* and *Schick* — and whether those two rulings augur the development of Ontario as a magnet for pharmaceutical class actions.

2. Toxic Torts

In March 2010, the Supreme Court of Newfoundland and Labrador Court of Appeal extended the Saskatchewan Court of Appeal's more stringent class certification standards set forth in *Wuttunee* to the toxic tort arena in *Dow Chemical Co. v. Ring*.[20] In *Dow*, the Court of Appeal reversed the trial court's certification of a class of residents of a military base who claimed that the government's use of herbicides at the base caused lymphoma or contributed to the risk of lymphoma. The appellate court based its ruling on three grounds.

First, the Court of Appeal held that the class was not "identifiable" because the class definition was overbroad. The trial court had defined the class as all residents of the military base "who claim they were exposed to dangerous levels of [herbicides] while on the Base."[21] On this point, the appellate court engaged in a two-step analysis.[22] As an initial matter, the court held defining the class as all residents of the base would be improper because an individual's mere residency at the base would not have a causal connection with any lymphoma. At the same time, however, the trial court's purported limiter — residents "who claim they were exposed to dangerous levels" — did not meaningfully limit the class because it did "not address the problem of eliminat[ing] persons who have no claim." In the court's words, "There [were] no objective criteria to enable one to assess whether any one of the approximately 400,000 people [who have resided at the base] is properly part of the class."[23] For this reason, the class did not satisfy the "identifiable-class" certification requirement.

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15 [2011] O.J. No. 1381 (Ont. Sup. Ct.).

16 *Id.* ¶¶ 46-47.

17 *Id.* ¶ 74.

18 *Id.* ¶¶ 33-35.

19 *Id.* ¶ 81.

20 [2010] NCLA 20 (Nfld.).

21 *See id.* ¶ 72.

22 *Id.* ¶¶ 60-77.

23 *Id.* ¶ 73.

Second, following *Wuttunee*, the Court of Appeal held that the class did not present common issues that could be resolved on an aggregate basis and then applied fairly to all the class members. As the *Dow* appellants noted, the case involved "at least 12 chemicals sprayed and 40 distinct lymphomas, … [with] spraying having taken place over a period in excess of 50 years."[24] Accordingly, the appellate court held, "what is framed as one question seeking one answer for all members of the class is in fact several questions requiring several answers which are dependent upon time of exposure of the individual members of the class."[25] For example, the trial court's first common issue had included the question: "Did … parts of the Base, after spraying, constitute an unusual danger of causing a malignant lymphoma and, if so, when?"[26] As the appellate court observed, this one common issue was actually four discrete questions: (i) what parts of the base were sprayed, (ii) what herbicides were sprayed, and in which areas, and over what period of time, (iii) can any of those herbicides contribute to causing lymphoma and (iv) what is the smallest amount of herbicide that can cause lymphoma. Thus, "[u]nless the relationship between various chemicals and all types of lymphomas is the same, the determination will have to be made for each type of lymphoma."[27] For this reason, the class's common issues were not common at all, and class certification was improper.

Finally, the Court of Appeal held that a class proceeding was not the "preferred procedure" because, as noted above, "the common issues [were] insignificant when compared to the large number of individual inquiries which would be needed to resolve this claim."[28] Like *Wuttunee*, *Dow* suggests that, at least outside Ontario, Canada's appellate courts may be moving toward a more stringent application of class certification requirements.

3. Securities Fraud

During 2009, the legal community gave considerable attention to *Silver v. IMAX Corp.*, the first case brought under the 2005 Ontario Securities Act's regime creating liability for continuing disclosure misrepresentations on the secondary securities market. In *IMAX*, the plaintiff-shareholders asserted two principal claims: (i) common law misrepresentation and (ii) statutory misrepresentation under the new Ontario Securities Act. These claims raised two issues, which court watchers followed closely: First, would the *IMAX* court certify the class on the common law claim, as well as the statutory claim? The answer to this question would have far-reaching ramifications, because the Ontario Securities Act caps damages at 5 percent of the defendant's market capitalization, but damages for the common law claim are not capped. Second, would the *IMAX* court grant the plaintiffs leave to proceed on their statutory claims, as required under the Ontario Securities Act? Because *IMAX* was the first decision to consider the statute's leave provisions, the legal community believed the answer to this question would set important precedent.

