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Defending Class Actions in Canada, 5th edition

Book launch and review of class action trends, issues
and updates

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Agenda

1. Introduction
2. Trends in class action filings
3. Certification trends
4. Multijurisdictional Issues
5. Settlement Trends

Introduction

- Many developments in class actions law since publication of our last edition in 2015
- Some broad trends in Canadian class actions:
 - SCC remains very interested in class actions, and seems intent on emphasizing the low standard for certification
 - Canadian class actions are getting larger and more complex
 - Consortia of counsel are becoming the norm
 - Canadian classes remain generally passive

Introduction

- Increasingly limited scope for pre-certification challenges
 - Sequencing issues
- More class action trials
 - Both full trials and summary judgment/summary trials

Introduction

- All provinces other than PEI have class actions legislation
- Only NB doesn't permit national opt-out classes
- Ont considering legislative changes that will make its legislation far more defendant-friendly
- Quebec remains a hotbed of class actions activity
- Seeing start of shift in volume of class actions toward BC, including by Ontario counsel
 - National opt-out classes
 - No costs
 - Plaintiff-friendly

Trends in Class Action Filings

PRODUCT LIABILITY

Discrimination

Data Breach

Ponzi Schemes

Consumer Protection

CONTRACT BREACH

PRICE FIXING

Mass Tort

ENVIRONMENTAL CLAIMS

Customer Fraud

Information Duty

Harassment

NEGLIGENT DESIGN

Insufficient Warning

Interest Rates

Environmental Claims

- Evolution
- Nature of claims
- Challenges for Plaintiffs
- Difficulties for Defendants
- Overreach

Privacy Claims

- Evolution
- Nature of claims
- Challenges for Plaintiffs
- Difficulties for Defendants



Certification Trends

New Risks and Opportunities

Risks

- Competition Class Actions
- Québec

Opportunities

- Arbitration Clauses
- Ontario Bill 161

Certification Trends

New Risks and Opportunities

Risks – Competition Class Actions: Pioneer Corp. v. Godfrey

- The discoverability principle applies
- Claims by “umbrella purchasers” can be certified
- The *Competition Act* does not oust common law and equitable claims
- Low threshold for certification of loss-related common issues

Certification Trends

New Risks and Opportunities

Risks – Québec: L’Oratoire Saint-Joseph du Mont-Royal v. J.J.

—The court plays a “screening role” and must simply ensure that the 4 conditions for authorization are met

- This is a purely procedural question
- The 4 conditions are interpreted and applied *broadly*
- If the conditions are met, the class action *must* be authorized
- The court will consider the merits later

—Just one identical, similar or related question of law that can affect the outcome of the class action is sufficient to meet the condition of commonality

Certification Trends

New Risks and Opportunities

Risks – Québec: L'Oratoire Saint-Joseph du Mont-Royal v. J.J. (Con't)

- The role of the judge is to screen out only those cases that are frivolous, clearly unfounded or untenable
- The applicant's burden is to establish an arguable case in light of the facts and law; this is a low threshold
- The applicant is not required to show the claim has a sufficient basis in fact; the facts are assumed to be true

Certification Trends

New Risks and Opportunities

Opportunities – Arbitration Clauses: TELUS v. Wellman

- Limited court intervention is a “fundamental principle underlying modern arbitration law”
- The *Arbitration Act*, 1991 does not give the court discretion to refuse to enforce arbitration agreements between *businesses*, even if they are not enforceable against fellow *consumer* class members

Certification Trends

New Risks and Opportunities

Opportunities – Ontario Bill 161

- Carriage decided within 60 days
- Ontario must be the preferable forum
- Defence motions to narrow or dispose of the proceeding may be brought prior to certification
- Common questions must “predominate” over individual ones
- Enhanced consideration of alternative procedures
- The Class can only recover costs of notice of certification if the claims succeed
- Direct right of costs recovery against third party funders
- Defendants have direct right of appeal to CA

Multijurisdictional Issues

Three critical jurisdictional questions that all Canadian class action defendants should be alert to at the outset of any class action:

—Foreign Defendants

—If I am a foreign defendant, should I attorn to the Canadian jurisdiction?

—National Classes

—If the action involves extra-provincial class members, does the court have jurisdiction over those class members representative plaintiffs?

—Global Classes

—If the action involves absent out-of-country claimants (“absent foreign claimants”), does the court have jurisdiction over those absent foreign claimants?

Foreign Defendants

Ex.: a class action filed in Quebec against
a corporation with its head office in another
province or country

Foreign Defendants – Jurisdictional Issues

1. Order and Fairness

2. Real and Substantial Connection

—Jurisdiction *Simpliciter*

- Is the defendant domiciled or resident in the jurisdiction of the claim?
- Does the defendant carry on business in the jurisdiction?
- Was the tort committed in the jurisdiction?
- Was the contract “connected with dispute” made in the jurisdiction?

Foreign Defendants

Challenging the Jurisdiction

- Rebut with evidence that there is no real and substantial connection
- Pleading *forum non conveniens*
 - Is there a clearly more appropriate forum to hear the class action?

