Class Actions:
What's next in Canada?

STIKEMAN ELLIOTT LLP

SHEARMAN & STERLING LLP

ACC Association of Corporate Counsel

SEMINAR MATERIALS | SEPTEMBER 2005

CLASS ACTIONS: What's Next in Canada?

CONTENTS

CLASS ACTIONS: What's Next in Canada?

AGENDA

Registration and Breakfast	**7:30 a.m. - 8:00 a.m.**
Welcoming Remarks from Ron Peppe, Association of Corporate Counsel	**8:00 a.m. - 8:05 a.m.**
Katherine Kay, Partner, Stikeman Elliott LLP **Brian Polovoy, Partner, Shearman & Sterling LLP** **Teri Monti, Assistant General Counsel, Royal Bank of Canada, Law Group**	**8:05 a.m. - 9:00 a.m.**
Question and Answer Period	**9:00 a.m. - 9:15 a.m.**

CLASS ACTIONS: What's Next in Canada?

PROFILE OF TODAY'S SPEAKERS

Katherine L. Kay
STIKEMAN ELLIOTT LLP

Brian Polovoy
SHEARMAN & STERLING LLP

Teri Monti
RBC LAW GROUP

Katherine L. Kay

Stikeman Elliott LLP
5300 Commerce Court West,
199 Bay Street
Toronto, Canada
M5L 1B9

Direct: (416) 869-5507
Fax: (416) 947-0866
kkay@stikeman.com

Law Practice

Katherine Kay is a partner with the Litigation and Competition Departments in the Toronto office of Stikeman Elliott. Her practice is concentrated on complex commercial litigation, frequently involving the overlap between regulatory, civil and criminal law regimes, and multiple jurisdictions. She heads the firm's competition litigation practice and is lead counsel on a broad range of cases dealing with all aspects of competition law, including criminal defence work, class and other civil actions, mergers, abuse of dominance and other reviewable matters before the Competition Tribunal.

A major focus of Katherine's practice is defence of class actions, where she has extensive experience across a range of cases, including those alleging anti-competitive conduct and securities law violations, as well as product liability cases. Her class action practice emphasizes the key aspects of formulating and coordinating strategic responses, often working very closely with counsel in the United States and other jurisdictions; coordinating and directing multiple class actions across several Canadian jurisdictions; vigorous and highly effective advocacy before the relevant courts; and negotiating, securing court approval and implementing settlements where appropriate.

Katherine regularly acts for clients in regulatory and criminal proceedings arising from both competition and securities investigations. She has extensive advocacy experience before all levels of trial and appellate courts in Ontario, the Federal Court of Canada, and the Supreme Court of Canada, as well as various administrative tribunals. She has frequently appeared before the Competition Tribunal and the Ontario Securities Commission, and other securities regulatory bodies.

Katherine has recently been selected as one of the "100 Women in Antitrust" in the world by the Global Competition Review. She is also recognized by Lexpert, the Canadian legal directory, as a leading practitioner in the area of Competition.

Professional Activities

Katherine is a member of the Canadian Bar Association, the Anti-Trust Law Section of the American Bar Association, The Advocates' Society and the Toronto Lawyers Association. She is the immediate past Chair of the Enforcement Practices and Procedures Committee and past Vice-Chair of both that committee and of the Criminal Matters Committee of the Competition Law section of the Canadian Bar Association. Katherine has spoken frequently at continuing legal education seminars in the areas of competition, securities and commercial litigation and has lectured at Osgoode Hall Law School, Queen's University, the Bar Admission Course of the Law Society of Upper Canada and the Ontario Centre for Advocacy Training. She is a past member of the Joint Committee on Court Reform in Ontario. She is also actively involved in the firm's internal committees, including the associates committee.

Publications

Katherine has written extensively on competition law, class actions and litigation topics. She is the co-author of the chapter on "Private Actions" in the *Competition Act and Commentary* (Butterworths, 2002).

Representative Work

Selected cases in which Katherine has appeared as counsel:

- *Hirst v. Sony of Canada Ltd. and Toys "R" Us (Canada) Ltd.* (2004) Ontario Superior Court of Justice (acting for defendants in class action alleging defects in consumer product);
- *La Cie. McCormick Canada v. Temple-Inland et al* (2004) Ontario Superior Court of Justice (acting for defendants in class action alleging price-fixing conspiracy);
- *Ledyit v. Bristol-Myers Squibb et al* (2003) Ontario Superior Court of Jutsice (acting for defendants in class action alleging defects in pharmaceutical products);
- *Commissioner of Competition v. Air Canada* (July 22, 2003) Competition Tribunal (acting for Air Canada in proceedings alleging abuse of dominance and predatory pricing);
- *Yu-Hong Wang v. Sony Corporation et al* (2003) Ontario Superior Court of Justice (acting for defendant in class action alleging defects in consumer product);
- *A & M Sod Supply Ltd. v. Hoechst AG et al* (2003) Ontario Superior Court of Justice (acting for defendant in class action alleging price-fixing conspiracy);
- *Always Travel Inc. v. Air Canada et al* (2002) Federal Court of Canada (acting for Air Canada in defence of first federal class action brought under the *Competition Act*);
- *Cello Products Incorporated v. Merrill Lynch & Co., Inc. et al* (2002) Ontario Superior Court of Justice (acting for defendants in alleged copper pricing manipulation case);
- *Commissioner of Competition v. Air Canada* (2000) Competition Tribunal and (2002) Federal Court of Appeal and leave to appeal to the Supreme Court of Canada (counsel to Air Canada in proceedings regarding the Commissioner of Competition's temporary order power under the *Competition Act*);
- *Commissioner of Competition v. Air Canada* (2000) arbitration (acted for Air Canada on arbitration to determine fair market value of Canadian Regional Airlines in connection with potential divestiture);

- *R v. Hoechst AG* (1999), Federal Court of Canada and *Fairlee Fruit Juice Limited v. Hoechst AG et al* (2000), Ont. S.C.J. (acted for defendant in criminal proceedings and reached nationwide settlement of class actions commenced in respect of the anti-competitive conduct);
- *R. v. Ajinomoto Co., Inc.* (1998) Federal Court of Canada and *Minnema* v. *Ajinomoto Co., Inc. et al* (1999) Ont. S.C.J. (acted for defendant in criminal proceedings and reached nationwide settlement of class actions commenced in respect the anti-competitive conduct);
- *R. v. Eisai Co. Ltd.,* (1999) Federal Court of Canada and *Ford* v. *Eisai Co., Ltd. et al* (2000), Ont. S.C.J. (acted for defendant in criminal proceedings and presently defending private class actions brought with respect to alleged anti-competitive conduct);
- *In the Matter of Lawrence Acton* (2000) Toronto Stock Exchange (acted for respondent trader in proceedings arising from RT Capital high closing matter);
- *In the Matter of Southwest Securities Inc.* (2000) Ontario Securities Commission (acting for respondents in proceedings regarding day trading firm);
- *Stern v. Imasco Limited, British American Tobacco, p.l.c., et al* (1999) Ontario Superior Court of Justice (acted for defendant in shareholder class action launched during course of transaction between Imasco and BAT and successfully argued motion to strike the action as disclosing no reasonable cause of action);
- *In the matter of Jennifer Dewling* (1999), 22 OSCB 7469 (acted for respondent to Ontario Securities Commission proceedings);
- *Wong v. Sony of Canada Ltd.* (1998) Ontario Court General Division (defending proposed class action alleging anti-competitive conduct);
- *Dofasco Inc. et al v. UCAR Carbon Canada Inc. et al* (1998) Ont. Ct. Gen. Div. (acting for one of defendants in civil conspiracy case launched as a result of U.S. antitrust prosecutions);
- *Pet Valu, Inc. et al v. Petsmart, Inc. et al* (1998) Ont. Ct. Gen. Div. (acting for defendants in civil predatory pricing claim);
- *Caputo* v. *Imperial Tobacco et al* (1997) Ont. Ct. Gen. Div. (acting for one of defendants in product liability class action);
- *Kentucky Fried Chicken Canada, a Division of Pepsi-Cola Canada Ltd. v. Scott's Food Services Inc. and Scott's Hospitality Inc.* (1997), 35 B.L.R. (2d) 21; (1998), 114 O.A.C. 357 (Ont. C.A.) (acted for the plaintiff with respect to an alleged breach of a franchise agreement, in part as a result of a take-over bid);

- *Robinson v. Ontario Securities Commission* (1993), 110 D.L.R. (4th) 166 (Ont. Div. Ct.) (acted for respondent to a hearing on constitutional challenge to the hearing process and in related and lengthy hearing);
- *Ontario Securities Commission v. Caratel Ltd.* (1992), 10 O.R. (3d) 491 (Ont. C.J.); appeal to Court of Appeal (1994), 12 O.R. (3d) 319 (acted for defendant on challenge to jurisdiction regarding provincial offences prosecution; case was ultimately dismissed against the defendants by way of a directed verdict); and
- *Adler and Elgersma v. Ontario* (1992), 9 O.R. (3d) 676 (Ont. C.J.); appeal to Court of Appeal (1994), 19 O.R. (3d) 1; appeal to Supreme Court of Canada 140 D.L.R. (4th) 385 (acted for parents seeking declaration of constitutional infringement regarding education funding).

Education

Osgoode Hall (LL.B. 1986), Carleton University (B.A. with distinction 1983).

Bar Admission

Ontario, 1988.

PROFILE

BRIAN H. POLOVOY

SHEARMAN & STERLING LLP

NEW YORK OFFICE

Tel: (+1 212) 848-4703
Fax: (+1 646) 848-4703
bpolovoy@shearman.com

- Mr. Polovoy is a partner in the Litigation Group whose practice involves a variety of complex commercial litigation, with particular emphasis on matters involving securities law, fraud, and investment banking. During 1996, Mr. Polovoy was seconded from Shearman & Sterling to Freshfields in London, England, where he worked in that firm's Litigation Department. During 1999, Mr. Polovoy was seconded to Morgan Stanley & Co. Incorporated, where he worked in their Law Department. Mr. Polovoy has lectured abroad on U.S. securities law litigation.
- Recent Experience Includes Representation Of:
  - Viacom Inc. in multiple expedited class action proceedings opposing attempts to enjoin its (a) merger with CBS Corporation, (b) acquisition of the minority interest in Infinity Broadcasting Corporation, (c) split-off of its controlling stake in Blockbuster Inc., and (d) acquisition of the minority interest in Sportsline.com, Inc.
  - Morgan Stanley in securities fraud class actions, internal investigations, and various state and federal court actions alleging breach of fiduciary duty, negligent misrepresentation and fraud
  - Delphi Corporation and certain officers and directors in derivative, securities fraud and ERISA class actions
  - Royal Group Technologies Limited and certain officers and directors in securities fraud class actions
  - ATI Technologies Inc. and certain directors and officers in securities fraud class actions
  - European law firm in securities fraud class action alleging that law firm participated in market manipulation
  - Covance Inc. and certain directors and officers in securities fraud litigation in federal and state court
  - Saudi American Bank in multiple class actions arising out of September 11, 2001 terrorist attacks
  - Unicover Managers, L.L.C., a reinsurance facility manager, in arbitration and litigation involving allegations of fraud
  - American General Finance, Inc. in action against bank alleging aiding and abetting fraud
  - AK Steel Corp. in action against former subsidiary and four former executives alleging complex financial fraud and violations of the RICO Act
  - Vanguard, Van Kampen, and Morgan Stanley mutual fund families in derivative actions alleging breach of fiduciary duty
- Bar Admissions
  - New York and District of Columbia
  - Various United States District Courts
  - United States Court of Appeals for the 2nd Circuit
- Education
  - Georgetown University Law Center, J.D., *cum laude*
  - Duke University, B.A. in Political Science, *cum laude*

Teri Monti

Teri Monti is Assistant General Counsel, Royal Bank of Canada. She was called to the Ontario Bar in 1982, and joined RBC in 1989 after practising as general commercial litigation. In her current role at RBC, Teri works with a team of lawyers managing litigation and providing advice on employment, pension and benefits issues.

RBC Law Group

Teri Monti
Assistant General Counsel
RBC Law Group
14th Floor, North Tower
Royal Bank Plaza
Toronto, Ontario
M5J 2J5

Tel: (416) 974-4679
Fax: (416) 974-2217

Class Actions: What's Next in Canada?

September 27, 2005
Toronto, Ontario

TODAY'S SPEAKERS:

Katherine Kay
Partner, Stikeman Elliott LLP

Brian Polovoy
Partner, Shearman & Sterling LLP

Teri Monti
Assistant General Counsel, Royal Bank of Canada, Law Group

STIKEMAN ELLIOTT

Class Actions:
What's Next in Canada?

Katherine Kay
PARTNER, STIKEMAN ELLIOTT LLP

STIKEMAN ELLIOTT

Today's Snapshot

- Appreciate that we've gone from zero to huge activity in very short time period
- Ontario's *Act* is little older than a decade
  - after a slow start, tons of activity
  - from rare happening to matter of course
- Quebec has exploded
  - very plaintiff-friendly environment
  - plaintiffs' counsel adjusting to this reality
- Other jurisdictions now on line

How Did This Happen?

STIKEMAN ELLIOTT

- Plaintiffs' counsel are up and running
  - strong lines of communication with U.S. plaintiffs' counsel firms
- Business people make business decisions and plaintiffs' counsel know that
- There is much uncertainty in the law
- Increasingly active regulatory arena
- Courts increasingly comfortable with the idea and keen to have newsworthy cases
- More settlements lead to more cases

STIKEMAN ELLIOTT LLP

Where Class Actions

STIKEMAN ELLIOTT

- Supreme Court of Canada has said you can have a class action anywhere and courts have inherent jurisdiction to create and manage the mechanics of class actions
- If that's not enough, have legislation in:
  - Quebec
  - Ontario
  - British Columbia
  - Saskatchewan
  - Newfoundland
  - Manitoba
  - Alberta
  - new Federal Court rules

STIKEMAN ELLIOTT LLP

Where Class Actions (continued)

STIKEMAN ELLIOTT

- More often than not, these class actions are litigated in more than one Canadian jurisdiction
- Ontario often (but not invariably) the lead
  - national class based on in Ontario approved by appellate courts
  - a consistent and coordinated approach across Canada is the goal
- Some jurisdictions are better than others
  - anecdotal "evidence" suggests that Ontario cases certified one-third of the time
  - in B.C., range closer to two-thirds
  - in Quebec, looking at 80-90%

STIKEMAN ELLIOTT LLP

Why Class Actions?