The Superior Court of Justice issued an opinion on each of these issues. On the class certification issue, the *IMAX* court departed significantly from existing Canadian law on reliance and loss causation. Until *IMAX*, Canadian courts tended to view common law misrepresentation claims as ill-suited to class proceedings, because proof that each class member relied on the alleged misrepresentation is

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24 *Id.* ¶ 85.

25 *Id.* ¶ 94.

26 *Id.* ¶ 79.

27 *Id.* ¶¶ 83-88.

28 *Id.* ¶ 107.

necessarily individualized.[29] In *Carom v. Bre-X Minerals Ltd.*,[30] for example, a group of shareholders had sought to certify a class action against a mining company that had allegedly lied about the discovery of a gold deposit in Borneo. The court certified a class, but held that it would include only shareholders who could demonstrate they had relied on a specific oral or written misrepresentation by the company. Notably, the court declined to adopt a U.S.-style "fraud-on-the-market" theory for secondary-market participants. In other words, shareholders who did not rely on a specific misrepresentation by the company when buying their shares were not included in the class.

In *IMAX*, the court certified a class asserting common law misrepresentation claims even though the plaintiffs only pleaded reliance by the representative plaintiffs themselves.[31] At the class certification stage, the court held plaintiffs need only show that a corporate document or statement contained a misrepresentation — not that each shareholder member of the class relied upon it. Accordingly, even though the plaintiffs did not plead that each class member relied on a misstatement by the company, the common law misrepresentation claim could proceed.

In addition, the *IMAX* court held that the class was proper even though most of the class members would be foreign. The court found a "real and substantial connection" between the plaintiffs' claims and Ontario — IMAX is an Ontario-based Canadian corporation traded on the Toronto stock exchange, and the alleged misrepresentations occurred in Ontario, as well as in New York.[32] The court also held that a class proceeding was appropriate even though some plaintiffs would present individual issues that would have to be decided after the court determined the common class issues.[33]

The *IMAX* court also held that plaintiffs could proceed with their statutory claim. The Ontario Securities Act requires plaintiffs seeking to pursue statutory claims for secondary-market misrepresentation to obtain "leave" to pursue the claims by clearing two hurdles — they must demonstrate that: (i) they brought the action in good faith and (ii) there is a "reasonable possibility" that they will prevail at a trial.[34] This leave requirement is unique to Canadian securities class actions.[35] The *IMAX* case presented the first test of these provisions. The court held that under the clear language of the Act, imposing "a 'high' or 'substantial' onus requirement for good faith in this type of proceeding" would be improper.[36] Further, the court concluded that "'reasonable possibility of success at trial' sets a low threshold for a plaintiff seeking leave to proceed with an action."[37] In addition, the court held, the "reasonable possibility" of success at this stage addresses only the merits of the plaintiffs' affirmative claims; it does not require the plaintiffs to "overcome" any defenses that the defendants could

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29 Andrew Gray, *Canadian Court Provides Guidance on Securities Class Actions*, Mondaq Business Briefing, Gale Doc. No. A216865066 (Jan. 15, 2010).

30 [1999] 46 OR (3d) 315.

31 *Silver v. IMAX Corp.*, [2009] Case No. CV-06-3257-00, ¶¶17-23 (Ont. S.C.J.).

32 *Id.* ¶¶ 35-39.

33 *Id.* ¶ 33 (quoting Heward v. Eli Lilly & Co. [2007] OJ No. 404 (S.C.), ¶ 69 ("whenever, because of the existence of individual issues, a judgment on the common issues in favour of the plaintiffs will not determine a defendant's liability, it will always be possible — and invariably likely — that an acceptable class will include persons who will not have valid claims")).

34 *See* Ontario Securities Act, § 138.8(2).

35 Allison Martell, *Canada's reformed class-action law wins few friends*, Reuters (Jul. 20, 2011).

36 *Silver v. IMAX Corp.*, [2009] O.J. No. 5573, ¶ 69 (Ont. S.C.J.).

