CLASS ACTIONS SEMINAR

Tuesday, November 24, 2015

BLG
Borden Ladner Gervais
<table>
<thead>
<tr>
<th>Time</th>
<th>Session</th>
</tr>
</thead>
<tbody>
<tr>
<td>12:45 pm – 12:50 pm</td>
<td>Welcome Remarks</td>
</tr>
<tr>
<td>12:50 pm – 1:30 pm</td>
<td>Hot Issues in the U.S. and Implications for Canada</td>
</tr>
<tr>
<td>1:30 pm – 1:45 pm</td>
<td>Developments in Worldwide Classes and Foreign Plaintiff Class Members</td>
</tr>
<tr>
<td>1:45 pm – 1:50 pm</td>
<td>Refreshment Break</td>
</tr>
<tr>
<td>1:50 pm – 2:10 pm</td>
<td>Claims for Breach of Statute – Is the End in Sight?</td>
</tr>
<tr>
<td>2:10 pm – 2:40 pm</td>
<td>Reflections from the Trenches of Common Issues Trials</td>
</tr>
<tr>
<td>2:40 pm – 3:00 pm</td>
<td>Refreshment Break</td>
</tr>
<tr>
<td>3:00 pm – 3:20 pm</td>
<td>Class Actions in Quebec – A Report from the Distinct Society</td>
</tr>
<tr>
<td>3:20 pm – 3:45 pm</td>
<td>The SCC on Contract Interpretation – a New Thorn in the Side of the Common Issue</td>
</tr>
<tr>
<td>3:45 pm – 4:10 pm</td>
<td>Saying Goodbye to Class Actions – The Return of Mass Torts, Test Cases and Other Relics of the Past</td>
</tr>
<tr>
<td>4:10 pm – 4:45 pm</td>
<td>Privacy Class Actions – The Year in Review</td>
</tr>
<tr>
<td>4:45 pm</td>
<td>Closing Remarks</td>
</tr>
</tbody>
</table>
Welcome Remarks

Cheryl Woodin
Hot Issues in the U.S. and Implications for Canada

Dr. Denis Martin, Class Action Practice Chair & Senior Vice President, NERA Economic Consulting
Bradley Heys, Vice President, NERA Economic Consulting
What’s New In Class Actions?

Hot Issues in the US and Implications for Canada

Denise Martin, Ph.D.
Senior Vice President
Borden Ladner Gervais, LLP, Toronto
24 November 2015

Brad Heys, CFA, CFE, MA, JD
Vice President
Recent Trends in Securities Class Actions
Filings of Securities Class Actions in Canada

Total: 114 Cases
Secondary Market Liability Cases Driving the Growth in Canadian Filings

Through September 30, 2015

Total: 67 Cases

Number of Filings

<table>
<thead>
<tr>
<th>Year</th>
<th>Filings</th>
</tr>
</thead>
<tbody>
<tr>
<td>2006</td>
<td>1</td>
</tr>
<tr>
<td>2007</td>
<td>3</td>
</tr>
<tr>
<td>2008</td>
<td>8</td>
</tr>
<tr>
<td>2009</td>
<td>6</td>
</tr>
<tr>
<td>2010</td>
<td>8</td>
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<td>2011</td>
<td>9</td>
</tr>
<tr>
<td>2012</td>
<td>8</td>
</tr>
<tr>
<td>2013</td>
<td>10</td>
</tr>
<tr>
<td>2014</td>
<td>11</td>
</tr>
<tr>
<td>2015</td>
<td>4</td>
</tr>
</tbody>
</table>
Active Canadian Securities Class Actions

As of December 31, 2001-2014 and September 30, 2015
Canadian Securities Class Actions by Industry Sector

- Finance: 24%
- Non-Energy Minerals: 23%
- Energy Minerals: 10%
- Industrial Services: 9%
- Commercial Services: 6%
- Health Technology: 5%
- Communications: 5%
- Electronic Technology: 5%
- Consumer Services: 4%
- Consumer Non-Durables: 3%
- Producer Manufacturing: 3%
- Other: 3%
- Non-Durables: 3%
Liability Limits in Canadian Securities Class Actions

For the Issuer

- The greater of:
  - $1 million; and
  - 5% of market capitalization (calculated over ten trading days prior to the making of the misrepresentation)

For Individual Officers and Directors

- The greater of:
  - $25,000; and
  - 50% of aggregate compensation from responsible issuer and affiliates over prior year

- Doesn’t apply if misstatement made knowingly
## Canadian Liability Limits: A Tale of Two Companies

<table>
<thead>
<tr>
<th></th>
<th>Small Cap Enterprises</th>
<th>Big Corp.</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Pre-“misrepresentation”:</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Share Price</td>
<td>$10</td>
<td>$100</td>
<td></td>
</tr>
<tr>
<td>Shares Outstanding</td>
<td>50 million</td>
<td>50 million</td>
<td></td>
</tr>
<tr>
<td>Market Capitalization</td>
<td>$500 million</td>
<td>$5,000 million</td>
<td></td>
</tr>
<tr>
<td><strong>“Corrective” Disclosure:</strong></td>
<td>Booking phony sales… massive and fraudulent overstatement of revenue and profits</td>
<td>Project delays coupled with goodwill write-down</td>
<td></td>
</tr>
<tr>
<td>Share Price Reaction to Disclosure:</td>
<td>Drop of 40%, from $10 to $6</td>
<td>Drop of 4%, from $100 to $96</td>
<td></td>
</tr>
<tr>
<td>Gross Damages</td>
<td>$200 million</td>
<td>$200 million</td>
<td></td>
</tr>
<tr>
<td>Liability Limit</td>
<td>$25 million</td>
<td>$250 million</td>
<td></td>
</tr>
</tbody>
</table>
Cross Border Class Actions
U.S. Filings Against Canadian Companies

1997-2005

- 41 US Filings without Parallel Canadian Filings (84%)
- 8 US Filings with Parallel Canadian Actions (16%)

2006-2014

- 26 US Filings without Parallel Canadian Filings (52%)
- 24 US Filings with Parallel Canadian Actions (48%)
Trends in Resolutions
Median Settlements in Securities Class Actions

Through December 31, 2014

Median Settlement in Canada, 2005-2014: $10.4 million

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Median Settlements ($MM)

- 2005: $8.3
- 2006: $8.0
- 2007: $4.4
- 2008: $18.7
- 2009: $1.5
- 2010: $8.1
- 2011: $29.6
- 2012: $12.3
- 2013: $9.6
- 2014: $5.2

USA and Canada ($US)

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NERA ECONOMIC CONSULTING
# Top 10 Canada-U.S. Cross-Border Settlements

## As of September 30, 2015

<table>
<thead>
<tr>
<th>Rank</th>
<th>Company</th>
<th>Year</th>
<th>Settlement Value (CAN $MM)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Filing</td>
<td>Settlement</td>
</tr>
<tr>
<td>1</td>
<td>Nortel Networks Corp. (I)</td>
<td>2001</td>
<td>2006</td>
</tr>
<tr>
<td>2</td>
<td>Nortel Networks Corp. (II)</td>
<td>2005</td>
<td>2006</td>
</tr>
<tr>
<td>3</td>
<td>Sino-Forest Corp.*</td>
<td>2011</td>
<td>2012</td>
</tr>
<tr>
<td>4</td>
<td>Biovail Corp.</td>
<td>2005</td>
<td>2008</td>
</tr>
<tr>
<td>5</td>
<td>YBM Magnex International, Inc.</td>
<td>1998</td>
<td>2002</td>
</tr>
<tr>
<td>6</td>
<td>Kinross Gold Corp.</td>
<td>2012</td>
<td>2015</td>
</tr>
<tr>
<td>7</td>
<td>Hollinger International, Inc.</td>
<td>2004</td>
<td>2008</td>
</tr>
<tr>
<td>8</td>
<td>Cinar Corp.</td>
<td>2000</td>
<td>2003</td>
</tr>
<tr>
<td>9</td>
<td>FMF Capital Group Ltd.</td>
<td>2006</td>
<td>2007</td>
</tr>
<tr>
<td>10</td>
<td>Novagold Resources Inc.</td>
<td>2009</td>
<td>2010</td>
</tr>
</tbody>
</table>

*Sino-Forest is partially settled.
Predicted Settlement Analysis
Predicted Settlement Model