STIKEMAN ELLIOTT

- Objectives of class actions
  - judicial economy
  - access to justice
  - behaviour modification for wrongdoers

STIKEMAN ELLIOTT LLP

The Battleground: Certification

STIKEMAN ELLIOTT

- Basic test the same across Canada's common law jurisdictions
  - Statement of Claim discloses a cause of action
  - identifiable class of two or more persons
  - claims of class members raise common issues
  - class proceeding would be the preferable procedure
  - proposed class representative has a workable litigation plan and does not have a conflict of interest with other class members
- The nub of the issue in these jurisdictions is "preferable procedure"
- Difficult to anticipate which cases will and will not be certified

The Battleground: Certification (continued)

STIKEMAN ELLIOTT

- Quebec is distinct – and nirvana for plaintiffs' counsel
  - very pro-certification
  - instead of preferable procedure, the issue is whether "the composition of the group makes the application of alternate procedures for joining multiple plaintiffs difficult or impracticable"
  - defendant has no right to discovery
  - judge "may" allow relevant evidence at certification hearing
  - no appeal if case is certified; if it isn't, plaintiffs can appeal
  - all this has made plaintiffs' counsel adjust their approach

What Has Come and What is Coming

STIKEMAN ELLIOTT

- "The categories of tort are never closed"; neither are the categories of class actions
- An early and ever-building wave: consumer, product liability and mass tort class actions
- A newer and ever-building wave: statutory breaches such as Competition Act and securities legislation
- Bill 198 anxiously awaited by defendants and eagerly awaited by plaintiff's counsel
- Other "tailor-made" class actions: employer and pension-related class actions
- "Look south, young (or not) plaintiffs' lawyer"
- Bill 198 anxiously awaited by defendants and eagerly awaited by plaintiffs' counsel

STIKEMAN ELLIOTT LLP

Bill 198 - Overview

STIKEMAN ELLIOTT

- Introduces statutory civil cause of action for secondary market purchasers who buy or sell securities of a "responsible issuer" during a period of a violation of the issuer's continuous disclosure obligations
- Impact on number of class actions and strike suits
- Fraud on the market theory plus
- Damages are assumed
- Changes to be in force as of December 31, 2005

STIKEMAN ELLIOTT LLP

Bill 198 – Overview (continued)

STIKEMAN ELLIOTT

Three continuous disclosure violations:

- Misrepresentation in a public document
- Misrepresentation in a public oral statement by person with actual, implied or apparent authority to speak on behalf of the issuer
- Failure of an issuer to make timely disclosure of a material change
- New regime does not apply to purchases made under a prospectus, take over bid or private placement since statutory relief already exists (recent Danier Leather decision)

Bill 198 – Overview (continued)

STIKEMAN ELLIOTT

- Only triggered if misrepresentation or failure to disclose relates to "material" information
- "Materiality" is defined as any change in the business, operations or capital which could be expected to have a significant effect on the market price or value of the responsible issuer's shares

STIKEMAN ELLIOTT LLP

Bill 198 – Overview (continued)
Potential Defendants

STIKEMAN ELLIOTT

- All "market participants in Ontario":
  - Reporting issuers or any public company with a substantial connection to Ontario (not defined)
  - Officers, directors, and "influential persons" of responsible issuer
  - Also includes auditors and other experts

Other Trends to Anticipate and Plan For

STIKEMAN ELLIOTT

- Damages and causation as potential new battleground
- Costs as a form of discipline or class counsel fees as additional incentive?
  - "bonus" in *Danier*
- Easier and more frequent access to U.S court files, saving time and money for plaintiffs' counsel
- More litigation regarding the interplay with U.S. cases (including class inclusion and settlements)
- Possible development of an opt-out and objector bar
- Your company as plaintiff?

STIKEMAN ELLIOTT LLP

When Business Sense Wins Out: Settling a Class Action

STIKEMAN ELLIOTT

- Think long-term: it's not just about the dollars
- Achieving a national deal: a jurisdictional dog's breakfast
- Structuring the settlement
- “Blow up", "most favoured nation", bar orders
- Notice, distribution, administration
- Considering U.S. payments and dealing with opt-outs
- Dealing with class counsel's claims for fees
- Securing court approval

STIKEMAN ELLIOTT LLP

Tips for Managing Class Action Litigation

STIKEMAN ELLIOTT

1. Take a holistic approach to regulatory and other potential liabilities. Your company’s exposure may arise in different places and at different times
2. Know that no one is ever happy in litigation
3. Manage expectations
4. Communicate ceaselessly
5. Early and often, identify the type of evidence and assistance needed from the business folks and explain how key that is: “It’s your case”

STIKEMAN ELLIOTT LLP

Tips for Managing Class Action Litigation

STIKEMAN ELLIOTT

6. For Canadian "copycat" litigation, draw on and facilitate the cooperation with and assistance from U.S. counsel (but don't get pushed aside)
7. Set the tone in terms of managing the action or actions
8. With cases in multiple Canadian jurisdictions, consider designating an outside counsel "quarterback"
9. Stay in the loop and communicate your expectations to outside counsel about your involvement and leaving time for getting your input
10. Avoid the temptation to pay the plaintiffs off. Think about the next set of cases. The obvious business judgment isn't always the right answer

STIKEMAN ELLIOTT LLP

SHEARMAN & STERLING LLP

A PRESENTATION TO THE ASSOCIATION OF CORPORATE COUNSEL

CLASS ACTIONS IN THE UNITED STATES

Brian H. Polovoy
September 27, 2005
Toronto

Overview

Canadian Companies in U.S. Derivative Lawsuits: A Bit of Good News

Canadian Companies in U.S. Class Action Lawsuits: Quantifying the Risk

Types of Class Action Lawsuits

State Court v. Federal Court: Congress Responds to the Horror Stories

Litigating a Class Action in the U.S.

Derivative Suits

Claims are by shareholder, but brought on behalf of the company – accordingly, any recovery (minus attorneys' fees) benefits the corporation

Shareholder derivative suits are often filed in conjunction with, or as a part of, class action suits

Derivative Suits

Recent *Nortel* decision stops U.S. derivative suits against Canadian corporations

- Pension fund plaintiffs were originally part of class action, then opted instead to file derivative action
- Complaint dismissed for lack of subject matter jurisdiction
- Court held that the "internal affairs" doctrine required resort to Canadian law of corporate governance (CBCA) which gives exclusive jurisdiction to Canadian courts and requires certain pre-suit procedures

Int'l Union of Operating Engineers v. Blanchard, et al., 04-CV-5954, 2005 WL 2063852 (S.D.N.Y. Aug. 25, 2005)

Increased U.S. Litigation Risks

Plaintiffs' lawyers increasingly focus on foreign markets, prospecting for both target companies and potential plaintiffs:

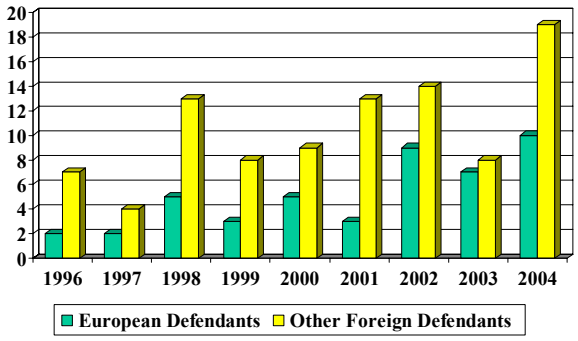
- "All the fields have been plowed in the United States … If you want to enter new markets, you have to go outside the United States."

U.S. Plaintiffs' Attorney, "Courting Abroad: For the Tort Bar, A New Client Base," *Wall Street Journal*, Sept. 2, 2005, at A1

- In 2004, 29 of 203 companies named in U.S. securities class actions were U.S. listed foreign corporations

PricewaterhouseCoopers 2004 Securities Litigation Study, at 2

U.S. Securities Class Actions Filed Against U.S. Listed Foreign Corporations*



*Excludes Laddering, Analyst & Fund cases
Source: PricewaterhouseCoopers 2004 Securities Litigation Study, at 2

Rising Costs of Settlements

Average settlement has increased (US$ 24.6 million) while median has held constant (US$ 6 million)

Larger settlements have become a reality in the U.S., and Canadian companies are not immune:

- CIBC (2005) US$ 2.4 billion
- MTC Electronic (1998) US$ 70 million
- Laidlaw, Inc. (2002) US$ 42.9 million
- Cinar Corp. (2002) US$ 27.3 million
- Arakis Energy (2001) US$ 24 million

Sources: Cornerstone Research, Post-Reform Act Securities Settlements (2004), at 2; "Bruised Bank Plans Cost Cuts," *Toronto Star*, Aug. 25, 2005, at D1; "Courting Abroad: For the Tort Bar, A New Client Base," *Wall Street Journal*, Sept. 2, 2005, at A1; *In re Arakis Energy Corp. Sec. Litig.*, 95-CV-3431, 2001 WL 1590512 (E.D.N.Y. Oct. 31, 2001).

Securities Actions

Companies listed on U.S. exchange face obvious risk

However, even non-listed companies may be subject to securities class actions

- *YBM Magnex Int'l*
- *Vivendi Universal, S.A.*

Potential plaintiff class includes both U.S. and foreign investors

- "Conduct" and "Effects" Test

Other Types of Class Actions

Antitrust

- subject matter jurisdiction is key
  - > U.S. courts will not exercise jurisdiction over foreign plaintiffs' claims where the harm complained of occurred outside the U.S.

    F. Hoffman La-Roche v. Empagran, S.A., 542 U.S. 155 (2004)
  - > U.S. courts may decline to exercise jurisdiction over Canadian defendants on the basis of comity.

    Rivendell Forest Prods. v. Canadian Forest Prods., 810 F. Supp. 1116 (D. Colo. 1993)
- treble damages & attorney's fees available

Products Liability/ Mass Tort

ERISA

Class Actions in State Courts

Pros and Cons of State Court Litigation

Removal to Federal Courts

- General availability
- Securities Litigation Uniform Standards Act (SLUSA) prohibits certain securities fraud claims that are based on state law; allows removal to federal court and subsequent dismissal

Class Action Fairness Act (2005)

Recently adopted legislation provides broader access to federal courts for foreign defendants of class actions

- Allows removal from state court to federal court where any member of the class of plaintiffs is a citizen of a State, and the defendant is a citizen or subject of a foreign state; and
- Aggregate claims exceed US$ 5 Million

U.S. Class Actions: Initial Procedural Aspects

Filing of multiple complaints in multiple jurisdictions is common

- Lawsuits are generally transferred to one court by Judicial Panel on Multidistrict Litigation

Appointment of "lead plaintiff" to represent the class

Motions to Dismiss

Failure to State a Claim

- Heightened pleading standards for securities class actions

Lack of Subject Matter Jurisdiction

- Important for securities and antitrust actions

Forum Non Conveniens

Certification

While most class actions are not defeated at certification, a defendant has an important opportunity to shape the claims against it and limit overall exposure by reducing class size

Requirements

- Impracticable to bring individual claims
- Common questions of law and fact predominate
- Representative will fairly and adequately represent class interests

Most useful tool to oppose certification is to show how individual issues of causation or damages militate against certification

- *Talisman Energy* is a recent example involving a Canadian company

Presbyterian Church of Sudan v. Talisman Energy, Inc., 01-CV-9882, 2005 WL 2278076 (S.D.N.Y. Sept. 20, 2005)

RBC Law Group

Dealing with Class Actions
An In-House Perspective

Teri Monti, Assistant General Counsel
RBC Law Group
September 27, 2005

Dealing with Class Actions

Preparation

- Basic understanding of class action procedures
- Awareness of recent case law affecting industry
- Identify class action expertise in external firms

Dealing with Class Actions

Retainer of counsel – Factors to Consider

- Knowledge of company and its business
- Experience with class action practice, firm's capacity to handle large files/partner with other firms
- Strategy proposed by firm
- Cost/Budget
- Jurisdiction and potential for multi-jurisdictional claims
- Potential for joint retainer with co-defendants

Dealing with Class Actions

Retainer of counsel – Process

- Determine specific criteria for counsel in the matter in question
- Evaluate potential firms based on these criteria, past experience with company and recommendations from others
- Prepare a short list of firms for request for proposal
- RFP requesting comments on claim, outline of proposed strategy, staffing and budget for defence of matter
- Interview firms
- Evaluate strategies
- Select firm and issue engagement letter

Dealing with Class Actions

Defensive Strategy

- Initial factual, legal and damages assessments
- Determine desired outcome and potential tactics
- Create timeline for key events
- Determine whether corrective action should be undertaken
- Consider discovery strategy – electronic discovery, litigation holds

Dealing with Class Actions

Class Action Avoidance

- **Conduct regular legal audits of products, processes**
- **Payment process to compensate identifiable group**
  - **Forensic audit report to validate calculations, process, etc.**
  - **Cheque negotiation to operate as release**
- **Claims process to allow submission of other claims**
  - **Class action settlement process without litigation**
  - **Advertised, claim forms, claims adjudication process with appeal**
  - **Record-keeping**

ACC Association of Corporate Counsel

Q&A

Katherine Kay
Stikeman Elliott LLP
Toronto, Ontario
kkay@stikeman.com
(416) 869-5507

Brian Polovoy
Shearman & Sterling LLP
New York, NY
bpolovoy@shearman.com
(212) 848-4703

Teri Monti
Royal Bank of Canada
Toronto, Ontario
teri.monti@rbc.com
(416) 974-4679

Notes

Association of Corporate Counsel

Class Actions: What's Next in Canada?