37 *Id.* ¶ 25.

put forward.[38] The court conducted an extensive review of the evidence and found that the plaintiffs satisfied both prongs of the statutory leave test.[39]

Initially, the two *IMAX* opinions were expected to have widespread consequences for future shareholder class actions. A March 2010 decision by a different judge of the same Ontario court, however, revealed considerable judicial disagreement regarding the requirements for certifying a common law misrepresentation class. In *McKenna v. Gammon Gold, Inc.*, the plaintiffs sought to certify a class of investors seeking damages for misrepresentation both at common law and under the Ontario Securities Act.[40] The plaintiffs claimed that during the proposed class period, Gammon, a mining company, released disclosures that contained misrepresentations, including overstating Gammon's production rate at certain of its gold and silver mines. The plaintiffs asserted both common law and statutory misrepresentation claims.[41]

The *Gammon* court refused to certify the common law claims. The court held that reliance is an essential element of a common law misrepresentation 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."[42] The court concluded: "The need to determine the issue individually would give rise to a multitude of questions in each case concerning the representations communicated to a particular investor, the experience and sophistication of the investor and whether there was a causal connection between the misrepresentation(s) and the acquisition of the security."[43] Accordingly, the court certified the statutory claims only.

At least one Ontario court recently has declined to follow *Gammon*, certifying the plaintiffs' common-law misrepresentation claim on the basis that the misrepresentations at issue, in contrast to *Gammon*, were consistent and repetitive, and could be treated as a common issue.[44] The court did recognize, however, that the case law on this issue is "in a state of evolution."[45] It is too early to tell whether the *Gammon* and *IMAX* common law misrepresentation decisions can be reconciled, an issue that the Ontario Court of Appeal likely will be called upon to resolve.[46] If, as in *IMAX*, shareholder class actions for common law misrepresentation are allowed to proceed even if plaintiffs cannot plead reliance, Canadian courts can expect to see many more such cases filed in coming months and years.

In any event, even if an appellate court later rejects *IMAX*'s reasoning on class certification, its statutory leave opinion still can be expected to have far-reaching ramifications. By setting a low bar for plaintiffs seeking leave to bring statutory misrepresentation claims, Canadian courts will make themselves all the more hospitable to securities cases.

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38 *Id.* ¶ 333.

39 The defendant's motion for leave to appeal this decision was recently denied. *Silver v. IMAX Corp.*, 2011 ONSC 1035 (Ont. Sup. Ct.).

40 [2010] ONSC 1591 (Ont. S.C.J.).

41 *Id.* ¶¶ 5, 10, 17.

42 *Id.* ¶ 135.

43 *Id.* ¶ 161.

44 *Dobbie v. Arctic Glacier Income Fund*, 2011 ONSC 25 ¶¶ 227-28 (Ont. Sup. Ct.).

45 *Id.*

46 *See* Julius Melnitzer, *Reliance Fight Brewing in Securities Cases*, Financial Post (Apr. 21, 2010).

4. Competition

Class action jurisprudence in the competition area has been somewhat of a rollercoaster in recent years, although the most recent cases trend positively for defendants.

In 2009, the British Columbia Court of Appeal unanimously reversed a trial court decision that denied certification of a consumer class including indirect purchasers,[47] holding that although "[t]he burden is on the plaintiff to show 'some basis in fact' for each of the certification requirements, in conformity with the liberal and purposive approach to certification, the evidentiary burden is not an onerous one — it requires only a 'minimum evidentiary basis,'" and the plaintiffs had "met the low threshold."[48] In particular, the court said the plaintiffs could use statistical evidence to prove aggregate classwide damages, including damages suffered by indirect purchasers.[49] A class proceeding, according to the Court of Appeal, was the proper procedure for the case, because the British Columbia Class Proceedings Act should be liberally construed to promote its goals of access to justice, behavior modification and judicial economy.[50] The Supreme Court of Canada denied the defendants' application for leave to appeal the Court of Appeal's decision on June 3, 2010.[51]

The Ontario Superior Court reached a similar conclusion in *Irving Paper v. Atofina Chemicals, Inc.*, certifying a class in a price-fixing case that included both direct and indirect purchasers[52] even though causation and damages were not common to all class members. With respect to causation, the court held that the certification standards did not require the plaintiffs to show that every possible class member was harmed by the price fixing. And with respect to damages, the court concluded that the indirect purchasers could be included in the plaintiff class because "a methodology may exist for the calculation of [their] damages."[53] On June 8, 2010, the Divisional Court denied the defendants' request for leave to appeal the *Irving Paper* class certification order.[54]