- Estimate expected settlement amount for a particular case given its specific characteristics
- Uses case-specific facts to predict a settlement range
- Based on historical settlement data
  - 853 U.S. cases filed and settled between 2000 and 2014
  - Settlements in the sample range from $100,000 to more than $7 billion
Factors Affecting Settlement Values

- Investor Losses
- Market cap
- IPO Involved
- Debt Included
- Preferred Stock Included
- Options Included
- Accounting Codefendant
- Irregularities Admitted
- Restatements

- Criminal Conviction or Payment to a Government Agency
- Institutional Lead Plaintiff
- Institution is a Public Pension Lead Plaintiff
- Financial Firm Codefendant
- Parallel Derivative Case
- Filing year
Distribution of Predicted Settlement Values for a Case with Specific Data

- Median: $13.9 million
- Mean: $20.0 million

Confidence Interval:
- 80% of Settlements are Expected to Fall Within This Range
- 90% of Settlements are Expected to Fall Within This Range
- 95% of Settlements are Expected to Fall Within This Range
## Comparative Settlements Analysis Using Canadian Settlements

### Canadian Statutory Secondary Market Cases Settled After 2006

<table>
<thead>
<tr>
<th>Settlement Amount as a Percentage of...</th>
<th>Damage Claim</th>
<th>Post-Class Period Market Cap</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mean</td>
<td>13.3%</td>
<td>11.7%</td>
</tr>
<tr>
<td>Median</td>
<td>9.1%</td>
<td>3.6%</td>
</tr>
<tr>
<td>Number of Cases</td>
<td>26</td>
<td>26</td>
</tr>
</tbody>
</table>
Recent Trends In Wage and Hour Class Actions: US v. Canada
Wage & Hour Settlements in US Have Decreased Since 2011

Settled Wage and Hour Cases by Year
Data as of March 31, 2015
Wage & Hour Filings in Canada Small But Potentially Growing

40% of cases since 2004 were filed in last two years (retirement fund, misclassification, overtime)

From Filings in the National Class Action Database
Wage and Hour Class Actions by Allegation Type

**US Settled Cases 2014-2015**
- Minimum Wage: 18%
- Overtime: 42%
- Tip Pooling: 3%
- Donning and Doffing: 2%
- Missed Meals and Breaks: 11%
- Off-the-Clock: 10%
- Misclassification: 14%

**Canadian Filed Cases 2004-2015**
- Minimum Wage: 10%
- Overtime: 52%
- Misclassification: 28%
- Other: 10%
Average Settlement Values in U.S. Have Declined

Mean Wage and Hour Settlement Amount by Year
Data as of March 31, 2015

Decline due to smaller classes post-Dukes
Recent Trends In Consumer Class Actions: US v. Canada
Consumer Class Actions

**US Settled Cases by Year**

- 2010: 50
- 2011: 100
- 2012: 150
- 2013: 200
- 2014: 250

**Canadian Filed Cases by Year**

- 2013: 60
- 2014: 80
- 2015: 50
Consumer Class Actions by Allegation Type

**US Settled Cases 2010-2014**
- Multiple Categories: 11%
- False Advertising: 18%
- Product Liability: 21%
- Fraud: 17%
- Inadequate Information/Warning: 4%
- Violation of Consumer Privacy: 14%

**Canadian Filed Cases 2013-2015**
- Multiple Categories: 5%
- False Advertising: 25%
- Product Liability: 30%
- Fraud: 11%
- Inadequate Information/Warning: 4%
- Violation of Consumer Privacy: 25%
Banking and Pharma Sector Largest Targets in US

US Settled Cases by Defendant Industry

- Transportation: 19%
- Banking/Finance: 13%
- Industrial Products: 12%
- Business/Consumer Service: 10%
- Pharmaceuticals: 12%
- Electronics: 9%
- Motor Vehicles: 8%
- Insurance: 4%
- Food Products: 3%
- Entertainment/Social Media: 3%
- Retail: 3%
- Telecommunications: 4%
Industrial Products and Pharma Sectors Largest Targets in Canada

Canadian Filed Cases by Defendant Industry

- **Industrial Products**: 32%
- **Pharmaceuticals**: 27%
- **Motor Vehicles**: 10%
- **Food Products**: 9%
- **Insurance**: 7%
- **Entertainment**: 5%
- **Electronics**: 3%
- **Retail**: 2%
- **Transportation**: 3%
- **Telecommunications**: 2%
- **Banking/Finance**: 10%

36
Average Settlements Higher than Median Settlements in US

Mega-Settlements Exceed $1 Billion

<table>
<thead>
<tr>
<th>Type of Allegation</th>
<th>Settlement Fund Value (Millions)</th>
</tr>
</thead>
<tbody>
<tr>
<td>False Advertising / Misrepresentation</td>
<td>$13.5</td>
</tr>
<tr>
<td>Product Liability</td>
<td>$73.6</td>
</tr>
<tr>
<td>Violation of Consumer Privacy</td>
<td>$8.7</td>
</tr>
<tr>
<td>Inadequate Warning / Information</td>
<td>$96.6</td>
</tr>
<tr>
<td>Fraud</td>
<td>$5.6</td>
</tr>
<tr>
<td>Antitrust</td>
<td>$122.0</td>
</tr>
<tr>
<td>Multiple Categories</td>
<td>$57.5</td>
</tr>
</tbody>
</table>

Settlement Fund Value (Millions)
Recent Trends in the Use of Economics in Class Actions
Class Action Filed Against *Nature’s Cones*

**Allegation**
- *Nature’s Cones* falsely advertised ice cream as “GMO Free”
- Consumers were misled
- Overpaid
- Sole competitor, *Faux Cones*, truthfully advertised its products as containing GMOs

**Damage**
- Difference in price between what consumers actually paid for product and what they would have paid had they known about GMOs
Economic Methods Proposed to Determine Monetary Value of Product Attributes

- Brand (*Nature’s Cone*/Faux Cones)
- Cone/Cup
- Whipped Cream
- Topping (Cherry/Nuts)
- GMO Status (GMO Free/Contains GMOs)

- Conjoint Survey
- Hedonic Regression
- “Hybrid” Method
Method 1: Conjoint Survey

- Use hypothetical choices to model consumer behavior
  - Respondents choose among set of products
  - Product alternatives have varying attributes
    - Attribute of interest
    - Other attributes expected to drive price
    - Price
  - Product selections reveal what respondents would be willing to pay for attribute of interest
Option A and Option C are identical except for GMOs and price.

If Respondent Chooses Option C over Option A…

<table>
<thead>
<tr>
<th>Attribute</th>
<th>Option A</th>
<th>Option B</th>
<th>Option C</th>
<th>Option D</th>
</tr>
</thead>
<tbody>
<tr>
<td>Brand</td>
<td>Nature’s Cones</td>
<td>Faux Cones</td>
<td>Nature’s Cones</td>
<td>Faux Cones</td>
</tr>
<tr>
<td>Cone/Cup</td>
<td>Cone</td>
<td>Cone</td>
<td>Cone</td>
<td>Cup</td>
</tr>
<tr>
<td>Whipped Cream</td>
<td>Whipped Cream</td>
<td>No Whipped Cream</td>
<td>Whipped Cream</td>
<td>Whipped Cream</td>
</tr>
<tr>
<td>Cherry/Nuts</td>
<td>Cherry</td>
<td>Nuts</td>
<td>Cherry</td>
<td>Nuts</td>
</tr>
<tr>
<td>GMO Status</td>
<td>Contains GMOs</td>
<td>GMO Free</td>
<td>GMO Free</td>
<td>GMO Free</td>
</tr>
<tr>
<td>Price</td>
<td>$1.25</td>
<td>$1.00</td>
<td>$1.50</td>
<td>$1.50</td>
</tr>
</tbody>
</table>

…value of GMO Free is revealed to be at least $0.25
Flaws of Conjoint Analysis

- Measures “willingness to pay”
  - No money being spent
  - May overstate true value

- Vague product attributes cannot be estimated
  - “Taste” may be an important driver of price but difficult/impossible to measure in conjoint
  - Advertising slogans can have different meanings for different consumers
    - “Get healthy today”
Method 2: Hedonic Regression

- Collect actual market price data and correlate statistically with product attributes

\[
\text{Price} = \beta_1 \text{Brand} + \beta_2 \text{Cone} + \beta_3 \text{W. Cream} + \beta_4 \text{Cherry} + \beta_5 \text{GMO Status}
\]