September 27, 2005
Toronto, Ontario

Association of Corporate Counsel

TODAY'S SPEAKERS:

Katherine Kay
Partner, Stikeman Elliott LLP

Brian Polovoy
Partner, Shearman & Sterling LLP

Teri Monti
Assistant General Counsel, Royal Bank of Canada, Law Group

STIKEMAN ELLIOTT

Class Actions: What's Next in Canada?

Katherine Kay
PARTNER, STIKEMAN ELLIOTT LLP

Today's Snapshot

STIKEMAN ELLIOTT

- Appreciate that we've gone from zero to huge activity in very short time period
- Ontario's *Act* is little older than a decade
  - after a slow start, tons of activity
  - from rare happening to matter of course
- Quebec has exploded
  - very plaintiff-friendly environment
  - plaintiffs' counsel adjusting to this reality
- Other jurisdictions now on line

How Did This Happen?

STIKEMAN ELLIOTT

- Plaintiffs' counsel are up and running
  - strong lines of communication with U.S. plaintiffs' counsel firms
- Business people make business decisions and plaintiffs' counsel know that
- There is much uncertainty in the law
- Increasingly active regulatory arena
- Courts increasingly comfortable with the idea and keen to have newsworthy cases
- More settlements lead to more cases

Where Class Actions

STIKEMAN ELLIOTT

- Supreme Court of Canada has said you can have a class action anywhere and courts have inherent jurisdiction to create and manage the mechanics of class actions
- If that's not enough, have legislation in:
  - Quebec
  - Ontario
  - British Columbia
  - Saskatchewan
  - Newfoundland
  - Manitoba
  - Alberta
  - new Federal Court rules

Where Class Actions (continued)

STIKEMAN ELLIOTT

- More often than not, these class actions are litigated in more than one Canadian jurisdiction
- Ontario often (but not invariably) the lead
  - national class based on in Ontario approved by appellate courts
  - a consistent and coordinated approach across Canada is the goal
- Some jurisdictions are better than others
  - anecdotal "evidence" suggests that Ontario cases certified one-third of the time
  - in B.C., range closer to two-thirds
  - in Quebec, looking at 80-90%

STIKEMAN ELLIOTT LLP

Why Class Actions?

STIKEMAN ELLIOTT

- Objectives of class actions
  - judicial economy
  - access to justice
  - behaviour modification for wrongdoers

STIKEMAN ELLIOTT LLP

The Battleground: Certification

STIKEMAN ELLIOTT

- Basic test the same across Canada's common law jurisdictions
  - Statement of Claim discloses a cause of action
  - identifiable class of two or more persons
  - claims of class members raise common issues
  - class proceeding would be the preferable procedure
  - proposed class representative has a workable litigation plan and does not have a conflict of interest with other class members
- The nub of the issue in these jurisdictions is "preferable procedure"
- Difficult to anticipate which cases will and will not be certified

STIKEMAN ELLIOTT LLP

The Battleground: Certification (continued)

STIKEMAN ELLIOTT

- Quebec is distinct – and nirvana for plaintiffs' counsel
  - very pro-certification
  - instead of preferable procedure, the issue is whether "the composition of the group makes the application of alternate procedures for joining multiple plaintiffs difficult or impracticable"
  - defendant has no right to discovery
  - judge "may" allow relevant evidence at certification hearing
  - no appeal if case is certified; if it isn't, plaintiffs can appeal
  - all this has made plaintiffs' counsel adjust their approach

What Has Come and What is Coming

STIKEMAN ELLIOTT

- "The categories of tort are never closed"; neither are the categories of class actions
- An early and ever-building wave: consumer, product liability and mass tort class actions
- A newer and ever-building wave: statutory breaches such as Competition Act and securities legislation
- Bill 198 anxiously awaited by defendants and eagerly awaited by plaintiff's counsel
- Other "tailor-made" class actions: employer and pension-related class actions
- "Look south, young (or not) plaintiffs' lawyer"
- Bill 198 anxiously awaited by defendants and eagerly awaited by plaintiffs' counsel

Bill 198 - Overview

STIKEMAN ELLIOTT

- Introduces statutory civil cause of action for secondary market purchasers who buy or sell securities of a "responsible issuer" during a period of a violation of the issuer's continuous disclosure obligations
- Impact on number of class actions and strike suits
- Fraud on the market theory plus
- Damages are assumed
- Changes to be in force as of December 31, 2005

Bill 198 – Overview (continued)

STIKEMAN ELLIOTT

Three continuous disclosure violations:

- Misrepresentation in a public document
- Misrepresentation in a public oral statement by person with actual, implied or apparent authority to speak on behalf of the issuer
- Failure of an issuer to make timely disclosure of a material change
- New regime does not apply to purchases made under a prospectus, take over bid or private placement since statutory relief already exists (recent Danier Leather decision)

Bill 198 – Overview (continued)

STIKEMAN ELLIOTT

- Only triggered if misrepresentation or failure to disclose relates to "material" information
- "Materiality" is defined as any change in the business, operations or capital which could be expected to have a significant effect on the market price or value of the responsible issuer's shares

Bill 198 – Overview (continued)

STIKEMAN ELLIOTT

Potential Defendants

- All "market participants in Ontario":
  - Reporting issuers or any public company with a substantial connection to Ontario (not defined)
  - Officers, directors, and "influential persons" of responsible issuer
  - Also includes auditors and other experts

Other Trends to Anticipate and Plan For

STIKEMAN ELLIOTT

- Damages and causation as potential new battleground
- Costs as a form of discipline or class counsel fees as additional incentive?
  - "bonus" in *Danier*
- Easier and more frequent access to U.S court files, saving time and money for plaintiffs' counsel
- More litigation regarding the interplay with U.S. cases (including class inclusion and settlements)
- Possible development of an opt-out and objector bar
- Your company as plaintiff?

STIKEMAN ELLIOTT LLP

When Business Sense Wins Out: Settling a Class Action

STIKEMAN ELLIOTT

- Think long-term: it's not just about the dollars
- Achieving a national deal: a jurisdictional dog's breakfast
- Structuring the settlement
- "Blow up", "most favoured nation", bar orders
- Notice, distribution, administration
- Considering U.S. payments and dealing with opt-outs
- Dealing with class counsel's claims for fees
- Securing court approval

STIKEMAN ELLIOTT LLP

Tips for Managing Class Action Litigation

STIKEMAN ELLIOTT

1. Take a holistic approach to regulatory and other potential liabilities. Your company's exposure may arise in different places and at different times
2. Know that no one is ever happy in litigation
3. Manage expectations
4. Communicate ceaselessly
5. Early and often, identify the type of evidence and assistance needed from the business folks and explain how key that is: "It's your case"

STIKEMAN ELLIOTT LLP

Tips for Managing Class Action Litigation

STIKEMAN ELLIOTT

6. **For Canadian "copycat" litigation, draw on and facilitate the cooperation with and assistance from U.S. counsel (but don't get pushed aside)**
7. **Set the tone in terms of managing the action or actions**
8. **With cases in multiple Canadian jurisdictions, consider designating an outside counsel "quarterback"**
9. **Stay in the loop and communicate your expectations to outside counsel about your involvement and leaving time for getting your input**
10. **Avoid the temptation to pay the plaintiffs off. Think about the next set of cases. The obvious business judgment isn't always the right answer**

SHEARMAN & STERLING LLP

A PRESENTATION TO THE ASSOCIATION OF CORPORATE COUNSEL

CLASS ACTIONS IN THE UNITED STATES

Brian H. Polovoy
September 27, 2005
Toronto

Overview

Canadian Companies in U.S. Derivative Lawsuits: A Bit of Good News

Canadian Companies in U.S. Class Action Lawsuits: Quantifying the Risk

Types of Class Action Lawsuits

State Court v. Federal Court: Congress Responds to the Horror Stories

Litigating a Class Action in the U.S.

Derivative Suits

Claims are by shareholder, but brought on behalf of the company – accordingly, any recovery (minus attorneys' fees) benefits the corporation

Shareholder derivative suits are often filed in conjunction with, or as a part of, class action suits

Derivative Suits

Recent *Nortel* decision stops U.S. derivative suits against Canadian corporations

- Pension fund plaintiffs were originally part of class action, then opted instead to file derivative action
- Complaint dismissed for lack of subject matter jurisdiction
- Court held that the "internal affairs" doctrine required resort to Canadian law of corporate governance (CBCA) which gives exclusive jurisdiction to Canadian courts and requires certain pre-suit procedures

Int'l Union of Operating Engineers v. Blanchard, et al., 04-CV-5954, 2005 WL 2063852 (S.D.N.Y. Aug. 25, 2005)

Increased U.S. Litigation Risks

Plaintiffs' lawyers increasingly focus on foreign markets, prospecting for both target companies and potential plaintiffs:

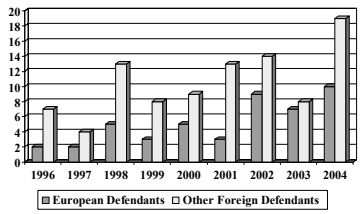
- "All the fields have been plowed in the United States … If you want to enter new markets, you have to go outside the United States."

U.S. Plaintiffs' Attorney, "Courting Abroad: For the Tort Bar, A New Client Base," *Wall Street Journal*, Sept. 2, 2005, at A1

- In 2004, 29 of 203 companies named in U.S. securities class actions were U.S. listed foreign corporations

PricewaterhouseCoopers 2004 Securities Litigation Study, at 2

U.S. Securities Class Actions Filed Against U.S. Listed Foreign Corporations*



*Excludes Laddering, Analyst & Fund cases
Source: PricewaterhouseCoopers 2004 Securities Litigation Study, at 2

Rising Costs of Settlements

Average settlement has increased (US$ 24.6 million) while median has held constant (US$ 6 million)

Larger settlements have become a reality in the U.S., and Canadian companies are not immune:

- CIBC (2005) US$ 2.4 billion
- MTC Electronic (1998) US$ 70 million
- Laidlaw, Inc. (2002) US$ 42.9 million
- Cinar Corp. (2002) US$ 27.3 million
- Arakis Energy (2001) US$ 24 million

Sources: Cornerstone Research, Post-Reform Act Securities Settlements (2004), at 2; "Bruised Bank Plans Cost Cuts," *Toronto Star*, Aug. 25, 2005, at D1; "Courting Abroad: For the Tort Bar, A New Client Base," *Wall Street Journal*, Sept. 2, 2005, at A1; *In re Arakis Energy Corp. Sec. Litig.*, 95-CV-3431, 2001 WL 1590512 (E.D.N.Y. Oct. 31, 2001).

Securities Actions

Companies listed on U.S. exchange face obvious risk

However, even non-listed companies may be subject to securities class actions

- *YBM Magnex Int'l*
- *Vivendi Universal, S.A.*

Potential plaintiff class includes both U.S. and foreign investors

- "Conduct" and "Effects" Test

Other Types of Class Actions

Antitrust

- subject matter jurisdiction is key
  - > U.S. courts will not exercise jurisdiction over foreign plaintiffs' claims where the harm complained of occurred outside the U.S.
    F. Hoffman La-Roche v. Empagran, S.A., 542 U.S. 155 (2004)
  - > U.S. courts may decline to exercise jurisdiction over Canadian defendants on the basis of comity.
    Rivendell Forest Prods. v. Canadian Forest Prods., 810 F. Supp. 1116 (D. Colo. 1993)
- treble damages & attorney's fees available

Products Liability/ Mass Tort

ERISA

Class Actions in State Courts

Pros and Cons of State Court Litigation

Removal to Federal Courts

- General availability
- Securities Litigation Uniform Standards Act (SLUSA) prohibits certain securities fraud claims that are based on state law; allows removal to federal court and subsequent dismissal

Class Action Fairness Act (2005)

Recently adopted legislation provides broader access to federal courts for foreign defendants of class actions

- Allows removal from state court to federal court where any member of the class of plaintiffs is a citizen of a State, and the defendant is a citizen or subject of a foreign state; and
- Aggregate claims exceed US$ 5 Million

U.S. Class Actions: Initial Procedural Aspects

Filing of multiple complaints in multiple jurisdictions is common

- Lawsuits are generally transferred to one court by Judicial Panel on Multidistrict Litigation

Appointment of "lead plaintiff" to represent the class

Motions to Dismiss

Failure to State a Claim

- Heightened pleading standards for securities class actions

Lack of Subject Matter Jurisdiction

- Important for securities and antitrust actions

Forum Non Conveniens

Certification

While most class actions are not defeated at certification, a defendant has an important opportunity to shape the claims against it and limit overall exposure by reducing class size

Requirements

- Impracticable to bring individual claims
- Common questions of law and fact predominate
- Representative will fairly and adequately represent class interests

Most useful tool to oppose certification is to show how individual issues of causation or damages militate against certification

- *Talisman Energy* is a recent example involving a Canadian company

Presbyterian Church of Sudan v. Talisman Energy, Inc., 01-CV-9882, 2005 WL 2278076 (S.D.N.Y. Sept. 20, 2005)

RBC Law Group

Dealing with Class Actions
An In-House Perspective

Teri Monti, Assistant General Counsel
RBC Law Group
September 27, 2005

Dealing with Class Actions

Preparation

- **Basic understanding of class action procedures**
- **Awareness of recent case law affecting industry**
- **Identify class action expertise in external firms**

Dealing with Class Actions

Retainer of counsel – Factors to Consider

- **Knowledge of company and its business**
- **Experience with class action practice, firm's capacity to handle large files/partner with other firms**
- **Strategy proposed by firm**
- **Cost/Budget**
- **Jurisdiction and potential for multi-jurisdictional claims**
- **Potential for joint retainer with co-defendants**

Dealing with Class Actions

Retainer of counsel – Process

- Determine specific criteria for counsel in the matter in question
- Evaluate potential firms based on these criteria, past experience with company and recommendations from others
- Prepare a short list of firms for request for proposal
- RFP requesting comments on claim, outline of proposed strategy, staffing and budget for defence of matter
- Interview firms
- Evaluate strategies
- Select firm and issue engagement letter

Dealing with Class Actions

Defensive Strategy

- Initial factual, legal and damages assessments
- Determine desired outcome and potential tactics
- Create timeline for key events
- Determine whether corrective action should be undertaken
- Consider discovery strategy – electronic discovery, litigation holds

Dealing with Class Actions

Class Action Avoidance

- Conduct regular legal audits of products, processes
- Payment process to compensate identifiable group
  - Forensic audit report to validate calculations, process, etc.
  - Cheque negotiation to operate as release
- Claims process to allow submission of other claims
  - Class action settlement process without litigation
  - Advertised, claim forms, claims adjudication process with appeal
  - Record-keeping

ACC Association of Corporate Counsel

Q&A

Katherine Kay
Stikeman Elliott LLP
Toronto, Ontario
kkay@stikeman.com
(416) 869-5507

Brian Polovoy
Shearman & Sterling LLP
New York, NY
bpolovoy@shearman.com
(212) 848-4703

Teri Monti
Royal Bank of Canada
Toronto, Ontario
teri.monti@rbc.com
(416) 974-4679

STIKEMAN ELLIOTT

CLASS ACTIONS IN CANADA

Where We've Been and Where We're Going

Katherine L. Kay

Stikeman Elliott LLP
Toronto, Ontario
September 2005

Introduction: The Wave Builds

From what seemed to be a particularly U.S. phenomenon, driven by opportunistic plaintiffs' lawyers and wonky jury awards, we in sleepy Canada have witnessed a rapid rise in the scope and extent of class actions north of the border in the last decade. Our plaintiffs' lawyers don't all have their own jets or yachts (or run for Vice-President), but the good ones do have first rate business sense and a spirit of opportunism that holds its own against any American, and our courts are as interested in entertaining cases that garner headlines as any other courts. So, for Canadian business, the cost of doing business has risen with increased exposure to class actions.