More recently, however, the British Columbia Court of Appeal turned this trend on its head, effectively curtailing indirect purchaser class actions entirely and bringing a great deal of uncertainty to this area of litigation. On April 15, 2011, the British Columbia appellate court released companion decisions, *Pro-Sys Consultants Ltd. v. Microsoft Corp.*[55] and *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*,[56] reversing the certification of classes made up of indirect purchasers on the basis that they had no cause of action. These rulings may not be final because plaintiffs are likely to

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47 *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, [2009] B.C.C.A. 503.

48 *Id.* ¶ 23 (internal citations omitted).

49 *Id.* ¶ 17.

50 *Id.* ¶ 23.

51 *See Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, [2010] CarswellBC 1361 (S.C.C.) (WL).

52 [2009] 89 OJ No. 4021 (Ont. S.C.J.); *see also* Michael Brown, *Possible Change in the Canadian Landscape For Price-Fixing Class Action Certification*, Mondaq Business Briefing, Gale Doc. No. A213327124 (Dec. 2, 2009).

53 *Irving Paper*, [2009] 89 OJ No. 4021, ¶ 143; *see also Chadha v. Bayer*, [2003] 63 OR (3d) 22 (Ont. C.A.) (reversing certification and holding that damages are essential to a non-contractual price-fixing claim and would require individual inquiry into damages). *But see Cassano v. Toronto Dom. Bank*, [2007] 87 OR 3d 401, ¶¶ 36-38 (C.A.) (holding that certification of a class in a price-fixing action alleging claims for breach of contract and restitution was proper even without proving aggregate damages); *Markson v. MBNA Bank*, [2007] 85 OR 3d 321 (C.A.) (same); *2038724 Ont. Ltd. v. Quizno's Canada Rest. Corp.*, [2009] 96 OR 3d 252 (Div. Ct.) (same), *aff'd*, 2010 ONCA 466.

54 *Irving Paper*, 2010 CarswellOnt 3898, ¶ 3 (Ont. S.C.J.) (WL).

55 [2011] B.C.J. No. 688 (B.C.)

56 [2011] B.C.J. No. 689 (B.C.)

seek leave to appeal to the Supreme Court of Canada, but if they are sustained, they would have a profound effect on Canadian competition class actions.

In rejecting indirect-purchaser class actions,[57] the British Columbia Court of Appeal relied on *Kingstreet Investments Ltd. v. New Brunswick (Finance)*,[58] a restitution case in which the Supreme Court of Canada 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. The *Microsoft* court concluded that, per *Kingstreet*, indirect purchasers to whom an overcharge allegedly was passed on could not, as a matter of law, maintain a cause of action, or else defendants could face the prospect of double recovery by both direct and indirect purchasers.[59]

In *Sun-Rype*, the lower court had decided that, notwithstanding *Kingstreet*, it was possible to certify a class that included direct and indirect purchasers by recognizing that the costs were passed through as a matter of fact (even though pass-through was not allowed as a defense as a matter of law) and that there would be no double recovery where damages would be assessed based on the total overcharge.[60] The British Columbia Court of Appeal disagreed and reversed, finding that the Class Proceedings Act was merely procedural and could not affect parties' substantive rights or create new causes of action.[61]

Both decisions were accompanied by vigorous dissents and many think it likely that the Canadian Supreme Court will hear the appeals. In the meanwhile, it remains to be seen whether other jurisdictions in Canada will follow *Microsoft* and *Sun-Rype* and refuse to certify indirect purchaser class actions on restitution grounds or align themselves with *Infineon* and *Irving Paper* and liberally grant certification. In the meantime, defendants can take heart that they now have some precedent to rely on when moving to decertify or dismiss indirect purchaser actions.