National Classes

Ex.: a class action in Ontario on behalf of all Canadians, i.e. class members residing in Ontario and outside Ontario

National Classes – Jurisdictional Issues

- Non-Resident Class Members
 - Real and substantial connection
 - Common issues
- Opt-in and Opt-out Regime
 - Opt-in provinces
 - New Brunswick, Newfoundland and Labrador
 - Opt-out provinces
 - Ontario, Québec, Alberta, Manitoba, Saskatchewan, British Columbia, Nova Scotia

National Classes – Jurisdictional Issues

- Parallel Interprovincial Proceedings
 - Strategic Considerations
 - Having a broader class definition
 - Raising *forum non conveniens*
 - Challenging the certification
 - Staying the proceeding on the ground of abuse of process
 - Joining multi-jurisdictional interprovincial hearings

Global Classes

Ex.: a class action filed in Ontario on behalf
of class members in Canada and outside
Canada

Global Classes – Jurisdictional Issues

—Absent Foreign Claimants

—Order, Fairness and Comity

—The consideration of the constitutional limits of Canadian jurisdictions over foreign claimants

—Res Judicata

—The binding force of a Canadian judgment over foreign claimants

—The enforcement and the recognition of the Canadian judgment in foreign countries

—The possibility of re-litigation by absent foreign claimants in their home countries

Global Classes – The Airia Brands Test

—*Airia Brands Inc. v. Air Canada*, 2015 ONSC 5332, an Ontario Court of Appeal's decision

—Facts

—An alleged global price-fixing conspiracy by several well-known international airlines

—Putative class made up of members from more than 30 different countries across the world

—First Instance

—Allowing the absent foreign claimants to be a part of the class would be counter to international legal norms and comity

Global Classes – The Airia Brands Test

—The Ontario Court of Appeal reversed the decision

—**The Real and Substantial Connection Test**

—Is there a real and substantial connection between the subject matter of the action and Ontario, and does jurisdiction exist over the representative plaintiff and the defendants?

—Are there common issues between the claims of the representative plaintiff and the absent foreign claimants?

—Are the procedural safeguards of adequacy of representation, adequacy of notice, and the right to opt-out provided?

—To enhance the real and substantial connection between absent foreign claimants and Ontario.

Global Classes – Jurisdictional Issues

- Challenging Jurisdiction Over Absent Foreign Claimants
 - Forum non conveniens*
 - Redefining the class definition
 - Arguing that class action is not the preferable procedure
- Settlement Considerations
 - The enforcement and the recognition of the Canadian settlement in foreign countries

Settlement trends

Increased scrutiny of the fairness of settlements

- **Québec example:** *Option Consommateurs c. Banque Amex du Canada*, 2018 QCCA 305
 - Increased scrutiny on the terms of the settlement, exposure, proposed distribution
- **Ontario's Bill 161**, the *Smarter and Stronger Justice Act*, 2019
 - Proposed changes to the Class Proceedings Act, **Section 27.1(7)** On a motion for approval of a settlement, the moving party shall make full and frank disclosure of all material facts, including, in one or more affidavits filed for use on the motion, the party's best information respecting the following matters, which the court shall consider in determining whether to approve the settlement:
[Ten items, including "[t]he range of possible recoveries in the litigation"]

Settlement trends

Increased scrutiny of class counsel fees

— Québec examples:

- *Option consommateurs c. Banque Amex du Canada*, 2018 QCCA 305, 2017 QCCS 200: The Court determines that legal fees of 25% in the context are not acceptable and suggests that 5% would be more appropriate

— Marcotte decisions :

- *Adams c. Banque Amex du Canada*, 2015 QCCS 1917: class counsel is awarded 33,3% of the recovery given the importance of the file
- *Marcotte c. Banque de Montréal*, 2015 QCCS 1915 : class counsel is awarded 25% of the recovery plus financing fees, for a total of 38% of the recovery

Settlement trends

Increased scrutiny of class counsel fees

— Ontario examples :

- *Lozanski v. Home Dépôt Inc.*, 2016 ONSC 5447: the court reduced class counsel fees in the context of settlement
- *McCallum-Boxe v. Sony*, 2015 ONSC 6896: the court criticizes the absence of written retainer agreement and establishes what would be fair and reasonable legal fees
- *Agnew-Americanano v. Equifax Canada*, 2018 ONSC 275:

[261] The Merchant approaches in the present case and in *McCallum-Boxe* encourage a rush to the courthouse with a claim the instant a potential class action arises, with a representative plaintiff who has not received the written fee agreement required by law, and has not had the opportunity to consider the legal consequences of such a written agreement. Consequently, the present Ballantine fee agreement remains antithetical to the interests of the proposed representative plaintiff, and contrary to both [s. 32\(1\)](#) of the [CPA](#) and settled law in *Smith Estate*.

Third Party Funding

- What is it? Investor who funds the litigation and absorbs an adverse cost award, in return of a share of the class action proceeds
- Started around 2009 in Canada and market is expanding rapidly
- Possible impact on the number of class actions as this lowers barriers to entry
- Recent examples in Québec: requirements have not yet been developed by Québec courts
 - *Marcotte c. Banque de Montréal*, 2015 QCCS 1915: the Court accepts to reimburse third party funding from the settlement recovery
 - *Re Bluberi Gaming Technologies*, 2008 QCCS 1040 (reasons of the SCC to be rendered shortly – outside of the class action context)
- In Ontario, the court established a list of 6 factors to consider in *Houle v. St. Jude Medical Inc.*, 2017 ONSC 5129 (2018 ONSC 6352)
- In Ontario, Bill 161 (section 33.1) recognizes third-party funding arrangements. Such arrangements will be subject to court approval as soon as practicable after the agreement is entered into

Conclusion

- Structure of *Defending Class Actions in Canada: A Guide for Defendants*
 - Chapters on topics not addressed today: arbitration clauses and class action waivers; limitations; costs and fees; comparisons between Canada and US
- Watch for developments with statutory reform in Ontario
- Watch for guidance from SCC on waiver of tort in *Atlantic Lottery Corporation v. Babstock* and on class actions and arbitration clauses in *Uber v. Heller*

Thank you.

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