- Does not suffer from “willingness to pay” bias because based on observed market prices/consumer decisions
Initial Review of Data Reveals Correlation Between Price and Presence of GMOs

GMO Status versus Price
Results of Hedonic Regression:

\[
\text{Price} = 0.50 \, \text{Brand} + 0.25 \, \text{Cone} + 0.10 \, \text{Whipped Cream} + 0.05 \, \text{Cherry}
\]

GMO Status was not estimated because it is “collinear” with Brand

- All ice cream advertised as GMO Free is *Nature’s Cones*
- All ice cream advertised as containing GMOs is *Faux Cones*
Other Critiques of Hedonic Regression

- Omitted Variable Bias
  - Data may not exist for important product attributes (e.g., taste)

- More fundamentally, cannot estimate “but for” price
  - Assumes that if Nature’s Cones had advertised its product as containing GMOs, supply and demand would be unchanged
  - However, changes would occur
  - “But for” price could be unchanged, lower or even higher – hedonics cannot predict
Method 3: Hybrid Approach

Results from conjoint indicate:

- Value of “GMO Free” = $0.20
- Value of Brand = $1.00
- Ratio = $0.20/$1.00 = 1/5

Combine with results from hedonic:

$0.50 Nature’s Cones Brand

$0.10

Implied Value of GMO Free “Tethered” to Market Price

1/5

4/5

$0.40

Implied Value of Remaining Brand Effect “Tethered “to Market Price
Critiques of Hybrid Approach

- Does not correct any flaws in conjoint
  - Garbage in, garbage out

- Does not correct fundamental flaw of hedonics
  - Cannot estimate how supply/demand decisions would change in “but for” world
  - Cannot estimate change in price absent alleged misstatements/omissions

- Despite flaws, has gotten some traction in US cases (e.g., ConAgra II)
  - Decisions on several pending cases (e.g., flushable wipes, e-cigarettes) will determine future of “no injury” litigation
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Contact Information

**Denise Martin, Ph.D.**
Senior Vice President
NERA—New York
+1 212-345-5296
denise.martin@nera.com

**Brad Heys, CFA, CFE, MA, JD**
Vice President
NERA—Toronto
+1 416 868 7312
brad.heys@nera.com
Developments in Worldwide Classes and Foreign Plaintiff Class Members

Markus Kremer & Heather Pessione
The Aria Brands v. Air Canada Case

- Alleged global conspiracy to fix prices on air freight shipping services
- Proposed international class of freight forwarders in >30 different countries who shipped goods to Canada
- Defendants resident & domiciled in Canada
The Legal Issue

• Defendants brought motion to stay action in relation to absent foreign claimants
  • No issue re: jurisdiction over defendants

• Argument:
  • Ontario courts lack jurisdiction over persons not resident in Canada who have not consented to jurisdictional or participated actively in action
The Evidence

- 8 Volumes of materials
- 26 Affidavits on foreign law
- Evidence established Canadian approach to jurisdiction inconsistent with that of most other countries
Canada v. The World

- Canada’s “real and substantial connection” test is a radical departure from other countries’ norms, where jurisdiction based on presence, consent or submission.
- Opt out regime does not apply outside Canada.
- Ontario class action judgment involving absent foreign claimants will not be enforced abroad.
The Court’s Decision

- Jurisdiction over defendants ≠ jurisdiction over absent foreign claimants
- Real & substantial connection test should not apply to absent foreign claimants
- Jurisdiction requires presence or consent
- Asserting jurisdiction when foreign courts will not recognize judgment would offend comity
  - Foreign claimants expect own laws to determine rights & not Ontario proceeding
Implications of the Decision

• Does not preclude “opt in” international class actions against Canadian residents

• Likely to lead to more careful drafting of proposed class by experienced class counsel

• Makes international class actions far less attractive to class counsel

• May result in Canadian defendants being sued abroad more frequently
Crystal Ball Gazing

• Appeal pending

• Issue likely to go to CA & SCC on this case or another

• Outcome difficult to predict, given Canadian courts’ tendency to go own way
The Aria Brands v. Air Canada Case

Questions?
Refreshment Break
Claims for Breach of Statute – Is the End in Sight?

Brad Dixon

Borden Ladner Gervais
The issue: contending with claims for recovery without proof of loss.

- Plaintiffs’ counsel seek for ways to obtain monetary relief for the class, without having to prove any actual loss by class members, as this often requires individual proof of loss.
- A preferred technique has been claims for disgorgement of profits based on alleged wrongful conduct – waiver of tort or restitution for wrongs.
Why is this important?

• In a highly-regulated business environment, breach of some statutory provision is an ever present risk.
• Uncertainty in the law on the consequences of breach makes risk assessment difficult.
• Plaintiffs use uncertainty to obtain certification and/or settlement of claims that might not otherwise warrant payment.
Plaintiffs in the ascendant

- Numerous cases certified on the strength of claims for disgorgement.
- Courts unwilling at the certification stage to come to grips with uncertainties: is waiver of tort an independent cause of action or just an election of remedies? what types of wrongful conduct engage the doctrine?
- Claims settled and no answers obtained.
Tide of Certifications stemmed

• *Koubi v. Mazda Canada* 2012 BCCA 310; leave to appeal to SCC denied January 17, 2013
  
  • Product liability claim: alleged design deficiency in door locks making them more susceptible to break and entry.
  
  • No loss alleged, claim for disgorgement of profits based on alleged breach of *Business Practices and Consumer Protection Act* (deceptive marketing) and *Sale of Goods Act* (implied warranties).
Koubi v. Mazda – success on appeal

- Claims certified by B.C. Supreme Court.
- Reversed on appeal.
- No resort to waiver of tort (whether it be an independent cause of action or an alternative remedy) or other restitution remedies to obtain disgorgement of gains for breach of statutes that are comprehensive codes (*BPCPA*) or where this would be inconsistent with statutory remedy (*SGA*).
Defendants press the advantage

  - Children’s cough and cold remedies – no evidence of effectiveness for children under six.
  - No claim for any injury or loss.
  - Disgorgement of profits sought based on alleged deceptive advertising (*BPCPA; Competition Act*).
Wakelam

• Certification reversed on appeal:
  • Following reasoning in *Koubi*, no resort to claims for unjust enrichment and constructive trust for breach of *BPCPA*
  • extension of the same analysis to the *Competition Act*: nothing to indicate Parliament intended the statutory right of action, to sue for damages for loss, be augmented by a general right in consumers to sue in tort or to seek restitutionary remedies.
Sunny Days for defendants

• **Koubi/Wakelam** followed
  • *Charlton v. Abbott Laboratories*, 2015 BCCA 26 – re: *BPCPA*. 
Too good to be true? Restive courts.

• * Wakelam, * interpreted restrictively by some lower courts - on its particular facts, the decision is not applicable to common law torts based on conduct wrongful under the statute.
  
  • * Pro-Sys v. Microsoft, * 2014 BCSC 1280
  • * Fairhurst v. Anglo-American PLC, * 2014 BCSC 2270
  • * Harrison v. Afexa Life Sciences Inc., * 2015 BCSC 638
BC Court of Appeal Pulls Back

*Watson v. Bank of America, 2015 BCCA 362*

- Adopts the restrictive view of the *Wakelam* decision as precluding only claims for disgorgement of profits as an alternate remedy for breach of the *Competition Act*.

- This nuance leaves open to plaintiffs any common law tort claims where wrongful conduct is a required element. The plaintiff can rely on breach of statute as the wrongful conduct, and even advance a waiver of tort claim if it can be founded on that particular tort.
Meanwhile in Ontario…

• Ontario judges not persuaded to follow B.C. approach in:
  • *Wellman v. Telus* (sub nom. *Corless v. Bell Mobility*), 2014 ONSC 3318; allowing unjust enrichment claim to stand based on breach of statute.
  • *Airia Brands v. Air Canada, et al*, 2015 ONSC 5352; not plain and obvious that a common law claim for unlawful means conspiracy is bound to fail.
Meanwhile in Ontario… (confusion reigns)

• Perell J. enters the fray in Ontario
  • *Shah v. LG Chem. Ltd.*, 2015 ONSC 6148
    • Declines to follow other Ontario cases.
    • BCCA got it right in *Wakelam*, wrong in *Watson*.
    • Effectively concludes: where a statute provides a comprehensive code, with remedies for breach, the common law must give way.
    • On this authority, the legal landscape in Ontario is better for defendants than in B.C.
What does all this mean?