In sum, recent Canadian court pronouncements on class certification standards are somewhat difficult to reconcile, and it remains to be seen whether new authorities will develop along substantive lines (*i.e.*, the type of case) or jurisdictional lines (*i.e.*, the province in which the case is brought). If class-certification standards develop along jurisdictional lines, that could portend many unfortunate consequences for Canadian business and for the judicial system. Among other things, plaintiffs' counsel are likely to engage in rampant forum shopping, targeting their filings in those provincial courts that seem more willing to certify cases for class treatment — *e.g.*, Ontario.

B. Applying Limitations Statutes To Class Actions

One class action that went to trial in 2010 also signals a potentially troubling development with respect to statutes of limitations in Canadian class actions. In *Smith v. Inco*,[62] the Ontario Superior Court held a common issues trial and granted $36 million in damages in private nuisance and strict liability (but not in public nuisance, trespass or for punitive damages) for soil contamination from the defendant's nickel refinery.[63] One of the defendant's key defenses was that the six-year statute of

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57 [2011] B.C.J. No. 688, ¶ 27.

58 [2007] 1 S.C.R. 3.

59 [2011] B.C.J. No. 688, ¶ 28.

60 [2011] B.C.J. No. 689, ¶¶ 84-85.

61 *Id.* ¶ 86.

62 [2010] O.J. No. 2864 (Ont. Sup. Ct.).

63 *Id.* ¶ 337.

limitations had run because the factory had closed down in 1984, but the suit was not brought until 2001.[64] The Ontario court ruled that the claims were not time-barred because the discovery rule applied, and the "overwhelming majority" of class members did not discover their claims until 2000.[65] The court acknowledged that the discovery rule had never been applied in the context of a class action but concluded that "only an insignificant minority of all of the members of the class" would have known about the contamination before 2000; "the overwhelming majority of the class members did not know and ought not to have known the material facts until approximately Feb. 15, 2000." [66] Accordingly, the court found, the claims of the class were ripe.[67]

Smith v. Inco is troubling because it suggests that plaintiffs with stale claims can recover in a class action by virtue of their association with a class, even though their claims would fail if brought individually. The court appeared undisturbed by this possibility, presumably based on its belief that only a very small number of class members discovered their claims earlier. It remains to be seen, however, whether courts would apply this ruling where the percentage of class members with stale claims is higher. The case has been appealed and is being watched closely.

C. U.S. Attorneys: Is The Welcome Mat Out?

For years, some observers have expressed concern that the U.S. plaintiffs' bar will begin opening offices in Canada to pursue class proceedings in that forum, much as they have done in some European Union member states. The recent case law suggests that while Canadian courts initially were frosty to U.S. attorneys, attitudes are warming.

In 2008, the British Columbia Supreme Court handed down *Chartrand v. General Motors Corp.*,[68] a decision refusing to certify a class of pick-up truck owners who alleged that their trucks' parking brakes were defective and sought repair costs. In rejecting certification, the court voiced concern that the proposed representative plaintiff had been recruited by class counsel and was not an active, decision-making participant in the litigation. The court particularly was distressed by the presence of U.S. attorneys on the plaintiff's side.

Concerns also arise when American counsel are involved in proposed Canadian class proceedings. The nature of the involvement is relevant. Lawyers from other jurisdiction[s] may be able to act as consultants. It is a different matter if they are in some way underwriting the litigation and obtaining a potential benefit from it. A representative plaintiff must have competent counsel in order to fairly and adequately represent the interests of the class. The court, as part of its role in a class proceeding, supervises class counsel to ensure that counsel is acting in the interests of the class. The court is not in a position to supervise the actions of or participation of counsel from another jurisdiction.[69]

But times may be changing — and changing quickly. In October 2009, the Ontario Superior Court gave a warmer welcome to U.S. attorneys when it granted "carriage"[70] of a class action against Timminco Ltd., a Canadian metals producer, to Canadian firm Kim Orr Barristers, which had partnered

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64 *Id.* ¶ 105.

65 *Id.* ¶¶ 116-119.

66 *Id.* ¶¶ 118.

67 *Id.* ¶¶ 118-119.

68 [2008] BCSC 1781 (B.C. Sup. Ct.).

69 *Id.* ¶ 106 (citing *Poulin v. Ford Motor Co. of Canada Ltd./Ford du Canada Ltée*, [2006] 35 CPC (6th) 264 (Ont. S.C.J.), ¶¶ 87-94).