A laundry list (with no comment on whether the wash is clean or dirty) of factors that explain the growth in class actions:

- Plaintiffs' counsel are up and running
- There is money to be made
- There is a very, very strong pipeline of potential cases: " Look south, young plaintiffs' lawyers"
- Businesspeople make business decisions often based on dollars and cents, and plaintiffs' counsel know it
- The Canadian reality is such that any case that settles in the U.S. is likely to settle here
- The regulatory arena is much more active and attracts much more press coverage, leading to more claims for compensation through the courts

- The various Canadian jurisdictions are more comfortable with, and in some cases are very keen to have in their courtrooms, class actions
- There is uncertainty in the law regarding, in particular, certification, leading to the ultimate risk management program: settlement
- Settlements lead to more cases.

Why Class Actions

The oft-cited objectives of class actions – and it's tough to quarrel with these, at least as a matter of principle - are (1) judicial economy, (2) access to justice and (3) behaviour modification for wrongdoers. Of course, take any high-falutin' principles, put them in the hands of creative litigators, add interested judges, throw in a few bad facts, and these cases really take off.

Where Canadian Class Actions

The bottom line is that the Supreme Court of Canada[1] has said that the superior courts have inherent jurisdiction to create and manage the mechanics of class actions, whether or not they have specific legislation. So, technically, the field is wide open.

That said, there is class proceedings legislation (or rules) in all of Quebec, Ontario, British Columbia, Saskatchewan, Newfoundland, Manitoba and Alberta, plus the Federal Court (a statutory court) has relatively new class action rules for matters falling within its statutory jurisdiction (which in some areas is a concurrent jurisdiction with provincial superior courts). And there is likely more to come in terms of specific legislation.

We have seen some, and are going to see more, forum shopping by plaintiffs' counsel in order to get at the optimal jurisdiction. What makes for optimal depends on the circumstances, of course, but certainly a province in which certification is granted more often than in another is likely to attract more cases than others, subject to other factors (discussed below), such as the ability to include non-residents in that provincial class. Informal data through 2002 suggested that Ontario cases are certified something like 30% of the time (and that number has likely gone up since that time), whereas in British Columbia, the certification success rate for plaintiffs was 67%, and in Quebec, it was and is higher still. Ontario will be the focus of most of the comments today, and I would suggest that trying to predict what will happen in Ontario courts on a contested certification motion shares many characteristics

---

1 Centres, [2001] 2 S.C.R. 534.

with the reading of tea leaves, but I'd rather face that uncertainty than try to defend against what are "slam-dunk" certification motions for plaintiffs in Quebec. In Ontario, defend certification and lose, and there is some prospect of success through the appeal route (which is more tortured if you're a losing defendant than a losing plaintiff, but that's another topic), but at least the appellate courts have looked at the cases and sometimes varied from the motions judge. Contrast that with B.C., where no defendant has successfully appealed a loss on certification. (There is, of course, always a first.) Contrast that further still with Quebec, if you lose as a defendant you aren't even allowed to appeal.

A Word on Canadian "National" Class Actions

While with many of the class actions to date in Canada we have witnessed cooperation, collegiality and integration among plaintiffs' counsel spread throughout the country, that is by no means the universal approach, and it is reasonable to expect that jurisdictional turf wars on the plaintiffs' side will increase with more provinces having class action legislation. The result of litigated turf war will depend, in part, on the legislative regime in the competing provinces and the willingness of the affected courts to defer to others and put their "comity" money where their mouths are.

Ontario case law[2] has recognized that an Ontario class action can be structured with a national class of plaintiffs, meaning all Canadian residents, whether or not they have a connection to Ontario, who do not opt out. With the benefit of additional jurisprudence regarding the approach to jurisdictional issues as between the provinces, the Ontario court more recently rejected a national class in [3], holding that certifying a national class in the Ontario case would not serve the administration of justice based on a number of factors. We can expect more cases on this issue as class actions continue to proliferate and as more jurisdictions become active. It is reasonable to expect that how such disputes are structured and what alternatives exist are likely to play a large role in the court's approach to ruling upon the propriety of a national class. For example, is it the defendants who oppose the national class? Or is it competing plaintiffs in another jurisdiction? What do the courts say about it in that other jurisdiction?

That approach is likely to be even further tested where there are other options for a national class. Manitoba's (much newer) class proceedings legislation also allows a plaintiff class to consist of all members of the class who do not opt out; on its face, it is equally open to a Manitoba case to have a national class as it would be to an Ontario case to have one (remember that the courts have said that a national class in

---

[2] (1995), 25 O.R. (3d) 331 (Gen. Div); leave to appeal dismissed; and (2002), 59 O.R. (3d) 656 (S.C.J.).

[3] [2003] O.J. No. 3267 (S.C.J.).

an Ontario court is acceptable without any legislative provision in the Ontario statute specifying that a national class could exist in Ontario). Setting up showdowns: a national class in Ontario, or in Manitoba? And if you're a defendant, where do you want to be defending a national class action[4]? Would you rather defend a national class action or several provincial ones? Do you have a choice?

As a practical matter, the courts in Ontario, Quebec and British Columbia have generally shown a willingness to work together and deference to their respective processes and timing. This has often worked by having the Ontario case be the national class, except for residents of Quebec and British Columbia, each of which will have their own cases with a class of their respective provincial residents. What will happen when we throw more courts into the mix and with continuing and growing divergences in the various courts' approaches to certification is likely to lead to more litigation. There are very interesting constitutional, academic and policy issues to be resolved in such disputes. Lovely for outside lawyers; bad for clients.

Strategic Direction

There are a number of "big picture" strategic considerations faced by a defendant served with a Canadian proposed class action. Clearly, the strategic thinking carries on throughout the case, but taking the time at the outset of the case to consider the nature of the response and the best "end game" for a defendant is a crucial first step. Defending a class action is expensive, in all respects. An integrated strategy at the beginning will pay dividends throughout. The following is a (clearly) non-exhaustive list of initial strategic considerations:

- Where has the action been commenced? Are there actions in more than one province? If not, do the plaintiffs' counsel intend to commence companion actions elsewhere? Does the defendant want them to?

- What is the possible range of exposure? Clearly, the extent of exposure should have a large role to play in terms of approach.

- How does the Canadian class action fit in with other private actions elsewhere in the world? How were those actions resolved? At what stage are those actions? Were there any settlements in those cases? On what terms?

---

[4] Other important considerations will obviously come into play. For example, under the Manitoba statute, there is a "no costs" clause, meaning that other than in exceptional circumstances a losing plaintiff on a certification motion will never have to pay the defendant's costs: s. 37(1), , C.C.S.M. c. C130.

- How does the Canadian class action fit in with any regulatory proceedings or potential proceedings dealing with the same impugned conduct? Will the response to the civil action affect regulatory consequences? Can the regulatory issues be structured to try to minimize the class action impact?

- If there is activity elsewhere in the world, how quickly and thoroughly can defence counsel be "brought up to speed" and remain "in the loop" on status and tactics? Never assume as Canadian defendants or defendants' counsel that someone will let you know what is going on elsewhere!

- What is the climate with co-defendants (who will exist in many kinds of class actions)? Can the defendants work together cooperatively and productively? Is there concern about possible "breaking ranks" and how does this impact information and strategy sharing?

- Where is the main battle likely to be? Strategically, is it better to save the forces for the main battle instead of multiple small ones?

- Does settlement make sense and how and when can it best be achieved?

Again, strategic thinking does not end at the beginning, but if it begins at the very beginning, the benefits are considerable. As stated earlier, the Canadian plaintiffs' class action bar is sophisticated and experienced, and anticipating their moves and framing the defendants' response is important. Furthermore, particularly in Ontario (centre of the universe), there is a group of experienced and knowledgeable judges who know the players and the issues and who take their case management role very seriously. Predicting (with the associated frailties thereof) the reaction of the class action case management judge is an important part of setting and following strategic direction.

The Battleground, or Contesting Certification

Certainly, for most parties to a class action, if there is to be a fierce battle, it's typically focussed on the motion for certification. In all of the jurisdictions in which there is class proceedings legislation – save Quebec – the test for certification is very similar. The Ontario test [5] requires the representative plaintiff to establish that:

1. The Statement of Claim discloses a cause of action;

2. There is an identifiable class of two or more persons;

---

5 , S.O. 1992, c.6, s.5.

3. The claims of the class members raise common issues;

4. A class proceeding would be the preferable procedure for the determination of those common issues; and

5. The proposed class representative:

   (a) can fairly and adequately represent the interests of a class in accordance with a workable plan; and

   (b) does not have a conflict of interest with other class members on the common issues to be raised.

If these criteria are not met by a proposed class action, certification will not be granted by the court.

A typical certification order in Ontario will specify the manner in which class members may opt out of the class proceeding and a deadline for doing so. Class members who opt out are at liberty to pursue separate proceedings, however such individual litigants are neither bound by nor can they take the benefit of the adjudication of the common issues in the class action. If class members do not opt out by the deadline they will be bound by the determination in the action which provides some finality to the proceedings for the defendant.

Quebec, sans doute, is distinct. Its courts are very pro-certification and indeed very pro-plaintiff in terms of the procedural approach to deciding the issue of certification. Keep in mind that in Quebec, there is technically no action until the decision to "authorize" or certify, so rather than starting with a Statement of Claim as in Ontario, for example, it is the motion to authorize the case to proceed as a class action that starts the ball rolling. Instead of focussing on the "preferable procedure" issue, the question for the Quebec court to address is whether "the composition of the group makes the application of alternate procedures for joining multiple plaintiffs difficult or impracticable". That, it seems to me, can be set up as something like a self-fulfilling prophecy. Furthermore, defendants to a certification motion do not have the presumptive right to any discovery, even in respect of the issues on certification, and the judge hearing certification "may" allow relevant evidence at the certification hearing, but probably isn't going to. While appeals on the propriety of these procedural issues are ongoing, it is fairly clear that to be served with a motion to authorize in Quebec is likely to face a certified class action.

While we're on the topic of Quebec, one last motivating thought for defendants: lose the certification motion and you aren't allowed to appeal; win, and the plaintiffs can (and will) appeal. Distinct is one word for it….

Back to the Canadian common law jurisdictions. In considering certification, the focus tends to be on the issue of "preferable procedure". Distilled to its essence, the

preferable procedure issue amounts to this: given all of the factors, including the "stacking" of the common issues versus the individual issues, is proceeding by way of class action the preferable procedure, bearing in mind the objectives of judicial economy, access to justice, and behaviour modification. Or, will the end of the determination of the common issues leave the court and the parties "at or close to the beginning" in terms of what work remains to be done. It is in framing this issue and positioning the facts that real strategic thinking can pay substantial dividends.

Of course, strategic thinking or not, in my respectful view it is very, very difficult on the state of the Ontario certification case law to predict which cases will and will not get certified. As an example, we have gone from statements from Justice Winkler in Ontario (who could be called the first class actions case management judge) saying that product liability cases are the "quintessential class proceeding"[6] to the same judge denying certification in what might be called the quintessential product liability claim: the tobacco case[7]. We also have Justice Winkler describing pension cases as "tailor-made" for class proceedings, where "the advantages of a class proceeding are so apparent as to be incontrovertible".[8] Securities class actions have been tried and have failed in Ontario because of the need to show reliance for statements not in formal securities documents, yet the combination of the amendments to Ontario's in and the decision of the Ontario court in the case (a certified class action that actually went to trial, where the defendant lost, to the surprise of many, and where the trial judge's theories have raised several (respectful) eyebrows), should leave those in that industry fearful about the prospect of certified class actions moving forward in the future.

Thrown from the Board – Costs, Interplay with U.S. Proceedings, and Other Issues

A major theme in any discussion about class actions is that they are intensely plaintiffs'-counsel-driven. This is a fruitful business if you do it right, and the good ones do it right. Their recipe for success: pick cases where liability on the actual cause of action is very strong (classic examples include price-fixing cases where the defendants have pleaded guilty, corporate wrongdoing that has been punished in a regulatory setting and can now form the basis for a civil action, cases where the defendants have settled for mammoth dollars in the U.S., etc.), get your Statement of Claim issued and go from there. One of the most active B.C. plaintiffs' lawyers has said that he operates on a "rule of thumb" that he'll only start a class action if its anticipated return is $1 million; keep in mind that he operates primarily in a jurisdiction with a small population and no ability to structure a national class. And for plaintiffs' counsel who do reach a settlement (or win a case), the prospect of hefty counsel fees for success is a realistic one.

---

6 (1999), 46 O.R. (3d) 130 (S.C.J.).