- These developments are important to risk assessment:
  - In certain cases it will be more difficult now for plaintiffs to obtain certification.
  - The risk presented by claims for disgorgement of profits and punitive damages may be lessened.
  - Plaintiffs may have to be prepared to prove individual damages before recovery can be obtained.
  - Shorter limitation periods may apply.
- All of this is helpful to defendants, but the situation is still in flux.
Is the end in sight?

• Certainly, further developments may be expected:
  • In Ontario as higher courts grapple with different results.
  • Possibly in B.C. as further cases come forward, but it will be difficult to get the Court of Appeal to alter course.
  • At the Supreme Court of Canada – not in Watson (no leave sought), but eventually perhaps.
The End (for now).

Thank you
Quebec Class Actions Against JTI-Macdonald, Imperial Tobacco and Rothmans, Benson & Hedges

November 24, 2015
Class Action: Key Principles

• The authorization is only a filter for frivolous claims. It does not mean that the claim must succeed on the merits

• The burden of proof cannot be lighter in a class action context than in individual trials

• Class actions cannot allow cases to succeed on a collective basis when they would fail on an individual basis
The “Representative Proof”

“At the trial of the common issues, the representative plaintiff will have responsibility for placing before the court « representative proof ». It is not necessary for every class member to testify or to give evidence at the trial of the common issues. If this were necessary, it would entirely defeat the purpose of a class proceeding. It is the representative plaintiff’s responsibility to place before the court a sample of class members and their experiences from which the court can draw an inference or conclusion about the experience of the entire class.”

Class Action: Key Principles

• Class actions are not meant to be commissions of inquiry
  • Québec, Assemblée nationale, Commission permanente sur la justice, Barreau du Québec – Recours collectifs, projet de loi 29 de 1977 (January 1979), p. 3

• Common issues do not have to settle all elements of liability with respect to individual class members
  • Collectif de défense des droits de la Montérégie (CDDM) v. Centre hospitalier régional du Suroît du Centre de santé et de services sociaux du Suroît, 2011 QCCA 826 (CanLII)
Class Action: Key Principles

[22] A single common, related or similar issue of law suffices to meet the condition in article 1003(a) CCP if it is significant enough to affect the outcome of the class action; however, it need not be determinative of the final resolution of the case: Comité d'environnement de la Baie Inc. v. Société de l'électrolyse et de chimie de l'Acannée, [1990] RJQ 655 (CA) at paragraphs 22 and 23. It is sufficient that it allows the claims to move forward without duplication of the judicial analysis (Pierre-Claude Lafond, Le recours collectif, le rôle du juge et sa conception de la justice (Cowansville, Que: Yvon Blais, 2005) at 92; Western Canadian Shopping Centres Inc. v. Dutton, [2001] 2 SCR 534 at para 39).

[23] It is quite possible that the determination of common issues does not lead to the complete resolution of the case, but that it results instead in small trials at the stage of the individual settlement of the claims. This does not preclude a class action suit.
Quebec Class Actions Against Tobacco Manufacturers: Overview

- **Authorized on February 21, 2005**
  - They cover a period of some 50 years (note article 27 of the *Tobacco-Related Damages and Health Care Costs Recovery Act* which removes the limitation period as a ground of defense)
    - Classes broadly defined

- The trial on the merits began on March 12, 2012

- The trial lasted 251 days

- More than 21,000 Exhibits were filed in the Court record

- 50 fact and 24 expert witnesses testified
CQTS/Blais Group

All persons residing in Quebec who satisfy the following criteria:

1) To have smoked, before November 20, 1998, a minimum of 12 pack/years of cigarettes manufactured by the defendants (that is, the equivalent of a minimum of 87,600 cigarettes, namely any combination of the number of cigarettes smoked in a day multiplied by the number of days of consumption insofar as the total is equal to or greater than 87,600 cigarettes). For example, 12 pack/years equals:

   20 cigarettes a day for 12 years (20 X 365 X 12 = 87,600) or
   30 cigarettes a day for 8 years (30 X 365 X 8 = 87,600) or
   10 cigarettes a day for 24 years (10 X 365 X 24 = 87,600)

2) To have been diagnosed before March 12, 2012 with:

   a) Lung cancer; or

   b) Cancer (squamous cell carcinoma) of the throat, that is to say of the larynx, the oropharynx or the hypopharynx; or

   c) Emphysema.

The group also includes the heirs of the persons deceased after November 20, 1998 who satisfied the criteria mentioned herein.
Létourneau Group

All persons residing in Quebec who, as of September 30, 1998, were addicted to the nicotine contained in the cigarettes made by the defendants and who otherwise satisfy the following criteria:

1. They started to smoke before September 30, 1994 and since that date have smoked principally cigarettes manufactured by the defendants;

2. Between September 1 and September 30, 1998, they smoked on a daily basis an average of at least 15 cigarettes manufactured by the defendants; and

3. On February 21, 2005, or until their death if it occurred before that date, they were still smoking on a daily basis an average of at least 15 cigarettes manufactured by the defendants.

The group also includes the heirs of the members who satisfy the criteria described herein.
COMMON QUESTIONS

1. Did the manufacturers manufacture, market and sell a dangerous product that is harmful to the health of consumers?

2. Were the manufacturers aware or presumed to be aware of the risks and dangers associated with the consumption of their products?

3. Did the manufacturers implement a systematic policy of non-disclosure of those risks and dangers?

4. Did the manufacturers trivialize or deny those risks and dangers?

5. Did the manufacturers establish marketing strategies conveying false information about the characteristics of the good sold?

6. Did the manufacturers knowingly manufacture a product which has the result of creating a dependence and did they ensure not to use parts of the tobacco plant which contain a level of nicotine so low as to have the effect of ending the dependence for a good part of smokers?

7. Did the manufacturers conspire to maintain a common front aimed at preventing the users of their products from being informed of the dangers inherent in their consumption?

8. Did the manufacturers intentionally deprive the members of the group from their right to life, security and integrity?
Plaintiffs’ Strategy

• Focused almost exclusively on the conduct (alleged faults) of the defendants

• Did not call a single class member to testify at trial, not even the class representatives

• Court refused defendants’ request to examine class members on discovery on the basis that individual issues would be dealt with at individual trials (which never occurred) and that the classes were so broad that any individual testimony would not be useful

• Very few witnesses able to testify to the documentary evidence being adduced but mainly used as a conduit to file documents emanating only from defendants (broad one-way production)

• Conducting a “Commission of Inquiry”
Conducting a *de facto* « Commission of Inquiry »

- Fine cut dust
- Research into « safer products »
- Smuggling
- Taxation
- Corporate Transactions
- Bad « ideas », although never implemented
- Policy of document retention
[15] In a case like this, where the size of the classes is in the tens of thousands, if not over a million in Létourneau, we have previously ruled that the testimony of a few or even dozens of class members does not amount to useful evidence on anything but individual issues. This reality is not necessarily good news for the Plaintiffs. It represents a complicating factor in their effort to adduce useful evidence. Nevertheless, it is not of itself a game-stopper. There are other ways of making that proof, including the methods adopted by the Plaintiffs here: expert opinions, presumptions and documentary statements demonstrating fault.
How Evidence was Adduced?

- Through witnesses – but no class member or class representative
- Documents were accepted into the evidence essentially on the basis that they were genuine (authentic)
  - *Conseil québécois sur le tabac et la santé v. JTI-MacDonald Corp.*, 2012 QCCS 1870 (CanLII)
  - “But other than where an exception applies, basically, the documents that are being filed under my May second (2nd) judgment, to a large extent, don’t say much more than "the company had this document in its possession, it knew what it said…” (Justice Riordan, Day 60, 2012, p. 35, 275)
- Pursuant to article 2870 CCQ – documents admissible as testimony when necessity /reliability criteria are satisfied
  - Trial Judge equated reliability with respect to the truth of the document’s content to the document’s authenticity/genuineness
Double Presumption of Causation

- Plaintiffs had the burden of establishing « conduct causation » (was the class members’ smoking caused by a fault of the defendants) and « medical causation » (were diseases caused by smoking)

- Plaintiffs made no attempt to prove conduct causation

- The Trial Judge nonetheless presumed that all class members’ decision to start or continue smoking was caused by the defendants’ wrongful conduct
  
  - Reliance on “mere common sense”.
  - Presumption made irrebuttable by awarding collective recovery.
Double Presumption of Causation

[792] The Plaintiffs do not see it that way. Seeking to make their proof by way of presumptions, they prefer the "it-stands-to-reason" test. This would have the Court presume, in light of the gravity of the Companies' faults, that it stands to reason that such faults were the cause of people's starting or continuing to smoke, even if there is no direct proof of that.