70 "Carriage" means that the court selects a particular law firm to be lead class counsel.

with Milberg LLP, a famous U.S. plaintiffs' firm.[71] In selecting Kim Orr for the lead role, the court clarified its understanding that Milberg would serve in a limited capacity, providing Kim Orr strategic advice and investigation and document management services.[72]

The court also clarified its understanding that Kim Orr would pay for Milberg's services directly, and that Milberg would not have a direct claim on any damages award.[73] The same court previously had rejected the involvement of a U.S. firm in a Canadian class proceeding when the U.S. firm intended to fund the litigation and share in any fees ultimately awarded.[74] The limited nature of Milberg's role may have played an important part in the court's decision and created a model for the involvement of U.S. counsel in future cases.[75]

Timminco did not go unnoticed in the United States. According to published reports, several U.S. plaintiffs' firms reportedly met with their Canadian counterparts in 2009, and Canadian firms have been recruiting U.S. class action colleagues to assist them with bringing cases in Canada.[76] In fact, Michael Spencer, the senior partner from Milberg LLP who partnered with Kim Orr in prosecuting the *Timminco* case,[77] recently sat for the Canadian equivalent of the bar exam as well as solicitor and barrister exams so he could be licensed to practice law in Canada and more fully participate in bringing large securities class actions there.[78] He will be spending part of his time at Kim Orr, working on Canadian and cross-border class actions.[79]

D. Who's Paying For Class Litigation?

Recent decisions about who should pay for class litigation have been a mixed bag: Canadian courts recently have affirmed the "loser-pays" principle, but they also seem open to third-party funding arrangements.

In 2007, the Supreme Court of Canada handed down *Kerr v. Danier-Leather*,[80] in which it held that the traditional loser-pays rule applies to class proceedings under the Ontario Class Proceedings Act 1992.[81] *Kerr* is significant because the court held that Ontario law permitted a court to require unsuccessful named plaintiffs to pay certain of the defendants' costs, even though those plaintiffs' claims were

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71 Mary Jane Stitt, *Court Rules Direct Involvement Of U.S. Firm In Canadian Class Action Acceptable*, Mondaq Business Briefing, Gale Doc. No. A2127117917 (Nov. 19, 2009).

72 That Kim Orr wanted the benefit of Milberg's experience in discovery-intensive U.S. cases says much about Canadian plaintiffs' firms desire to use discovery as a litigation tool, as their U.S. counterparts do. This is notable in light of a 2009 amendment to Ontario's rules of civil procedure that sought to restrict the scope of permissible discovery. Amended rule 30.02 now permits parties to discover documents "relevant to any matter in issue," instead of the older "relating to any matter in issue." The drafters' intent in making this subtle change was to narrow the scope of discovery to core relevant documents. *See* Ontario R. Civ. P. 30.02, R.R.O. 1990, Reg. 194.

73 *Sharma v. Timminco Ltd.*, [2009] 99 OR 3d 260, ¶ 78 (Ont. S.C.J.). *But see* Canadian Underwriter.ca, Daily News (Sept. 30, 2010) (quoting a source claiming that Kim Orr was actually being "funded monetarily" by Milberg, rather than the inter-firm billing arrangement that the *Timminco* court had envisioned).

74 *Poulin v. Ford Motor Co. of Canada*, 2006 CanLII 38880 (Ont. S.C.J).

75 Stitt, *Court Rules Direct Involvement Of U.S. Firm In Canadian Class Action Acceptable*.

76 Julie Triedman, *New Players at the Table*, The American Lawyer, 40, 44 (Aug. 2009).

77 *Sharma v. Timminco Ltd.*, 99 O.R. (3d) 260, ¶¶ 31-32.

78 Sandra Rubin, *Class-action king turns sights to Canada; Michael Spencer, a lead counsel on the* Vivendi *shareholder lawsuit, sees 'great opportunity' in Ontario*, The Globe and Mail, B13 (May 11, 2011).

79 *Id.*

80 [2007] SCC 44.