7 (2004), 236 D.L.R. (4th) 348 (Ont. S.C.J.).

8 (2001), 53 O.R. (3) 285 (S.C.J.).

With reward comes risk (to reverse–engineer a phrase), and it is in the context of costs awards that many who work on the defence side of the street had reason to celebrate in the last two years when significant costs awards were made against unsuccessful plaintiffs after they lost certification. Keep in mind that although many provincial jurisdictions do not allow for costs awards in class actions, Ontario very deliberately made that a feature of the legislation here.

Whereas the first wave of Ontario cases had declined to make significant costs awards against losing plaintiffs, on the basis that such cases are novel and making David pay Goliath would be wrong (this may not have been the precise way the judges put it, but you get the idea), in 2002 and 2003 two Ontario courts rejected that approach and required unsuccessful plaintiffs to pay costs of the certification motion to the defendants. In and [10], significant costs awards in favour of successful defendants were made against the representative plaintiffs ($175,000 in and $184,000 in).

Ah, but the celebration didn't last all that long. It appears that the judiciary, at least in Ontario, has given its head a shake and has decided more recently that actually requiring unsuccessful plaintiffs to pay the defendants' costs would be expensive. So, instead of actually compensating the successful defendants for a portion of their costs that would accord with the new and improved costs tariffs (which were themselves intended to create greater clarity and predictability of costs awards), in , Justice Nordheimer of the Ontario Superior Court took a claim by the successful defendants for costs of $127,000 on a partial indemnity scale for defending certification and chopped that back to $50,000, on the basis that the quantum of costs should reflect what the court views as a "fair and reasonable amount" (I thought that's what the new costs tariffs were supposed to do). Justice Nordheimer also made the point that the plaintiff was of modest means and that it is a desired objective to have a measure of consistency in costs awards on similar motions[12].

In , Justice Cullity of the Ontario Superior Court inclined to the view that the successful defendants' claim for costs of defending certification in the amount of $475,000 was "nothing short of outrageous" and stated his view that such an order would have a chilling effect and might defeat the objectives of the . In the result, he deprived the successful defendants of any costs whatsoever (although the fact that the representative plaintiffs were mostly incarcerated mental patients was clearly a very large factor in the decision).

---

[9] , [2002] O.J. No. 3495 (S.C.J.).

[10] , [2002] O.J. No. 3532 (S.C.J.); [2004] O.J. No. 317 (Div. Ct.); leave to appeal to Court of Appeal granted [2004 O.J. 3870.

[11] [2004] O.J. No. 3608.

[12] See also the recent Court of Appeal for Ontario decision in , [2004] O.J. No. 2634 (C.A.).

[13] [2003] O.J. No. 4081.

The and decisions are to be contrasted with the .[14] case in which Justice Cullity reviewed a claim for plaintiffs' costs on a successful certification motion and awarded costs to the plaintiffs of $618,000 (reduced from $1.4 million claimed, but hefty nonetheless). Notice how $475,000 for defendants' costs is outrageous, but $600,000 for plaintiffs' costs was appropriate in those circumstances. Sigh.

Without ranting, it is also difficult to reconcile the statements by some courts about "fair and reasonable" amounts while chopping defendants' costs claims after successfully defeating certification with the courts' approach in richly rewarding the plaintiffs' counsel with generous multipliers (the recent record is 4.8 in)[15]. was a case in which Canada Pension Plan survivors' pensions for same sex partners of deceased plan members was sought and obtained by the plaintiffs, which the court described as "bet the firm" litigation. The judge reviewed the fees sought by plaintiffs' counsel (to be paid from the settlement fund) and concluded that a high multiplier of 4.8 times the docketed fees and disbursements – yielding a fee of almost $15 million to the plaintiffs' counsel – was justified. I don't quarrel with that; at least not here. But, live by the sword, die by the sword. We suspect (but because of privilege don't get to know) that plaintiffs in a class action are often indemnified against an adverse cost award by plaintiffs' counsel. If plaintiffs' counsel are going to get almost five times their actual docketed rates when they succeed, why shouldn't that side have to pay when they lose certification? (So much for no ranting….)

2005 saw yet another wrinkle to the issue of plaintiffs' counsel costs: the "success premium". In the trial judge was faced with a request for an award of substantial indemnity costs, on the basis that the litigation had been hard-fought and the defendants should have to pay extra for having fought; that claim was rejected by Lederman J. However, because there had been an offer to settle made by the plaintiffs which the plaintiffs "beat" at trial, an award of substantial indemnity costs from the date of the offer flowed from the operation of the . Lederman J. turned then to whether, on top of that, there should be a "premium". Citing Court of Appeal authority (in a non-class action case) for the proposition that there could be a premium which "ought to occur only rarely and only when both factors – risk and result – cry out for an award of substantial indemnity costs", the trial judge concluded that both factors were present in the case before him and concluded that an appropriate premium to the plaintiffs' solicitors should be $1 million. A result cheered by the plaintiffs' bar, to be sure.

Leaving the issue of costs, turn now to certainty. Because of the nature and flow of Canadian commerce, many Canadian plaintiffs may form part of the plaintiff class

---

[14] [2004] O.J. No. 3102.
[15] [2004] O.J. No. 1867 (S.C.J.).
[16] [2005] O.J. No. 1972 (S.C.J.)

in U.S. class actions. That means that not only are they eligible to receive compensation from a U.S. settlement pool, but their claims are also – one might think – extinguished by virtue of a U.S. settlement which typically includes a broad release. Not so fast.

The recent Ontario case of [17] considered a motion to stay or dismiss two Ontario class actions on the basis that they were frivolous, vexatious or otherwise an abuse of process of the court's process because of the existence of a court-approved settlement in the U.S. A group of Canadian plaintiffs had attended the U.S. settlement approval (or fairness) hearing in Illinois to object to its application to Canadians, and were unsuccessful. Notice of the U.S. settlement, including regarding opt-out rights, was provided to Canadians in the form approved by the U.S. court (publication by notice in two issues of magazine and in three Quebec French newspapers). Two class actions were then commenced in Ontario: one by the same group that had appeared in the U.S. and objected to the settlement, and the other by an unrelated plaintiff group.

In lengthy reasons, Justice Cullity reviewed recent jurisprudence from the Supreme Court of Canada and the Court of Appeal for Ontario on recognition of judgments from other jurisdictions, and decided that while the Illinois court had a real and substantial connection with the dispute and its judgment could be enforced in Canada according to the principles from those recent cases, the principles of natural justice or fairness dictated that the Illinois judgment could not apply to the entire Canadian putative class because of inadequacies in the notice of the U.S. settlement to the class. (This despite the fact that the Illinois court had approved the form of Canadian notice). Then (sort of adding insult to injury), Justice Cullity ruled that the Illinois judgment should be enforced against those Canadian consumers who had personally objected at the Illinois fairness hearing, because they had attorned to the Illinois court. That didn't cover the Canadian plaintiff class in the second Ontario class action, though, just the people who went to Illinois to object.

The decision was appealed to the Court of Appeal for Ontario, with the appellate court upholding the decision of Cullity J.[18]. Writing for the court, Sharpe J.A. stated that the findings of the motions judge respecting the adequacy of notice and other issues were essentially factual and therefore entitled to deference. The court went further by rejecting the defendant's claims that the doctrines of or abuse of process would preclude recovery in an Ontario class action, finding that the parties before the U.S. court were different than those before the Ontario court.

The lesson is quite clear: do not assume that a U.S. settlement will bind Canadian members of the class, however defined. Attention must be paid to the Canadian

---

[17] [2004] O.J. No. 83 (S.C.J.).

[18] , [2005] O.J. No. 506 (C.A.)

"drill" involving notice and the wise course of action would seem to be to seek settlement approval in the Canadian courts.

Interestingly, as a matter of U.S. law, the long arm of the U.S. courts has arguably been shortened recently by the U.S. Supreme Court's decision in [19] in which that court decided that suits brought in the U.S. by foreign firms in respect of transactions that took place outside the United States with injuries suffered outside the United States (although in respect of conduct that had also happened within the U.S.) should not proceed. Very closely watched by plaintiffs' counsel in Canada and in other jurisdictions, had been held up as the end of jurisdictional sovereignty and the death knell for plaintiff firms outside of the U.S., on the basis that if the suit had been allowed to proceed in the U.S., all cases would forevermore be litigated in the U.S., leaving non-U.S. lawyers with nothing to do.[20] Celebration followed the U.S. Supreme Court's ruling: Canadian plaintiffs' lawyers could keep litigating in Canada!

It bears noting that similar pronouncements of doom and gloom have been heard from Canadian plaintiffs' counsel following the decision, the view being expressed that as long as the right notice is given to Canadian class members, U.S. courts (and U.S. plaintiffs' lawyers) will be able to loop Canada into their cases and there will be nothing for Canadian lawyers to do. We shall see.

While on the topic of U.S. courts, one final issue to be quickly canvassed. Because so much litigation happens on both sides of the border, cooperation and facilitation between the courts is on the rise. This isn't always good new for defendants. Many Canadian class actions "follow on" U.S. class actions, meaning that a lot more work and documentary production has happened in the U.S. than in Canada. Not surprisingly, Canadian plaintiffs have said "why wait until discovery in Canada, if we can have at the U.S. court file, we'll save time, effort and money (which means we can extract a settlement earlier, perhaps)." And both Canadian and U.S. courts have been awfully amenable to such approaches. In the vitamins price-fixing class actions in Canada, Justice Cumming in Ontario said, "it's up to the U.S. court whether to grant access to its court file"; the Divisional Court and Court of Appeal agreed, and the Supreme Court of Canada declined to hear the appeal[21]. The U.S. court dealing with the U.S. vitamins cases initially indicated it would await the conclusion of the Canadian litigation on this point, which ended unsuccessfully for the defendants (with the Supreme Court denying leave). The plaintiffs then did not pursue their claim for access to the U.S. court file because - wait for it – the Canadian vitamins class action cases settled. More recently still, the Ontario plaintiffs' counsel

---

[19] 124 S.Ct. 2359 (2004).

[20] I may be exaggerating the concerns expressed slightly.

[21] (2001), 6 C.P.C. (5th) 245 (Ont. S.C.J.); (2002), 212 D.L.R. (4th) 563 (Ont. Div. Ct.); (2003), 223 D.L.R. (4th) 445 (Ont. C.A.); leave to appeal to Supreme Court of Canada dismissed [2003] S.C.C.A. No. 245.

in a Canadian class action which is a follow-on of longstanding and extensive U.S. class actions alleging price-fixing in the linerboard and cardboard industry, sought and obtained access to the U.S. court file[22], over the objections of the defendants.

Expect much more litigation on all of these questions.

Settlements: Sometimes a Necessary Evil

To ignore the business justification for reaching a settlement of a class action would be bad lawyering. Meaty legal issues aside, the stakes have to be very high for a defendant not to at least seriously consider some form of resolution that crystallizes exposure (to the greatest extent possible), stops the legal expense, and closes the chapter. If the price is right, settlement can be the best course of action. And the plaintiffs' bar knows it.

When settlement discussions are engaged, reference to U.S. settlements (if they exist) is inevitable. In a refrain familiar to both plaintiffs' and defendants' counsel, the U.S. settlement is typically held out by the plaintiffs as the only sensible reference point for a Canadian deal, with the defendants responding by pointing to the U.S. settlement figure as fundamentally overstated for Canadian settlement purposes, having been arrived at in a different damages regime with risk of a wonky jury verdict.

Whether or not there is a U.S. reference point for Canadian settlement negotiations, attention will be focused on how to measure, for settlement purposes, the amount of damages, and then often how to distribute those damages among the class of plaintiffs. Once the amount is agreed upon, defendants will want a complete release, covering as broad a time period as possible. Bar orders may also be agreed to and sought from the court as a means of (hopefully) preventing claims for contribution and indemnity from non-settling co-defendants.

Even after agreement on quantum and general terms of the settlement, other issues must be addressed, including (but by no means limited to):

- How will the settlement funds be distributed among the plaintiff class?
- How will claims be proven by class members?
- How will payments already made as part of U.S. settlements get dealt with in the Canadian settlement?

---

22 , (August 25, 2004), U.S. Dist. Ct., Eastern District of Pennsylvania.

- What happens to opt-outs? On what basis do they reduce the settlement fund? Is there a "blow up" clause in the settlement which sets aside the settlement if a certain percentage opt-out?

- Can a "return to defendants" clause be negotiated if there are inadequate claims against the fund or do the funds get distributed ?

- Are the plaintiffs' class counsel fees to come out of the settlement fund, or are they to be in a separate pool and paid (following court approval) by the defendants?

- What role should the defendants have in the administration of the settlement?

- What role should the defendants have in the amount of fees to be paid to plaintiffs' class counsel?

Generally for the defendants, the for settlement is that it must be a national deal, which compensates all Canadian plaintiffs and is approved by as many courts as considered advisable. There are now seven provincial jurisdictions which have class proceedings legislation. To date, many (but not all) of the settled class actions intended to cover all of Canada have been commenced with Ontario as the "lead" jurisdiction, with the proposed class in the Ontario action defined as a national one. Where the class being defined in the Ontario action is a national class (for example, all purchasers in Canada of a product), a national settlement typically proceeds with a framework that compensates the national class out of the funds set aside for the Ontario (or national) class, with other funds or pools established for particular claimants in other jurisdictions.

Court approval of a settlement of class action must be obtained, no matter the terms of the settlement. In considering whether to approve the settlement, the court must find that "in all the circumstances the settlement is fair, reasonable, and in the best interests of those affected by it"[23]. Typically, the Ontario court, with its national class, is the first to consider the reasonableness and fairness of the proposed settlement, based on a number of factors,[24] including:

(a) the likelihood of recovery or the likelihood of success;

(b) the amount and nature of any discovery evidence;

(c) the proposed settlement terms and conditions;

---

[23] , [1998] O.J. No. 1598 (Gen. Div.).

[24] .

(d) the recommendations and experience of class counsel;

(e) future expenses and the likely duration of litigation;

(f) recommendations of neutral parties, if any;

(g) the number of objectors and the nature of the objections; and

(h) the presence of good faith and the absence of collusion.