[798] The Plaintiffs readily admit that they did not even try to prove the cause of smoking on an individual basis, recognizing that that would have been impossible in practical terms. Thus, they turn to presumptions of fact in order to make their proof.

[803] With respect to the first, who could deny the seriousness of a presumption to the effect that the Companies' faults were a cause of the Members' smoking? The existence of faults of this nature leads strongly to the conclusion that they had an influence on the Members' decision to smoke. Mere common sense dictates that clear warnings about the toxicity of tobacco would have had some effect on any rational person. Of course, that would not have stopped all smoking, as evidenced by the fact that, even in the presence of such warnings today, people start and continue to smoke.
Double Presumption of Causation

• Medical causation established through epidemiological evidence

• Section 15 of the *Tobacco-Related Damages and Health Care Costs Recovery Act*:

  “15. In an action brought on a collective basis, proof of causation between alleged facts, in particular between the defendant’s wrong or failure and the health care costs whose recovery is being sought, or between exposure to a tobacco product and the disease suffered by, or the general deterioration of health of, the recipients of that health care, may be established on the sole basis of statistical information or information derived from epidemiological, sociological or any other relevant studies, including information derived from a sampling.

  The same applies to proof of the health care costs whose recovery is being sought in such an action”
Double Presumption of Causation

• Medical causation is established by a single universal “critical dose” derived from epidemiological studies

• Presumption made irrebuttable by awarding collective recovery

• Class representative’s emphysema not caused by smoking, but nevertheless compensated by the final judgment
We do, however, recognize that it is possible that under Dr. Siemiarycki's method some people might be included in the classes, and thus compensated, incorrectly. But should that be a concern with classes of the size here?

The courts should not allow the spirit and the mission of the class action to be thwarted by an impossible pursuit of perfection. While respecting the general rules of the law, the courts must find reasonable ways to avoid allowing culpable defendants to frustrate the class action's purpose by insisting on an overly rigid application of traditional rules. This is particularly so where the fault, the damages and the causal link are proven, as they are here.
Evidence of Moral Damages

- Evidence of moral damages suffered by all class members made through the testimony of three Plaintiffs’ experts:
  - An expert in ear, nose and throat medicine and cervicofacial oncological surgery
  - A chest and lung clinician
  - A psychiatrist specialized in addiction
Awareness

- The Trial Judge assessed the class members’ knowledge of the risks of smoking solely from a class-wide perspective.

- Disregarded the fact that prior to “Knowledge Dates” established for all class members, a large (but undetermined) number of class members were aware of the health risks of smoking.

- These class members would be compensated notwithstanding the fact that they had personal knowledge.
The First Instance Judgment

• In the Blais File, the Judgment awards over $6.8 billion in moral damages to the class members on a solidary basis, which sum translates to approximately $15 billion with interest

• The Judgment also condemns the manufacturers to pay punitive damages

• In the Létourneau File, the Judgment dismisses the claim for moral damages, but awards class members an aggregate award of $131,000,000 in punitive damages

• The First Instance Judgment is currently under Appeal, which appeal should be heard in November 2016
It happened to me too…

Michael C. Smith
BLG Toronto
mcsmith@blg.com
@MichaelSmithYYZ

BLG Class Actions Seminar
Tuesday, November 24th, 2015
BLG Toronto Offices
Ramdath 2014 ONSC 3066 and 4818

• Appeal argued May 7, 2015 – decision under reserve

• Misrepresentation – Consumer Protection Act claim

• Damages = (Direct and Indirect Costs) – (Residual Value)
• Three representative plaintiffs cherry-picked by class counsel
• Cherry-picked the best evidence from the three representative plaintiffs and applied it to all class members, despite:
  • Damages not a common issue
  • Problems with the plaintiffs’ evidence:
    • They misinterpreted the misrepresentation, and their misrepresentation was really the basis of their claims
    • Other contradictions between plaintiffs’ evidence and plaintiffs’ damages theory
  • Evidence to the contrary from class members who opted out, other people similarly situated, and from experts
  • No discovery
• One-sided Individual evidence used as basis for representative assumptions that in turn became the basis for an aggregate damages award
• Courts want to be able to do ‘rough justice’

• But substantive rights of defendants are significantly affected

• Coupled with the denial of discovery rights (procedural right)
• Individual issues being turned into common issues, or being “assumed away” – what is the point of certification?

• Onus of proof eliminated or reversed

• Unpredictable

• Makes certification and pretrial procedure all the more important?
Thank You

Follow me on twitter: @MichaelSmithYYZ
Connect with me on LinkedIn
Refreshment Break
Class Actions in Québec – A Report from the Distinct Society
Francois Grondin & Patrick Plante
NEW DEVELOPMENTS REGARDING CLASS ACTIONS IN QUEBEC

Class Action Seminar
Toronto, ON
November 24th, 2015

Stéphane Pitre, Partner
Insurance and Tort Liability Group
514.954.3147
spitre@blg.com
Presentation Outline

I. False representation claims

II. Necessity to demonstrate the existence of a group

III. Conclusion
Section I
FALSE REPRESENTATION CLAIMS
False Representation Claims

- Legal dispositions regarding false representation

“218. To determine whether or not a representation constitutes a prohibited practice, the general impression it gives, and, as the case may be, the literal meaning of the terms used therein must be taken into account.

219. No merchant, manufacturer or advertiser may, by any means whatever, make false or misleading representations to a consumer.

228. No merchant, manufacturer or advertiser may fail to mention an important fact in any representation made to a consumer.”
False Representation Claims (cont’d)

• Test of Time

“[78] …A court asked to assess the veracity of a commercial representation must therefore engage, under s. 218 C.P.A., in a two-step analysis that involves — having regard, provided that the representation lends itself to such an analysis, to the literal meaning of the words used by the merchant — (1) describing the general impression that the representation is likely to convey to a credulous and inexperienced consumer; and (2) determining whether that general impression is true to reality. If the answer at the second step is no, the merchant has engaged in a prohibited practice.

[124]…In our opinion, a consumer who wishes to benefit from the presumption must prove the following:

(1) that the merchant or manufacturer failed to fulfil one of the obligations imposed by Title II of the Act;
(2) that the consumer saw the representation that constituted a prohibited practice;
(3) that the consumer’s seeing that representation resulted in the formation, amendment or performance of a consumer contract; and
(4) that a sufficient nexus existed between the content of the representation and the goods or services covered by the contract.”
False Representation Claims (cont’d)

- *Lévesque v. Videotron*
  - Group: every individual who used the Illico service to rent at least once a movie (for adult/torid)
  - Petitioner alleged that the message on Channel 900 to the effect that the duration of the rental is 24 hrs. is wrong. In reality, rental period varies between 9 – 18 hrs.
  - In first instance, the Certification was denied on the basis of absence of demonstration of a group
  - Mr. Lévesque did not do any inquiries and/or did not identify any other consumers in his situation
  - He did not provide for an estimate of consumers in the same situation
False Representation Claims (cont’d)

• Decision of the Court of Appeal
  • Principle
    • a Petitioner cannot just submit his case
    • Petitioner must take certain steps to demonstrate that he is not the only one in his situation
    • The level of research will depend on the nature of the recourse and its characteristics
False Representation Claims (cont’d)

- The Court of Appeal overturned the decision of the first instance and certified the case on the following basis:
  - We can presume that Respondent has the data to determine the number of clients that rented “adults movies / torid”
  - We can reasonably presume that a percentage of the 1.8 million clients rent adult movies
  - As for the argument that Petitioner did not demonstrate that the rental duration is as important to other members as it is for him, this question is not appropriate at this time
  - The violation of the law is evaluated on an objective basis and not with regards to a particular consumer
  - The main question is whether the representations or omissions regarding the duration of the rental period is a prohibited practice under the LPC. The answer to this question concerns all members
Section II
EXISTENCE OF A GROUP
Existence of a Group

• **Hébert v. Kia Canada Inc.**
  • Petitioner complains that the Bluetooth system of his vehicle is defective. Considering that all Kia brand cars use the same technology, Petitioner wishes to represent the owners of all Kia vehicles, model years 2009 to 2014.
  • The Court finds that Petitioner presented a case supporting his personal action. On this basis, criteria of article 1003 b) is met.
  • However, he did not demonstrate the existence of group:
    • Both Kia and the cellphone manufacturers indicate a possible compatibility issue.
    • Petitioner does not know any other members who were complaining of the same issue.
    • Petitioner did not do any investigation to determine the nature of the problem, and/or to identify other members who were complaining of the same issue.
    • Petitioner did not allege any expert report, specialized article or any proof of a possible generalized problem with the Bluetooth system of the Kia vehicles.
  • Considering the absence of a group, the certification was denied on the basis of articles 1003 a), b), c) and d).
Existence of a Group (cont’d)

• Decision of the Court of Appeal

“[1] To obtain the authorization of a class action, the Petitioner has the burden of demonstrating that the four cumulative criteria set out at Article 1003 of the Code of Civil Procedure are satisfied, which implies the existence of a group of people in the same situation as the Petitioner.