81 *Id.* ¶ 65 (citing Class Proceedings Act, S.O., ch. 6 (1992) (Can.), § 31(1)).

at least colorable and the ruling dismissing them made new law.[82] In this respect, *Kerr* rejected the Alberta and New Brunswick provincial policies of not imposing costs when the representative plaintiffs' claims are premised on novel theories. *Kerr* similarly rejected the practices in British Columbia, Manitoba, Newfoundland and Saskatchewan of imposing costs against representative plaintiffs only where there has been abusive, vexatious or frivolous conduct. In the *Kerr* opinion, the Supreme Court recognized that class proceedings could lead to abusive litigation, noting that "protracted litigation has become the sport of kings in the sense that only kings or equivalent can afford it."[83] The Court therefore concluded that "regard must also be had to the situation of the respondents/defendants who have incurred the costs."[84]

Without question, the loser-pays rule, as articulated in *Kerr*, is an effective safeguard against abusive litigation. *Kerr*'s salutary effects may be diluted, however, by what appears to be Canada's growing acceptance of third-party litigation funding.

In *Meltzer Investment GmbH v. Gildan Activeware Inc.*, the Ontario Superior Court rejected a proposed third-party funding agreement, but held that such agreements were not *per se* champertous or otherwise against public policy.[85] The court held that the arrangement in the *Meltzer* case was unlawful 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. The court suggested, however, that a litigation-funding arrangement that calculated recovery based on these specified factors would be permissible.

More recently, however, Ontario courts have blessed third-party funding agreements. In *Dugal v. Manulife Financial Corp.*,[86] for example, the Ontario Superior Court approved a funding agreement between the plaintiff class and a third party, where the latter would pay the plaintiffs' costs in return for a commission on any settlement or judgment, despite the defendants' argument that the arrangement was champertous. The court approved the arrangement in part because of its concern that Canada's loser-pays rule otherwise would discourage individuals from filing class actions, undercutting the goals of the Class Protection Act.[87] The court explained that when costs become prohibitive, class parties may apply for financial support for disbursements and indemnity against costs to the Class Proceedings Fund that is under the administration of the Class Proceedings Committee.[88] But the fund charges a fee of 10 percent of any recovery, which was higher than the 7 percent the third-party funder agreed upon with the plaintiffs.[89] Notably, the *Dugal* court mentioned that a similar arrangement was approved in another case, *MacQueen v. Sydney Steel Corp.* (Oct. 2010), Action 218010 (N.S.S.C.).

In 2009, in *Hobshawn v. Atco*,[90] the Court of Queen's Bench in Alberta similarly approved a private third-party funding agreement to fund a representative plaintiff's legal fees in a class proceeding. In

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82 The Ontario law provided that when determining whether to award costs against a representative plaintiff, "the court may consider whether the class proceeding was a test case, raised a novel point of law or involved a matter of public interest." Class Proceedings Act, S.O., ch. 6 (1992) (Can.), § 31(1).

83 [2007] SCC 44, ¶ 63.

84 *Id.* ¶ 64.

85 [2009] CanLII 41540 (Ont. S.C.J.).

86 2011 ONSC 1785 (Ont. Sup. Ct.).

87 *Id.* ¶ 33.

88 *Id.* ¶ 30.

89 *Id.* ¶¶ 32-33.

90 Julius Melnitzer, *Courts Pave Way for More Class Actions*; 3rd-Party Help, Legal Post, FP10 (Oct. 7, 2009).

light of the court's decision, BridgePoint Financial Services Inc., the funding company in *Hobshawn*, reportedly is exploring numerous other funding opportunities in Canada.[91]

In short, while Canada seems committed to the loser-pays rule — at least for now, Canadian courts have sought to mitigate the impact of this rule on potential class plaintiffs by embracing third-party funding. This development greatly could influence the frequency with which class actions are filed in Canadian courts.