As a matter of practice, court approval of a "national deal" has historically first been sought in Ontario, and then frequently has also been sought from the courts of British Columbia and Quebec, until relatively recently the only other provinces with class proceedings legislation. Often "companion" actions are commenced in British Columbia and Quebec at or near the outset of the "national case" filed in Ontario and court approval of the settlement in those two provinces will also be required. Sometimes, actions are commenced in other jurisdictions only after settlements have been reached so that those courts can review, consider and "bless" the settlement in those jurisdictions (although there is rightly concern that those courts will not be pleased with actions commenced in their jurisdictions only to allow for court approval of settlements). The rules and practice of each jurisdiction regarding notice and procedure for approval and implementation have to be respected. The fact of Ontario approval of the national deal which comprises a national class has generally been felt to be very persuasive when it comes to securing approval in British Columbia and Quebec.

The idea behind seeking approval in other jurisdictions, even where a national class was formed in Ontario, is as a risk management tool, the expectation being that if a court in British Columbia approves a settlement involving a national class out of Ontario, with British Columbia residents covered in the British Columbia case, the likelihood of a court allowing a new case down the road from a British Columbia plaintiff who claims he is not bound by the settlement will be dramatically reduced. That said, that issue has not been thoroughly litigated, leaving settling parties to assume the risk of future actions in jurisdictions where approval was not sought or obtained.

The effect of court approval of a settlement of a national class in Ontario and the legislative provisions of the is (hopefully) to preclude later actions taken by anyone who may have been a member of the class as defined in the settlement and who did not opt out in accordance with the legislation. Thus if, for example, a large corporate purchaser of a price-fixed product, resident in New Brunswick (with no class action legislation), falls within the class definition in the Ontario action (which it would, because of the national definition) and does not opt out of the action, and does not collect from the settlement fund or feels that the settlement was wholly inadequate and later brings an action in New Brunswick for

$10 million in damages, that corporate plaintiff will immediately be met with the argument that its claims are barred by operation of the Ontario approval order. In articulating the potential dispute, one can hear the howls of outrage now (again involving the centre of the universe); aside from the outrage, there are legal (jurisdictional and constitutional, among others) arguments that could be made. This is no longer a theoretical risk. Recently, a national class was certified in Ontario as part of a court-approved settlement. A new class action was then commenced in Quebec, and the Quebec court certified, notwithstanding the existence of the national court-approved deal in Ontario[25]. Needless to say, further proceedings in that case are ongoing.

Historically, the practicalities have driven the paucity of law on these issues: the likelihood of there being enough money at stake for that issue to be litigated is low, so settling defendants take the risk. The risk, while low, does exist, and defendants need to know this as part of their settlement considerations.

While the practice of obtaining approvals in all of Ontario, British Columbia and Quebec of a national settlement is fairly common, the existence of fairly new class proceedings legislation in other Canadian jurisdictions (and, for that matter, the Federal Court) raises the question of whether additional court approvals should be obtained. Here, the assessment is likely to be: the more courts that bless my settlement, the better in terms of being able to prevent new cases commenced by individual or even class plaintiffs who claim not to be bound by the settlement reached without their involvement. On the other hand, the involvement of more courts and more judges reviewing a settlement may increase the chances that approval is not given.

The court whose approval of the settlement is sought will receive material supporting the settlement, usually including expert affidavit evidence about how both the agreed quantum and distribution mechanism are fair and reasonable. Drawing in part on exhortations from the bench in the U.S., Canadian judges are "live" to the possibility of what might be called "sweetheart deals" that are quickly reached between plaintiffs and defendants for an amount that might not represent a fair damages amount and might involve a nice fee for plaintiffs' counsel. On the fee side, where the court is satisfied that the settlement was a good result, we are seeing a greater willingness on the part of the class action judiciary to reward (as they are able to do by statute) the efforts of plaintiffs' counsel by way of a multiplier or a contingency percentage. The inherent conflict in the role of plaintiffs' counsel in these situations is recognized by all, but is not dealt with in any readily ascertainable fashion. Defendants' counsel typically listen to the plaintiffs' counsel make their pitch for their fees right after the settlement approved, but their role on such a fees

---

[25] [2004] O.J. No. 1406 (S.C.J.) and [2003] J.Q. No. 18920 (C.S.Q.).

approval motion is usually as spectator only[26]. Again, the practicalities drive the results.[27]

Parting Thoughts: Some Tips for Managing Class Action Litigation

Listing tips for inside counsel and other business folks who are managing the defence of class action litigation can be seen as an exercise in stating the obvious, but the only reason that something can be justifiably labelled trite is because it reflects accepted learnings. So, here's a trite list of ten tips for managing class action litigation:

1. Take a holistic approach to regulatory and other potential liabilities. Your company's exposure may arise in different places and at different times.

2. Know that no one is ever happy in litigation.

3. Manage expectations.

4. Communicate ceaselessly.

5. Early and often, identify the type of evidence and assistance needed from the business folks and explain how key that is: "It's your case".

6. For Canadian "copycat" litigation, draw on and facilitate the cooperation with and assistance from U.S. counsel (but don't get pushed aside).

7. Set the tone in terms of managing the action or actions.

8. With cases in multiple Canadian jurisdictions, consider designating an outside counsel "quarterback".

9. Stay in the loop and communicate your expectations to outside counsel about your involvement and leaving time for getting your input.

10. Avoid the temptation to pay the plaintiffs off. Think about the next set of cases. The obvious business judgment isn't always the right answer.

---

[26] In a settlement that is negotiated as an all-inclusive deal, with no separate fees pool, a defendant may negotiate either a cap on the fees and/or no multiplier to be requested by class counsel. The negotiating power here on the defendant's side lies in the real concern that if the class counsel fees are too high, the settlement pool will be reduced by too much, leaving greater risk that there will be objectors to the settlement, that the court won't approve, and that there may be more opt-outs from the settlement (who may start their own cases). Plaintiffs' counsel understand these issues and will often entertain such negotiations regarding a cap or no multiplier, as long as there is room for them to get a meaningful fees award from the court.

[27] This is not to say that plaintiffs' counsel do not deserve those fees. They may (they may not). I'm probably just jealous.

CLASS ACTION UPDATE

NOVEMBER 2004

Court of Appeal to Consider Whether a U.S. Court-Approved Class Action Settlement Binds Canadians

Decisions of the Supreme Court of Canada in recent years have affirmed that Canadian courts should recognize foreign judgments in appropriate circumstances.[1] Two companion decisions of the Ontario Superior Court of Justice released earlier this year make it clear, however, that it cannot simply be assumed that foreign judgments – or, in this case, a settlement reached in foreign class proceedings – will necessarily be enforced in Canada. The Court of Appeal for Ontario is scheduled to hear the appeal next month.

Parsons v. McDonald's Restaurants of Canada Ltd. (2004), 45 C.P.C. (5th) 304 (Ont. S.C.J.) considered the effect of a court-approved settled class action in Illinois on two class actions commenced in Ontario regarding substantially the same subject matter. The Illinois case was brought against McDonald's and Simon Marketing, a California firm hired by the restaurant chain to conduct promotional contests and games, some of which were offered to customers in Canada. The U.S. proceedings alleged that employees of the marketing firm had misappropriated prizes intended for customers. McDonald's and Simon Marketing reached a settlement with class members. The order of the Illinois court giving effect to the settlement included releases in favour of McDonald's and its subsidiaries, including in Canada. Notice of the settlement was to be given to class members, including regarding the right to opt out of the class, and the Illinois court made specific provision for notice to class members in Canada.

Criminal charges had been brought against one of the Simon Marketing employees. At his trial, the employee made allegations that McDonald's had instructed him to manipulate the contests so that no high-value prizes were awarded in Canada. These allegations were not part of the U.S. proceedings, but Mr. Parsons, a Canadian, got wind of them and filed objections to the settlement before the Illinois court on behalf of Canadian class members.

[1] See, for example, *Morguard Investments Ltd.* v. *De Savoye*, [1990] 3 S.C.R. 1077; *Beals* v. *Saldanha*, [2003] S.C.J. No. 77.

He argued that the settlement could not extend to issues which were exclusively Canadian. These objections – and an appeal – were rejected in Illinois.

Mr. Parsons, as representative plaintiff, commenced a class action in Ontario against McDonald's of Canada and Simon Marketing. A separate Ontario class action was also commenced by the same firm as that representing Mr. Parsons. The defendants moved to stay or dismiss the Ontario class actions as being frivolous, vexatious, or an abuse of the court's process because of the existence of the U.S. court-approved settlement. Mr. Justice Cullity of the Ontario Superior Court of Justice did dismiss the case started by Mr. Parsons, but ruled that the rest of the plaintiff class (represented in the second class action started by the same firm) was not bound by the Illinois judgment and could proceed with their case in Ontario. In the end, McDonald's lost, but so did Mr. Parsons.

The first issue considered by Justice Cullity was the jurisdiction of the Illinois court to include Canadian class members in the proceedings. Justice Cullity made the general observation that the "special features" of class actions, where many class members have little or no involvement in the actual proceedings, may require some modification in the approach to the rules with respect to the enforcement of foreign judgments. On balance, he was satisfied that there was a sufficiently "real and substantial connection" with Illinois to allow its court to entertain the proceedings. The fact that Parsons had voluntarily submitted to the jurisdiction of the Illinois court (and would therefore be bound by the settlement terms) did not mean, however, that the settlement was necessarily binding on other Canadian class members.

Justice Cullity then considered whether the Illinois settlement order should be recognized in Ontario. He noted that Canadian courts cannot ignore "the unique possibilities of abuse that may arise when settlements of class proceedings have been negotiated." Justice Cullity concluded that it would be a denial of natural justice to enforce the Illinois settlement in Ontario, because it would give McDonald's and Simon Marketing a complete defence to the claims about prize-manipulation in Canada, which were not even at issue in the Illinois proceedings. Justice Cullity also found that the notice provided to Canadian class members was "woefully inadequate" in terms of reaching them effectively through English and French-language media. The natural justice arguments did not apply to Parsons himself, however, as he had submitted to the Illinois court's jurisdiction and could not say that he was inadequately informed of his rights as a class member.

The defendants also claimed that the issues raised by Parsons were the subject of a final decision in Illinois and should not be allowed to be re-litigated in Ontario. On this point, Justice Cullity noted that the Illinois order was not a final decision on the merits – and that the allegations about the manipulation of prizes in Canada were in any event an entirely new issue. On the other hand, by submitting to the Illinois court, Parsons had in effect voluntarily agreed to the settlement, which was extensive enough to preclude a claim by him against McDonald's of Canada and Simon Marketing. As a result, his action was permanently stayed, while the other members of the Canadian class – who had not submitted to the Illinois court – were allowed to proceed.

In related proceedings, *Currie v. McDonald's Restaurants of Canada Ltd.*, [2004] O.J. No. 1862 (S.C.J.), McDonald's sought an order that would compel Canadian class members to choose between participating in the Canadian class proceedings and taking the benefits of the U.S. settlement. Mr. Justice Cullity stated that it was not appropriate for the courts to try to rectify decisions of a foreign court or to remedy its failures in terms of natural justice. He also concluded that McDonald's was seeking to impose an "opting in" system, which was specifically rejected when Ontario's class action legislation was adopted. As a final point, it was held that the legislation does not permit a judge to make orders prior to certification of a proceeding as a class action.

Parsons has been appealed to the Court of Appeal for Ontario, and that court's consideration of the issue will be instructive. If the judgment stands, one cannot simply assume that Ontario courts will recognize and enforce a foreign order – including a foreign settlement. Regardless of the outcome in this particular case, the comments in the judgment on the "special nature" of settlements of cross-border class actions are important, and may take on a life of their own.

U.S. defence counsel should be aware that, at the very least, in order to be in a position to assert that a "global" settlement binds Canadian plaintiffs, the class action settlement notice must meet Canadian standards of reasonableness and the defendants will need to be prepared to address plaintiffs' assertions of denial of natural justice if the U.S. settlement is enforced in Canada.

Stikeman Elliott's Class Action Seminar

On October 20, 2004 the Stikeman Elliott Litigation Group hosted a seminar on the "The Next Big Wave: An Update on the Canadian Class Action Scene" for clients and guests in Toronto, Ontario. The seminar was moderated by David Byers, Co-Chair of the National Litigation Group and the topics and speakers included:

An Update on Class Actions in Canada, Katherine Kay
The Certification Motion, Adrian Lang
Insurance, Financial Services and Pension Class Actions, Alan D'Silva & Kathryn Chalmers
Products Liability Class Actions, Douglas Harrison
Securities Class Actions, Patrick O'Kelly

If you would like to receive a copy of the seminar materials, which includes papers from each of our presenters, please E-mail us at info@stikeman.com.

Stikeman Elliott LLP's Class Action Group:

TORONTO
Tel: (416) 869-5500
David R. Byers
Kathryn I. Chalmers
Alan D'Silva
Doug F. Harrison
Peter F. C. Howard
Katherine L. Kay
Eliot N. Kolers
Adrian C. Lang
Patrick J. O 'Kelly
Simon A. Romano

MONTREAL
Tel: (514) 397-3000
Eric Azran
David Banon
Louis P. Bélanger
Suzanne Côté
Michel Décary Q.C.
Mortimer G. Freiheit
Stephen W. Hamilton
Marc Laurin
Yves Martineau
Frédéric Pierrestiger
Anik Trudel

VANCOUVER
Tel: (604) 631-1300
Hein Poulus Q.C.
David Brown

For representatives in other offices, please contact:

OTTAWA
Tel: (613) 234-4555
Stuart C. McCormack

CALGARY
Tel: (403) 266-9000
Lou Cusano

NEW YORK
Tel: (212) 371-8855
Kenneth Ottenbreit

LONDON
Tel: 44 (0) 20 7367 0150
Shawna Miller

SYDNEY
Tel: (61-2) 9232 7199
Brian Hansen

Stikeman Elliott LLP's Litigation Group has earned a reputation as a market leader in Canada's largest business centres. Members of the group regularly act on a wide range of litigation relating to commercial contracts, class actions, securities, tax, competition/antitrust, product liability, intellectual property, professional negligence, directors' and officers' liability, defamation, insurance, real estate, insolvency, fraud, construction, employment, human rights, environmental and constitutional matters.