[2] The burden of the Petitioner is that of “demonstration” and not of proof.

[3] In this case, the trial judge considered that the evidence before him was not sufficient for finding the existence of a group. It was explained at length in paragraphs 20 to 46 of the judgment appealed.”
Section III

CONCLUSION
Conclusion

• Petitioner has the burden of demonstrating the existence of a group

• In false representation cases, the Courts can presume of the existence of a group

• If the case is certified, Plaintiff must meet all of the conditions of the test of Time
Stéphane Pitre, Partner
Insurance and Tort Liability Group
514.954.3147
spitre@blg.com
“L’Action Collective” Under the New Quebec Code of Civil Procedure

November 24, 2015

François Grondin: fgrondin@blg.com
Patrick Plante: pplante@blg.com
New Quebec Code of Civil Procedure is expected to come into force on January 1\textsuperscript{st}, 2016

Procedural rules governing class actions in Quebec will be covered by articles 571 to 604 (Book VI, Title III)

A brand new name in French (the legislator opted for “Action collective”), but few major changes to existing rules

The criteria for determining if a class action can be authorized (certified) remain the same (article 575 CCP)
The legislator abandoned the “50 or less employees” rule

• New article 571 CCP provides that legal persons (corporations), partnerships or associations may be members of the class.

• According to article 999 d) of the current Code, only legal persons (corporations), partnerships or associations with 50 employees or less can become members of the class.

• As such, a corporation will automatically be a class member if it falls under the definition of the class pursuant to the authorization judgment, unless it opts out of the class (art. 580 CCP).

• The legal person no longer needs to be at arm’s length with the representative of the class to be a member of a class.
The new article 578 CCP provides that a judgment authorizing a class action may now be appealed with leave of a judge of the Court of Appeal.

- Prohibited by article 1010 of the current Code, although the case law recognized a few exceptions interpreted very restrictively (e.g. lack of jurisdiction).
The right to appeal remains asymmetrical, since a judgment denying authorization may be appealed as of right by the petitioner.

When authorized, the appeal is heard and decided by preference (article 578 in fine).
What criteria will be used by a judge of the Court of Appeal to grant leave?

The new article 578 CCP is silent on the criteria.

Article 30 of the new Code, although not applicable to authorization judgment, provides the following criteria: Leave to appeal is granted if the judge considers that the matter at issue (1) involves a question of principle, (2) a new issue, or (3) an issue of law that has given rise to conflicting judicial decisions.
Leave to Appeal

- **Vivendi Canada Inc. v. Dell’Aniello, [2014] 1 SCR, para. 35**

[35] A class action may be authorized only if the four criteria of art. 1003 C.C.P. are met. If the motion judge errs in law or if his or her assessment with respect to any criterion of art. 1003 C.C.P. is clearly wrong, the Court of Appeal can substitute its own assessment, but only for that criterion and not for the others. An error in relation to one criterion does not give the Court of Appeal carte blanche to reconsider all the other criteria to be met before the bringing of a class action may be authorized.
Multi-Jurisdictional Class Actions

- The new Code circumscribes the discretion of the judge with respect to multi-jurisdictional class actions.

- In essence, the motion judge is required to take into consideration the protection of the rights and interests of Quebec residents.

- Article 577 CCP provides that the court cannot refuse to authorize a class action on the sole ground that the class members are part of a multi-jurisdictional class already under way outside Quebec.
  - This is consistent with the approach already adopted by Quebec courts.
Multi-Jurisdictional Class Actions

• If asked to decline jurisdiction, to stay an application for authorization to institute a class action or to stay a class action, the court is required to have regard for the protection of the rights and interests of Quebec residents

• This is also consistent with the approach already adopted by Quebec courts

• See Choquette v. Atlantic Power Corporation, 2013 Q.C.C.S. 6617: Justice Nollet denied a motion to stay the Quebec proceedings on the basis, *inter alia*, that this was not in the interests of the Quebec members
Multi-jurisdictional class

- When an application to enforce a settlement or a judgment in a foreign class action is made to the court, the court makes sure that the rules of *Civil Code of Quebec* that apply to the recognition and enforcement of foreign decisions have been complied with and that the notices given in Quebec in connection with the class action were sufficient (article 594 CCP)

- See *Canada Post Corporation v. Lépine*, 2009 SCC 16: Class action notices must be adequate (precise, unambiguous and accessible) to satisfy the requirements of procedural fairness
Multi-jurisdictional class

- As well, the court is required to make sure that:
  - the requirements that govern the exercise of the rights of Quebec residents are equivalent to those imposed in class actions brought before a Quebec court (i.e. that the rules governing class actions in the foreign jurisdiction do not cause prejudice to the Quebec residents)
  - that Quebec residents may exercise their rights in Quebec in accordance with the rules applicable in Quebec (it is still unclear what this requirement means)
  - that, in the case of collective recovery of claims, the remittance of any remaining balance to a third person will be decided by the court insofar as the Quebec residents’ share is concerned
The New Code (Varia)

- Maintains that an application for authorization may only be contested orally (article 574 CCP)
- Provide minor differences in terms of notices (article 579 CCP)
- Does not allow a defendant to request that the proceedings be split (article 584 CCP)
- Indemnity for the legal costs to the representative plaintiff (article 593 CCP) – essentially codifying the existing practice
- No significant differences with respect to an appeal against a judgment on the merits (articles 602 to 604 CCP)
The SCC on Contract Interpretation – A New Thorn in the Side of the Common Issue

Tim Buckley & Maureen Doherty
Facts

• Sattva introduced Creston to a mining deposit in Mexico, which Creston ultimately purchased.

• Finder’s Fee Agreement of $1.5 million, to be paid in shares of Creston.

• Parties disagreed on the date to price the shares and what the term “maximum amount” meant in payment term in the contract.
Sattva Capital Corporation v. Creston Moly Corporation

- Arbitrator found in favour of Sattva

- Creston sought leave to appeal the arbitrator’s decision pursuant to s. 31(2) of the B.C. Arbitration Act but leave was denied on the basis that it was not a question of law

- Court of Appeal reversed the decision and found that the arbitrator's failure to address the meaning of the agreement’s “maximum amount” raised a question of law
Supreme Court of Canada

- Construction of the finder's fee agreement did not constitute a question of law.

- The issue in this case raises a question of mixed fact and law.