E. Focusing On The Merits In The Face Of Unfavorable Certification Standards

Given the liberal standards for certification that seem to be spreading in Canadian courts, defendants will need to adopt other strategies — in addition to fighting class certification — in order to prevail in class action cases. Motions for summary judgment may be one such method. In January 2010, an amended Rule 20 of Ontario's Rules of Civil Procedure, which governs summary judgment motions, came into effect.[92] Under the amended rule, Ontario judges are permitted to weigh evidence submitted by defendants who have sought summary judgment. A number of observers in Canada believe this will empower courts to dismiss purported class proceedings on questionable claims before or after the class certification stage. Given Ontario's generally permissive class certification requirements, observers expect defense attorneys to use the new summary judgment rule frequently to attempt to shut down class proceedings before they are certified.[93] One court has observed that the number of motions for summary judgment greatly has increased since the amendment.[94] Under the new rule, plaintiffs must set out in affidavits specific facts showing the existence of a genuine issue for trial, and the court must take a "good hard look" at the evidence.[95] Ontario's summary-judgment rule may prove to be an effective counterbalance to the low evidentiary standard plaintiffs are required to meet at the certification stage. And class action defendants will be able to utilize the new rule to challenge plaintiffs on historically difficult issues such as proving classwide damages.

Thus far, the new rule has been applied to one class action with favorable results for the defendants. In *Healey v. Lakeridge Health Corp.*,[96] the Ontario Court of Appeals affirmed the motion judge's grant of summary judgment to the defendants on the issue of compensability of psychological injuries and denial of the plaintiffs' motion for partial summary judgment as to causation and damage assessment.[97] *Healey* involved two class actions made up of plaintiffs who claimed psychological injuries after being told they may have been exposed to tuberculosis when they visited the hospital.[98] The motion judge granted the defendants' motion for summary judgment, holding that the law did not provide compensation for the type of alleged injury plaintiffs suffered.[99] The judge dismissed the plaintiffs' motions for partial summary judgment, finding that causation could not be determined on summary judgment and damages were too individualized to allow for aggregation.[100] The appellate court addressed the new summary judgment rule in finding that the motion judge did not err

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91 *Id.*

92 *See* Ontario R. Civ. P. 20, R.R.O. 1990, Reg. 194.

93 *See* Daryl-Lyn Carlson, *New Class Action Rules Get Mixed Reviews From Law Firms*, Financial Post (Feb. 24, 2010).

94 *Blue Giant Equipment Corp. v. Misco Holdings Inc.*, 2010 ONSC 4404 (Ont. Sup. Ct.).

95 *Id.*

96 2011 ONCA 55 (Ont.)

97 *Id.* ¶ 81.

98 *Id.* ¶ 1.

99 *Id.* ¶¶ 18-19.

100 *Id.* ¶¶ 69, 71.

in granting summary judgment to the defendant; according to the court, the extensive evidentiary record provided a sufficient basis to decide that there was no genuine issue for trial.[101] *Healey* is an encouraging decision for defendants, particularly in cases where there is a well-developed record.

In addition to the new summary judgment procedure, defendants in Ontario securities fraud class actions can seek to block non-meritorious suits from proceeding to trial at the "leave" stage discussed above with respect to the *IMAX* case. The 2005 overhaul of the Ontario Securities Act included a requirement that plaintiffs obtain leave to proceed in securities class actions by showing they have brought the action in good faith and that the class has a reasonable possibility of success.[102] This requirement was designed to prevent frivolous class actions from going to trial,[103] but commentators differ on whether the leave requirement effectively will screen out frivolous lawsuits.[104] Although the Ontario Superior Court of Justice has held that the leave requirement is a "low threshold,"[105] defendants still may avail themselves of this early opportunity to test the merits of plaintiffs' claims.

Conclusion

Over the last two years, there has been an unprecedented level of class action activity in Canada. During this period, the chief justice of Canada, the chief justice of Ontario and Ontario's leading class action judge all have issued opinions calling for expanded use of class proceedings to promote access to justice.[106] And they are likely to get their wish. Although the "certify-all-classes" tendency of Canadian courts was tempered recently by significant rulings in the product liability, toxic tort and competition arenas, the other recent developments discussed in this article (including liberalized certification standards in securities fraud cases, cross-border alliances among law firms and the acceptance of third-party funding in class proceedings) suggest that the volume of class actions filed in Canadian courts may continue to grow.

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101 *Id.* ¶ 76.

102 *Silver v. IMAX Corp.*, [2009] O.J. No. 5573, ¶ 19; *see also* Martell, *Canada's reformed class-action law wins few friends*.

103 *Id.*

104 Martell, *Canada's reformed class-action law wins few friends*.

105 [2009] O.J. No. 5573, ¶ 25.

106 Triedman, *New Players at the Table*, at 40-41.