The group has been ranked as "Leading Individuals" for the General Commercial Litigation practice area in Chambers Global *World's Leading Lawyers 2003*. Stikeman Elliott has five litigators (representing its Toronto and Montreal offices) cited in the prestigious *2004 Guide to the 500 Leading Lawyers in Canada*, a joint publication of *The American Lawyer* and LEXPERT. In addition, *The Canadian Legal Lexpert Directory 2004* cites Stikeman Elliott litigators as "Repeatedly Recommended" in the Class Action, Corporate Commercial and Securities sectors; and as "Leading Practitioners" in the Class Action, Corporate Commercial, Competition, Securities, and Insolvency & Financial Restructuring sectors.

The firm's class action practice has a breadth of experience in defending class actions commenced under many different legal causes of action and for clients who fall within many types of industries. The firm's national presence allows it to respond strategically and comprehensively to cases that are commenced in more than one Canadian jurisdiction. Because many Canadian class actions mirror actions commenced in other jurisdictions outside of Canada, Stikeman Elliott's class action lawyers emphasize a cooperative approach in dealing with our legal colleagues in other jurisdictions, creating integrated legal strategies for the benefit of clients.

For more information about the contents of this newsletter, please contact the authors, Katherine Kay (kkay@stikeman.com) or Adrian Lang (alang@stikeman.com) or any of the other members of the Class Action Group listed on this page.

If you would like to subscribe or unsubscribe to the Class Action Update, please contact us at info@stikeman.com.

CLASS ACTION UPDATE

MARCH 2005

No Automatic Enforcement of U.S. Class Action Settlement

In the last Class Action Update, we reported on *Parsons* v. *McDonald's Restaurants of Canada Ltd.* (2004), 45 C.P.C. (5th) 304 (S.C.J.), which discussed the interplay between Canadian and U.S. class proceedings, and the cross-border enforcement of U. S. settlements.

Parsons was the would-be representative plaintiff in a Canadian class action against McDonald's and a marketing firm, alleging irregularities in the administration of promotional contests. After an earlier class action was brought in Illinois, McDonald's and the marketing firm reached a settlement in the U.S. proceedings, which purported to extend to Canadian class members. Mr. Justice Cullity held that because Parsons had voluntarily participated in the Illinois proceedings, he was bound by the terms of the settlement – but also held that it did *not* bind other Canadian class members, who had not received adequate notice of their rights. Principles of natural justice did not permit Justice Cullity to recognise and enforce the U.S. settlement, except as it related to Mr. Parsons. Parsons's action was therefore permanently stayed, but the remainder of the Canadian class were allowed to proceed with their action in Canada.

The decision of Mr. Justice Cullity has recently been upheld on appeal (in reasons released February 16, 2005, Court File Nos. C41264/C41289/C41361). Writing for the Ontario Court of Appeal, Mr. Justice Sharpe recognised the general principle of comity in the enforcement of foreign judgments, but agreed with Justice Cullity's statement that class action proceedings have 'certain unique features' that need to be taken into account. In particular, the enforcement of foreign judgments (including settlements) must consider the special situation of the unnamed, non-resident plaintiff. While there was a real and substantial connection between the issues in dispute in *Parsons* and in the courts of Illinois, members of the Canadian class (apart from Mr. Parsons) had 'done nothing to invite or invoke Illinois jurisdiction.' Order and fairness demanded careful consideration of their procedural rights under any settlement. If Canadian class members in *Parsons* had been properly notified of the Illinois settlement, adequately represented by counsel and given a clear right to opt out of the settlement, there would have been no problem in enforcing it in

Canada with respect of those plaintiffs who had not opted out. Justice Sharpe saw no reason to interfere with the factual findings in the court below, which had determined that the notice given to Canadian class members of the Illinois proceedings was 'woefully inadequate.' The Court of Appeal concluded that it was not an error on the part of Justice Cullity to apply the standard the Illinois court applied in respect of notice to American class members, as part of the overall examination of natural justice.

The Court of Appeal then dealt with an argument by McDonald's that the action brought in Canada by Currie, one of the class members not bound by the U.S. settlement, ought to be stayed as *res judicata* or an abuse of process. (Currie's action was brought as a protective measure to preserve the rights of Canadian class members in the event of an adverse ruling against Parsons.) The Court of Appeal rejected the contention that Currie was merely the *alter ego* of Parsons and that the two were in any event only nominal plaintiffs, the real plaintiff being the law firm who represented them both. The Court held that Currie and Parsons were not in privity with each other, and Currie's claim was not merely an attempt to re-litigate the same issues raised by Parsons. The doctrine of *res judicata* therefore did not apply, and there was nothing to suggest that it was an abuse of process to allow Currie's action to go ahead. The Court noted that, although the Canadian firm that represented both Parsons and Currie had a significant financial interest in the proceedings, the class as a whole had a greater stake and, furthermore, the legal rights of the parties were not be to be assessed 'on the basis of their lawyers' pecuniary interest in the outcome.'

As a result of the Court of Appeal's judgment, Ontario courts will not simply rubber-stamp U.S. class action settlements. The 'special nature' of cross-border class actions has been given clear recognition by the Ontario Court of Appeal, and as a result Judges will necessarily take a long, hard look at the procedure applied to non-resident class members in a foreign jurisdiction, especially with respect to notice, representation and the right to opt out of any settlement. As we observed in our last Update, U.S. defence counsel should be aware that a global settlement may need to satisfy Canadian standards of procedural fairness and natural justice in order to be enforced north of the border.

Tobacco Industry Class Action Certified in Quebec

In a recent decision, the Québec Superior Court authorized the first tobacco class actions in Québec[1]. This decision emphasizes the philosophical and legislative differences between class action legislation in Quebec and elsewhere in North America, as well as the fact that Québec courts may allow class actions to proceed that would likely be refused in other Canadian jurisdictions. It also confirms Québec's reputation as a preferred jurisdiction for plaintiffs to pursue class actions in Canada.

Justice Pierre Jasmin certified two class actions brought on behalf of millions of Quebecers against JTI-MacDonald, Imperial Tobacco and Rothmans, Benson & Hedges. The plaintiffs in the two cases are claiming damages as a result of addiction to tobacco products and smoking-related illnesses.

Although a similar class action in Ontario had previously been rejected by the Ontario Superior Court[2], which ruled that the class proceeding would not be "fair, efficient and manageable," the Québec Superior Court allowed the proposed class actions to proceed, despite their *prima facie* doubtful manageability.

In their submission opposing the class actions, the tobacco companies notably argued that in order to ascertain liability, the suits would inevitably require inquiry into the specific circumstances of each of the millions of individuals likely to be part of the class, and therefore a class procedure would be contrary to the efficient administration of justice.

[1] *Blais* v. *Imperial Tobacco et al.*, and *Létourneau* v. *Imperial Tobacco et al.*, Quebec Superior Court, February 21, 2005.
[2] *Caputo* v. *Imperial Tobacco*, Ontario Superior Court, February 5, 2004

The Québec Court did not accept this argument and ruled that there were enough identical, similar or related questions of law or fact for the case to proceed as a class action. According to the Court, even if the complexity of the individual issues overpowers the common issues, that does not mean that the class action should not be certified. The Court indicated that its decision could always be reviewed or even cancelled at a later time.

Moreover, the Québec Court went so far as to conclude that it does not matter if the representative does not actually represent the class. Indeed, Justice Jasmin ruled that even if the proposed representative has himself no cause of action against the defendants, he can still be an adequate representative.

The Québec judgment introduces troubling and contradictory implications. On the one hand, the Québec legislature has introduced an expeditious process for certification, but on the other hand, Québec Courts may well , as a result, find themselves bogged down in the administration of complex class actions requiring many years of litigation.

"Light" Cigarettes Class Action Certified in B.C.

On February 8, 2005 the B.C. Supreme Court certified a class action against Imperial Tobacco Canada Limited (Imperial Tobacco) in relation to all brands of cigarettes identified as "light" or "mild" sold by it in British Columbia.

The claims advanced are not based on any allegation of damaged health or personal injury, but rather, on a novel theory of liability based on British Columbia's consumer protection legislation. The plaintiff's theory of liability is that the labelling of cigarettes as "light" or "mild" constitutes a deceptive act or practice under the *British Columbia Trade Practice Act* (the *TPA*). The plaintiff sought to make the relevant claims period run from July 5, 1974, the date when the *TPA* came into force, through to the court-ordered opt-in/opt-out date.

The plaintiff's theory of liability is that by marketing cigarettes as light or mild, Imperial Tobacco was representing that they were less harmful and had less toxic emissions than regular cigarettes. The plaintiff alleges that this is not the case, due to a phenomenon known as compensation. According to the plaintiff, "compensation is a tendency of smokers to block the [filter] vents with their lips or fingers, inhale more deeply, puff more frequently, hold the smoke in their lungs for longer, and smoke more cigarettes."

The plaintiff advanced three categories of claims:

1. a declaration that the defendant had engaged in deceptive acts and practices and an injunction preventing it from doing so in the future;
2. the restoration to class members of money obtained by the defendant as a result of such deceptive acts and practices; and
3. damages, both compensatory and punitive.

Imperial Tobacco challenged certification on the basis that the statement of claim alleges that causation and reliance are not necessary elements of the claim. The defendant pressed this argument both as a basis for concluding that the statement of claim was flawed and to support its argument that if the claim was properly framed (so as to include the need to prove individual causation and reliance), the action would not be suitable for certification because individual issues related to those matters would overwhelm the common issues identified by the plaintiff.

In granting certification, the court relied on the fact that the *TPA* defines a deceptive act or practice as a representation or conduct that has "the capability, tendency or effect of deceiving or misleading a person." From this starting point, the court noted that it is not necessary to show that someone has actually been

deceived in order to establish a deceptive act. Rather, the focus of the analysis is on the conduct of the defendant and the capability, tendency or effect of that conduct to deceive or mislead, whether or not an individual plaintiff was actually deceived by it. The court also concluded that in the statutory cause of action for restoration of money, proof of reliance is unnecessary because the causal connection "arises out of the defendant's conduct in both deceiving and acquiring a benefit through its deception."

But he court held that another of the statutory causes of action, namely the statutory claim for damages, does require proof of individual reliance. However, the court noted the plaintiff's submission that it will be able to prove the necessary reliance without individual evidence by tendering statistical evidence to demonstrate the distortion of the entire marketplace. The court expressed some doubt that such a theory would succeed, but stopped short of saying that it was plain and obvious that it would fail and, as a result, approved the claim, allowing it to proceed to trial.

Ultimately the court concluded that all of the statutory requirements for certification had been met. The court found that there was an identifiable class, notwithstanding that the class included every person, whether a resident of British Columbia or not, who had purchased one of the identified brands of cigarettes in the province. In reaching this conclusion, the court held that the difficulties in identifying such individuals were mitigated by the fact that the plaintiffs were not seeking individual compensation, but rather a global recovery of all money spent on the identified brands of cigarettes, which could subsequently be distributed as compensation to individual plaintiffs without the defendant's involvement.

Stikeman Elliott LLP's Litigation Group has earned a reputation as a market leader in Canada's largest business centres. Members of the group regularly act on a wide range of litigation relating to commercial contracts, class actions, securities, tax, competition/antitrust, product liability, intellectual property, professional negligence, directors' and officers' liability, defamation, insurance, real estate, insolvency, fraud, construction, employment, human rights, environmental and constitutional matters.

The group has been ranked as "Leading Individuals" for the General Commercial Litigation practice area in Chambers Global *World's Leading Lawyers 2003*. Stikeman Elliott has five litigators (representing its Toronto and Montreal offices) cited in the prestigious *2004 Guide to the 500 Leading Lawyers in Canada*, a joint publication of *The American Lawyer* and LEXPERT. In addition, *The Canadian Legal Lexpert Directory 2004* cites Stikeman Elliott litigators as "Repeatedly Recommended" in the Class Action, Corporate Commercial and Securities sectors; and as "Leading Practitioners" in the Class Action, Corporate Commercial, Competition, Securities, and Insolvency & Financial Restructuring sectors.

The firm's class action practice has a breadth of experience in defending class actions commenced under many different legal causes of action and for clients who fall within many types of industries. The firm's national presence allows it to respond strategically and comprehensively to cases that are commenced in more than one Canadian jurisdiction. Because many Canadian class actions mirror actions commenced in other jurisdictions outside of Canada, Stikeman Elliott's class action lawyers emphasize a cooperative approach in dealing with our legal colleagues in other jurisdictions, creating integrated legal strategies for the benefit of clients.

Stikeman Elliott LLP's Class Action Group:

TORONTO
Tel: (416) 869-5500
David R. Byers
Kathryn I. Chalmers
Alan D'Silva
Doug F. Harrison
Peter F. C. Howard
Katherine L. Kay
Eliot N. Kolers
Adrian C. Lang
Patrick J. O 'Kelly

MONTREAL
Tel: (514) 397-3000
Eric Azran
David Banon
Louis P. Bélanger
Suzanne Côté
Michel Décary Q.C.
Mortimer G. Freiheit
Stephen W. Hamilton
Marc Laurin
Yves Martineau
Frédéric Pierrestiger
Anik Trudel

VANCOUVER
Tel: (604) 631-1300
Hein Poulus Q.C.
David Brown

For representatives in other offices, please contact:

OTTAWA
Tel: (613) 234-4555
Nicholas McHaffie

CALGARY
Tel: (403) 266-9000
Lou Cusano

NEW YORK
Tel: (212) 371-8855
Kenneth Ottenbreit

LONDON
Tel: 44 (0) 20 7367 0150
Derek Linfield

SYDNEY
Tel: (61-2) 9232 7199
Brian Hansen

If you would like to subscribe or unsubscribe to the Class Action Update, please contact us at info@stikeman.com.