- “The historical approach according to which determining the legal rights and obligations of the parties under a written contract was considered a question of law should be abandoned.”
Evidence of Surrounding Circumstances

- Court must consider “surrounding circumstances” (or factual matrix) when interpreting a written contract

- Varies from case to case

- Only objective evidence of background facts at time of execution of contract

- In the words of Lord Hoffman, “absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.” (The Supreme Court of Canada citing, *Investors Compensation Scheme Ltd. v. West Bromwich Building Society*, [1997] UKHL 28)
Factual Matrix: Context vs. Intentions

- A Court will not interpret a contract in a vacuum

- They will take into account the factual matrix which existed at the time in order to interpret the provisions

- Previously, a Court would only look at factual matrix when there was ambiguity, but this has changed

- Actions taken by the parties during negotiations, industry realities and sound business practices are all facts which can be admitted in determining the factual matrix
• Summary Judgment to interpret terms of consumer top up agreement

[18] It is beyond dispute that contractual words and phrases cannot be read or interpreted in isolation. The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean.[10]
Summary Judgment to interpret terms of consumer top up agreement

[19] There is also no dispute about the basic proposition that regard must be had to the contract as a whole and the surrounding circumstances that gave rise to the contract. [11] A court should consider “facts that were known or reasonably capable of being known by the parties when they entered into the written agreement.” [12]
• [20] In *Sattva Capital*, the Supreme Court concluded that “the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction” and that:

The overriding concern is to determine "the intent of the parties and the scope of their understanding" … To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning …
• Surrounding circumstances were admitted into evidence:

  • Brochures and Pamphlets from retailers
  • Statements on the backs of prepaid cards
  • Information on receipts
  • Information on websites
• Motion to certify common issue to interpret scope of release given to IKO for warranty repairs and for summary judgment on the meaning of the release

• Court accepted there was variation in circumstances surrounding execution of release:
  • Different length and scope of limited warranties
  • Variation in complaints of performance failure
  • Variation in causes of failure
  • Variation in compensation paid
  • Variation in causes of action
  • Variation in the nature and extent of discussion between the parties
  • Variation in involvement of legal counsel
Matoni v. C.B.S. Interactive Multimedia Inc.

- Consumer protection type claims made
- Claim of misrepresentation that completion of the educational program would lead to professional accreditation
- The final class definition exempted those who signed a document on registration to the program that described the correct facts regards accreditation
• Motion for Certification claiming that course calendar misrepresented the benefits of the program and that it would enable students to obtain three industry designations in addition to the college certificate

• Certification granted

• At damages stage, Court examined three class years of students and decided at this late stage to exclude the third cohort from the class definition because the third cohort received a correction in the orientation session

• Case is under appeal
Contract Interpretation: A New Thorn in the Side of the Common Issue

• Issues for Defendant
  • How does defendant defend itself when a contract term may be uniform, similar or identical, but the factual circumstances differ through the class period

• Will Sattva force courts to consider differing circumstances at liability stage (Wright v. UPS)

• Can differing circumstances fragment the putative class
Questions?
Saying Goodbye to Class Actions – The Return of Mass Torts, Test Cases and Other Relics of the Past

Cheryl Woodin
Saying Goodbye to Class Actions

Class actions have the profound effect on:

• What gets litigated;
• Where risk comes from; and
• How people get compensated for alleged wrongs.

They have taken root in certain industries such that the law against which we measure risk hinges on the outcome of “procedural” motions (certification).
What is determined to be:

- A viable cause of action at 5(1)(a);
- A common issue at 5(1)(C);
- At the “low hurdle” of the certification motion
- Has profound consequences for what evidence is relevant at trial
- What is appropriate as a method for calculating and awarding damages

Often the evidence relevant to a defence is individual, and is at risk of being filtered out of the primary analysis; deferred to individual issues trials.
Saying Goodbye to Class Actions

• As the OLRC continues its review of class action legislation in Ontario, we are at a crossroads.
• While that review continues, we also see signs of life beyond, beside or outside class actions.
• In order to understand what is producing those changes and whether, as defendants, we should continue to usher them in – step back to take stock of the broader picture.
Saying Goodbye to Class Actions

What do we get when we step outside class actions?

- Avoids cost of process
- Avoids risk of judicially engineered common issues
- Return individual issues, re: entitlement and damages to the front line
- Avoids producing results in a class action which affect the U.S. litigation
Saying Goodbye to Class Actions

What do we give up when we say goodbye to class actions?

• Efficiency of determining issues in common (if it exists)
• Finality for defined class through court approved settlement or judgment
• Splintering plaintiffs’ consortium with little ability to regulate them
Mass Tort Litigation in the U.S.

- Very different threshold for certification
- Heavy use of MDL – what does it offer?
- Examples of MDL proceedings that would or have been certified here:
  - Vioxx
  - Surgical Mesh
Saying Goodbye to Class Actions

Canadian “MDL” – what does it look like?

• Not constitutionally available
• Can and is occurring as a “grass roots” alternative
• Lawyers and clients organize themselves; may benefit from national carriage arrangements between plaintiffs’ counsel
• There is judicial support for alternative processes
• See O’Brien v. Bard Canada Inc. (2015 ONSC) – inviting “an ‘opt in’ type of mass claim” following failed attempt at certification
Saying Goodbye to Class Actions

• Avoiding the class action altogether

• Ex. – Paul Miller’s mesh litigation

“In a class action, if you lose once, you’re done. When you have 215 cases and lose one, you can analyze the weaknesses and perhaps rectify things for the next trial. There’s a certain leverage in maintaining a ‘next case up’ mentality”

– Financial Post, May 28, 2014

• Allows individual plaintiffs’ counsel to maintain more control
Saying Goodbye to Class Actions

The s. 29 exit from a class action

• By-passing the class action requires court approval
• Court considers “prejudice to the putative class”
• Court principally concerned about effect on limitation period examples:
  • Janssen-Ortho Birth Control Patch
  • Hudson v. Austin (Perrell J.)
Saying Goodbye to Class Actions

The decision points at exit:

- **The scope of notice – influenced by:**
  - Type and number of claims
  - Objectives in proceeding with discontinuance
- **The claims that come after**
  - Will there be an alternative to conventional claim?
The holidays are almost upon us…

- Class action procedure is not the shiny new toy it once was.
- In the right type of case, we are finding that everything old is new again
- Welcome back, procedure of the past!
Privacy Class Actions – The Year in Review

Barry Glaspell and Anne Merminod
Agenda

1. Two recent QC cases
2. ONCA’s “Intrusion upon Seclusion”
3. Snooper
4. Misadventure/Loser
5. Reaper
6. Hacker/Fraudster
7. Reflections

Appendix: Notes on Recent Cases
1.1 **Sofio v Investment Industry Regulatory Organization of Canada (IIROC): Facts**

- Loss of portable device containing personal data of 50,000 brokerage firm clients
  - Name
  - Address
  - Date of birth
  - Name of broker and account number opened with broker

- **Portable device included password**

- **Information not encrypted**

- Has not been found

- No reported case of malicious use
1.2 *Sofio v IIROC*: QC Superior Court

- **Damages claimed:** $1000$ per client
  1) Stress resulting from loss of information
  2) Time devoted to protect identity

- Authorization criteria satisfied, with the exception of that relating to the “serious appearance of a right” (arguable case)

- Sofio made *prima facie* proof of fault, but failed to show existence of compensable injury
  - Ordinary annoyances not “compensable” damages

- Motion for class authorization dismissed
1.3 Sofio v IIROC: QC Court of Appeal

- Sofio appealed & filed motion for leave to introduce new evidence on appeal (Aff. of Mr. Lamoureux)
- QC CA: Existence of a tangible moral injury qualifying for monetary compensation not demonstrated
- Fault does not *ipso facto* cause injury, even a moral one

25. “[…] this does not mean that when personal information is lost or stolen […] there will only be a compensable injury if the loss or theft in question entailed the de facto usurpation or attempted usurpation of the petitioner’s identity or the commission of fraud of attempted fraud upon him. That is not the case. The problem, in this case, related to the fact that the allegations of the Motion for Authorization, accepted as being true, very simply do not reveal any injury, not even a merely moral one.”
1.4 Lamoureux v IIROC

- New class action instituted by Mr. Lamoureux relying on same facts
- Alleges he is victim of identity theft
- Pleads punitive damages: 500$/per member
  - Emotional suffering
  - Inconveniences; and
  - Costs related to protection of identity

To be continued…
1.5 Zuckerman v Target Corporation

Theft
700,000 clients
Name
Address
Telephone number
Banking information
Credit card information
1.6 Zuckerman v Target

- US cyber attack;
- Damages alleged are in the nature of ordinary annoyances and anxieties, do not constitute “compensable” damages

[12] [...] Zuckerman claims that while he has not been the victim of fraud (i.e. identity theft) so far, he has experienced and continues to experience fear, stress, inconvenience and loss of time due to the necessity of monitoring more closely his monthly statements of accounts, all of which are compensable damages according to him. ...

[...] 

[55] Based on the allegations of the Motion, the Court finds that the damages alleged by Zuckerman are prima facie of the nature of ordinary annoyances and anxieties and do not constitute “compensable” damages.

- QC Sup Ct: Motion for declinatory granted (no jurisdiction); motion to authorize class action dismissed
1.6  Zuckerman v Target

• QC CA: Not appropriate for lower court judge to analyze quality of damages on jurisdiction inquiry;

• Might have been appropriate inquiry had declinatory exception been heard together with class authorization
2.1 Intrusion Upon Seclusion: *Jones v Tsige -- ONCA*

- J and T worked at BMO; T in common law relationship with J’s former husband
- T accessed Jones’ banking records 174x over 4 years
- Did not disseminate information, checking to see if paying child support
- T apologized, suspended 1 week
- PIPEDA applied to BMO not T
- 1st Canadian appellate court decision finding new common law intentional tort, intrusion upon seclusion
2.2 *Jones v Tsige* -- Elements of New Tort

1. An unauthorized intrusion
2. Intrusion “highly offensive” to reasonable person
3. Matter intruded upon was private
4. The intrusion caused anguish and suffering
   - Recover without traditional compensable harm
   - Amount can range up to $20K
   - Plaintiffs allege “aggregate assessment of damages”
   - Game changing decision
   - New common law foundation for privacy breach class actions
3.1 Snooper /Tsige cases

*Hopkins v Kay, 2015 ONCA 112; SCC leave denied*

- Hospital employee snooping PHI; patients notified
- Hospital moved to strike claim; PHIPA complete code
- Argued that new common law tort and statutory tort under PHIPA could not co-exist, but failed
- Series of approx. 15 of these cases across Canada
- No traditional damage; seclusion tort breeds new privacy class action litigation
- Complex questions of duty to log, audit, disclose snooping
- New exposure area for Canadian business
3.2 *Ari v ICBC, 2015 BCCA*

- Released last week
- Employee snooped auto insurance info
- BCCA re-affirms no common law *Jones v Tsige* tort of invasion or breach of privacy in BC
- But allowed claim re employer vicarious liability for statutory *Privacy Act* tort to proceed, on whether extends to unauthorized acts so connected with authorized acts, that regarded as modes of doing an authorized act
- Important question re whether employers to be held strictly liable for illegal acts of employees
4.1 Loser cases

*Condon v Canada*

- Loss of hard drive; contained unencrypted PI of 583K individuals in connection with student loan program
- 1st Fed Ct intrusion upon seclusion class action certified
- Generally unencrypted USBs, laptops, phones, hard drives being lost or stolen; may be required to give notice
- Notice creates class
- Ps may plead ID theft even if no evidence, to get certified, though no harm other than stress
- *Tsige* creates new exposure: Failure to protect PI by leaving hard drive in an unlocked cabinet satisfy *Jones* test? Frustration/anxiety forms of compensable distress?
5.1 Reaper cases

- *Douez v Facebook* -- Sponsored Stories
- *Ladas v Apple & Albilia v Apple* -- Recording of location data on iOS4 devices
- *Plimmer v Google*: Interception and use of personal information collected from emails sent to Gmail users for “targeted” ads
- *Elkoby v Google*: Collection of encrypted wi-fi information by Google Streetview cars
- *Bell Canada* – “Relevant Advertising Program”
  - ✓ Claim not for damages but for profit earned
  - ✓ Seek discovery of IP, marketing, financial data
  - ✓ Not just tech co exposure
6.1 Fraudster/Hacker cases

Ashley Madison

- Employee may steal PI, harvest it for profit: *BNS v Evans* (clients defrauded) or *Rouge v Broutzases* (PHI harvested & sold)
- Vicarious liability of innocent employer for intentional conduct or punitive damages?
- Hacking (*Home Depot*; *Sony* re PlayStation)
- Usually given notice of security or privacy breach
- Often few people really damaged
- Huge exposure to reputation
- Settlement $$$ likely to increase dramatically
7.1 Reflections

- **Policy**: In situ privacy breach policy critical -- response team, address security and media, before happen
- **Cyber insurance**: Allocation of risks/costs
- **Clients**: Transparent; empathy; upfront compensation
- **Media**: Proactive and honest
- **Legal**: Seamless privacy and class action expertise
- **Settlement**: Concern re precedent, Ps may conclude easy target for repeat business
<table>
<thead>
<tr>
<th>Class Action</th>
<th>Type of Claim</th>
<th>Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>Evans v. The Bank of Nova Scotia</td>
<td>Bank employee allegedly provided 643 Bank customers’ information to girlfriend who disseminated it to third parties for fraudulent purposes</td>
<td>Certified</td>
</tr>
<tr>
<td>Condon v. Canada</td>
<td>Loss of a hard drive containing personal information of approximately 583,000 individuals in connection with the student loan program administered by the Human Resources and Skills Development Canada</td>
<td>Certified</td>
</tr>
<tr>
<td>Hopkins v. Kay</td>
<td>Claims of improper access to health records of 280 patients at the Peterborough Regional Health Centre</td>
<td>Pre-certification</td>
</tr>
<tr>
<td>Rouge Valley Health System</td>
<td>Larger class action launched on behalf of 14,450 new mothers, notified by Rouge Valley Health System, some of whose contact details may have been criminally sold to RESP companies</td>
<td>Pre-certification</td>
</tr>
<tr>
<td>Lozanski v. The Home Depot Inc.</td>
<td>Home Depot credit card related security breach that affected approximately 56 million customers in Canada and the United States claiming $500 million in damages.</td>
<td>Pre-certification</td>
</tr>
</tbody>
</table>
## Recent privacy class actions: BC

<table>
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<tr>
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<tbody>
<tr>
<td>Douez v. Facebook, Inc.</td>
<td>Case involving Facebook's Sponsored Stories “product”: advertisers who paid</td>
<td>Certified</td>
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<tr>
<td></td>
<td>to make use of this product could use the names and likenesses of Facebook</td>
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<td></td>
<td>users in “sponsored stories” about their products or services, then be sent</td>
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<td></td>
<td>to the contacts of the person featured in the story.</td>
<td></td>
</tr>
<tr>
<td>Ladas v. Apple Inc.</td>
<td>Recording of location data on iOS4 devices</td>
<td>Not certified</td>
</tr>
<tr>
<td>Plimmer v. Google</td>
<td>Interception and use of personal information collected from emails sent to</td>
<td>Pre-certification</td>
</tr>
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<td></td>
<td>Gmail users to avoid paying for the data and to increase its revenues from</td>
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<td>third-party advertisers by displaying “targeted” ads to consumers based on</td>
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<td>information received from others.</td>
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# Recent privacy class actions: QC

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</thead>
<tbody>
<tr>
<td><strong>Sofio c. Organisme canadien de réglementation du commerce des valeurs mobilières (OCRCVM)</strong></td>
<td>Investment Industry Regulatory Organization’s (IIROC) breach in which an employee lost an unencrypted laptop containing the financial information of more than over 52,000 brokerage firm clients</td>
<td>Not certified</td>
</tr>
<tr>
<td><strong>Belley c. TD Auto Finance Services Inc. (similar to Mazzona)</strong></td>
<td>Loss of customers.’ Information while in transit</td>
<td>Certified</td>
</tr>
<tr>
<td><strong>Elkoby c. Google</strong></td>
<td>Collection of encrypted wi-fi information by Google Streetview cars</td>
<td>Pre-certification</td>
</tr>
<tr>
<td><strong>Gad Albilia v. Apple inc.,</strong></td>
<td>Recording of location data on iOS4 devices</td>
<td>Certified</td>
</tr>
<tr>
<td><strong>Chasles v. Bell Canada Inc. (ROC Tocco v. Bell Mobility Inc.)</strong></td>
<td>Relevant Advertising Program (RAP) and OPC Finding</td>
<td>Pre-certification</td>
</tr>
</tbody>
</table>
## Recent privacy class actions: Other

<table>
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<tr>
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<th>Status</th>
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</thead>
<tbody>
<tr>
<td>Hynes v. Western Regional Integrated Health Authority</td>
<td>An employee improperly accessing 1,043 medical records without authorization</td>
<td>Certified</td>
</tr>
<tr>
<td>Doe v. Health Canada</td>
<td>40,000 users enrolled in the medical marijuana program that received a letter with the word &quot;Marihuana&quot; on the outside envelope</td>
<td>Certified</td>
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*Note: The image includes a reference to the Canadian flag and an address at the bottom right corner.*
Closing Remarks

Tim Buckley