CLASS ACTION UPDATE

JUNE 2005

The Quebec Court of Appeal Upholds the Constitutional Validity of the Class Action Authorization Process

A great deal has been written about the significant changes to the Quebec class action regime brought about by the last reform of the *Code of Civil Procedure* of Québec (C.C.P.) that took effect on January 1, 2003. The new version of Article 1002 C.C.P. reads as follows:

> "**1002.** A member cannot institute a class action except with the prior authorization of the court, obtained on a motion.
>
> The motion states the facts giving rise thereto, indicates the nature of the recourses for which authorization is applied for, and describes the group on behalf of which the member intends to act. It is accompanied with a notice of at least 10 days of the date of presentation and is served on the person against whom the applicant intends to exercise the class action; the motion may only be contested orally and the judge may allow relevant evidence to be submitted."

Hence, in Quebec, it is no longer necessary to file an affidavit in support of a motion for authorization to institute a class action. Therefore, the applicants are no longer examined out of court on affidavit. Further, such a motion can no longer be contested in writing, although the judge can allow "relevant evidence" to be submitted.

This amendment restricts the rights of the defence to such an extent that some have asserted that new Article 1002 C.C.P. would be unconstitutional. In a unanimous judgment rendered on April 29, 2005, in *Pharmascience Inc.* v. *Options Consommateurs et Piro*[1], the Quebec Court of Appeal upheld the constitutionality of Articles 1002 and 1003 C.C.P., the cornerstones of Quebec's class action regime.

[1] No. 500-09-014659-049, Judges Robert, Gendreau and Rochon

In this matter, Pharmascience Inc. and several other defendant pharmaceutical companies (the "Defendants") were sued for having allegedly implemented a system of rebates or other advantages in favour of pharmacists. This system would have led to an increase in the users' mandatory financial contributions to their drug insurance plans.

As a preliminary argument, the Defendants contended, among other things, that Article 1002 C.C.P. infringed the fundamental right to a hearing before an independent and impartial tribunal, a right protected by Section 23 of the *Charter of Human Rights and Freedoms*[2] (the "Charter"). According to the Defendants, under Section 23 of the Charter, a plaintiff must prove the facts that underlie the exercise of his or her rights against a defendant before the defendant can prepare his or her own defence. Thus, the removal of the need for an affidavit in support of a motion to authorize the institution of a class action means that the court hearing the matter will decide whether or not the motion meets the requirements of Article 1003 C.C.P. without the applicant having to prove the facts forming the basis of his or her claims and without the defendant being able to examine the applicant on discovery. According to the Defendants, any authorization allowed in connection with any such limited proof would breach Section 23 of the Charter and, consequently, would be illegal. Since Article 1003 C.C.P. is the only legislative base on which the institution of a class action can be authorized, the entire Quebec authorization regime was *ipso facto* challenged, hence, the importance of the Court of Appeal's decision in this matter.

In a unanimous ruling, the reasons for which were penned by Justice Paul-Arthur Gendreau, the Court of Appeal dismissed the Defendants' arguments.

The Court opined that the Defendants confused the nature and the intent of the motion to authorize the class action and the ruling disposing thereof with the class action itself, instituted after the authorization stage. In fact, according to the Court of Appeal, the motion to authorize would only be the [translation] "screening and verification mechanism" intended to ascertain if the conditions under Article 1003 C.C.P. are met[3].

Only once authorization has been granted, can the court rule on the very merits of the action and apply all the rules of practice and evidence provided by law.

Thus, according to the Court, the authorization would not consider the defendant's rights and obligations (as the action has not yet been formed) but only the granting of a judicial mandate to a person entitling him or her to represent a group, to the extent the alleged facts seem, at face value, to justify the claimed right. In other words, Article 1002 C.C.P. does not deny the defendant any substantive right but, to the contrary, affords him or her additional protection against vexatious proceedings by requiring, unlike the customary rule, prior judicial authorization.

Judge Gendreau states that at the authorization stage, the applicant only has to show that the alleged facts seem to justify the conclusions that are sought, that is, a criterion comparable to that of the *colour of right* applicable in interlocutory injunction matters. At this stage, the judge must, therefore, ensure that there is a serious colour of right in light of the alleged facts which must be found as established.

This does not mean that the defendant cannot assert any grounds. In fact, the Court points out that the defendant, without being able to compel an inquiry into the merits of the litigation, is not barred from [translation] "*of course, submitting an oral but, undoubtedly, real, vigorous and unreserved contestation*". Nothing prevents the defendant from requiring the presentation of evidence inasmuch as he or she can demonstrate its relevance to the judge hearing the motion.

---

[2] R.S.Q., c. C-12

[3] Article 1003 lists the following four conditions:

> "**1003**. The court authorizes the bringing of the class action and ascribes the status of representative to the member it designates if of opinion that:
> (a) the recourses of the members raise identical, similar or related questions of law or fact;
> (b) the facts alleged seem to justify the conclusions sought;
> (c) the composition of the group makes the application of article 59 or 67 difficult or impracticable; and
> (d) the member to whom the court intends to ascribe the status of representative is in a position to represent the members adequately."

Lastly, the Court is of the opinion that Section 23 of the Charter by no means entitles the defendant to an examination on discovery at the authorization stage [translation] "*which is not the trial and does not form part thereof*".

Pharmascience Inc. requested permission from the Supreme Court of Canada to appeal this decision and its decision should be known within the next few months. However, on June 22, 2005, the Court of Appeal dismissed a Motion to Stay the proceedings in first instance.

Comments

The debate raised by the *Pharmascience* matter illustrates the distress felt by companies that are sued in Quebec in class action matters. In fact, the Quebec rules for the authorization of a class action used to be the most favourable in North America even before the 2003 reform. Now, the reform seems to have further emphasized the gap existing between the Quebec system and the other jurisdictions where class action exists.

We believe that the "screening mechanism" embodied by the motion to authorize a class action seriously risks to become a real sieve if defendants are not given the opportunity to adequately defend themselves during the authorization stage. The Court of Appeal did reaffirm however has just stated that this stage cannot be disregarded and that the oral contestation of this motion to authorize must, nonetheless, remain "*real, vigorous and unreserved"*. One can only hope that the Superior Court will apply this teaching and will adopt a broad and liberal interpretation of Article 1002 where it is a question of authorizing relevant evidence at the authorization motion stage.

Though the Court of Appeal deems the current system to be constitutional, we cannot, however, overlook the fact that it gives rise to considerable uncertainty with regard to the scope of the argument and the evidence that might be adduced during the hearing on a motion to authorize. In fact, the Superior Court seems vested with vast discretionary power in this respect but it is only at the hearing that the parties to the proceedings will really know what evidence will be authorized. This is likely to lead to some surprises and foster some uncertainty for all the parties involved in a class action dispute.

Whether constitutional or not, the authorization system implemented by the 2003 reform seems to have important gaps and leave much room for judicial discretion, without specific guidelines having been defined by law in order to provide some guidelines as to how courts should exercise this discretion and thus allow litigants to know what to expect with regard to this process. In this respect, some legislative or judicial action would be desirable to more clearly define the authorization process.

The Quebec Court of Appeal will decide on the Fonds d'Aide aux recours collectifs' right and interest to intervene in the context of the ratification of a settlement out of court

This October, Option Consommateurs, a non-profit organization which is instituting more and more class actions in Quebec based on the *Consumer Protection Act*, will defend before the Quebec Court of Appeal its right to be compensated in connection with an out-of-court settlement duly ratified by the Superior Court. The *Fonds d'aide aux recours collectifs* (hereinafter the "Fund") has decided to intervene on November 22, 2004 in an agreement recently reached between Option Consommateurs, Deborah Ditchburn and Easyhome Ltd. to settle the case between them.

The settlement agreement provided for the payment of a certain sum of money to Option Consommateurs out of the overall settlement amount to be distributed among the members of the group, in order to cover the "costs, fees and disbursements" it incurred for the purpose of the class action.

When the parties asked the Court to authorize and ratify the settlement agreement entered into and thoroughly negotiated between them, the Fonds argued before the Honourable Justice Borenstein, appointed to decide of the matter, that it had the right to intervene in connection with the motion to authorize the transaction, claiming that the payment of money to Option Consommateurs was in direct conflict with the rights of the Fonds.

Asked for a ruling on a motion to dismiss the Fonds' request to intervene presented by the attorneys for Option Consommateurs, Justice Borenstein held on March 18, 2005 that the Fonds did not have the legal interest to intervene in connection with a settlement between two parties and, more specifically, that it [Translation] "had no interest and no right to interfere in the negotiations which gave rise to the settlement between the parties". The judge also reaffirmed that it is [Translation] "up to the Court to decide whether the agreement should be approved, while ensuring that the Fonds is reimbursed any advances, which is the case in this motion".

The Fonds filed a motion for leave to appeal the decision, which was allowed on April 27th by a judge of the Court of Appeal. The issue of the legal interest of the Fonds to intervene in connection with an out-of-court settlement and, possibly, the issue of the right of Option Consommateurs to be indemnified from the sums which would otherwise be distributed among the members of the group will therefore be the subject of an unprecedented Court of Appeal decision, as it has never had the occasion to decide of these issues. Leave to appeal was granted as the Court considered the issues to be "questions of principle".

In its appeal the Fonds claims, among other things, that the agreement negotiated between the parties, in which Option Consommateurs was given a sum of money, not only unfairly deprives the members of the group of an equivalent sum, but also deprives the Fonds of its right to any remaining sums under section 42 of the *Act respecting the class action*.

While the issue of whether or not a sum of money is paid to petitioner Option Consommateurs does not really have a material impact on the Defendant, as that sum would be disbursed at any rate as it is part of the overall amount intended for the full and final settlement of a case, the Fonds' interest and right to intervene in a settlement out-of-court could become a constraint and a fact to consider in the negotiation of future out-of-court settlement discussions.

Stikeman Elliott LLP's Class Action Group:

MONTREAL
Tel: (514) 397-3000
Eric Azran
David Banon
Louis P. Bélanger
Suzanne Côté
Michel Décary Q.C.
Mortimer G. Freiheit
Stephen W. Hamilton
Marc Laurin
Yves Martineau
Frédéric Pierrestiger
Anik Trudel

TORONTO
Tel: (416) 869-5500
David R. Byers
Kathryn I. Chalmers
Alan D'Silva
Doug F. Harrison
Peter F. C. Howard
Katherine L. Kay
Eliot N. Kolers
Adrian C. Lang
Patrick J. O 'Kelly

VANCOUVER
Tel: (604) 631-1300
Hein Poulus Q.C.
David Brown

For representatives in other offices, please contact:

OTTAWA
Tel: (613) 234-4555
Nicholas McHaffie

CALGARY
Tel: (403) 266-9000
Lou Cusano

NEW YORK
Tel: (212) 371-8855
Kenneth Ottenbreit

LONDON
Tel: 44 (0) 20 7367 0150
Derek Linfield

SYDNEY
Tel: (61-2) 9232 7199
Brian Hansen

If you would like to subscribe or unsubscribe to the Class Action Update, please contact us at info@stikeman.com.

CLASS ACTION UPDATE

AUGUST 2005

Ontario Court of Appeal Reverses its own Decision in Automobile Insurance Class Action

by Alan L.W. D'Silva and Bradley M. Davis

David Polowin Real Estate Ltd. v. Dominion of Canada General Insurance Co.[1]

[2005] O.J. 2436 (Court of Appeal for Ontario), June 15, 2005; rev'g *McNaughton Automotive Ltd. v. Co-operators General Insurance Co.* (2001), 54 O.R. (3d) 704 (C.A.)

A five-judge panel of the Ontario Court of Appeal recently took the unusual step of overruling its own previous decision interpreting the province's statutory insurance regime. In the earlier ruling, *McNaughton Automotive,* the Court had held that where a vehicle is damaged beyond repair and the insurer elects to take title to the salvage, the insurer is not entitled to reduce its payment to the insured by the amount of the deductible set out in the policy. The new ruling reaffirms longstanding industry practice permitting the application of deductibles in these "total loss" situations.

Background

In 1999, McNaughton Automotive Ltd. commenced a proposed class proceeding against Co-operators General Insurance Co., challenging the Ontario insurance industry practice of applying policy deductibles in total loss cases. In its claim, McNaughton asserted that Statutory Condition 6(7), a mandatory term in every Ontario automobile policy, prohibits the application of a deductible when the insurer takes title to the salvage because it expressly provides that, if the insurer pays "the actual cash value of the automobile, the salvage, if any, shall vest in the insurer."

[1] Indexed by QuickLaw as *Segnitz v. Royal & SunAlliance Insurance Co. of Canada.*

McNaughton's claim was dismissed in 2000 by the Ontario Superior Court of Justice on the basis that, when Statutory Condition 6(7) is read in the context of the whole policy, the application of a deductible in total loss cases is in harmony with the purpose of the policy, which is to fully indemnify the insured for all losses that exceed the amount of the agreed-upon deductible.

In 2001, however, the Ontario Court of Appeal reversed the dismissal of the McNaughton claim. The Court of Appeal held at that time that Statutory Condition 6(7) deals with the quantification of the insurer's indemnification obligation to the insured and that the insurer's payment of the actual cash value when taking title to the salvage in a total loss case cannot therefore be reduced by the deductible. In making this finding, the Court of Appeal emphasized section 234(2) of the *Insurance Act*, which states that no variation in a Statutory Condition is binding on an insured. The Supreme Court of Canada denied Co-operators' application for leave to appeal the decision.

Following the release of the Court of Appeal's decision in *McNaughton*, over thirty proposed class proceedings were commenced in Ontario, Alberta and British Columbia against insurers from across Canada.

In Ontario, The Economical Insurance Group (Economical), Liberty Mutual Insurance Company (Liberty Mutual) and Federation Insurance Company (Federation) along with a few other insurers, brought motions for summary judgment seeking the dismissal of the proposed class proceedings brought against them.

In support of their summary judgment motions, Economical, Liberty Mutual and Federation filed extensive statutory interpretation evidence that had not been made available to the Court of Appeal in the *McNaughton* case. This included extensive evidence relating to the legislative history, intent and purpose of Statutory Condition 6(7) and the relevant provisions of the *Insurance Act*. These insurers also filed evidence that the longstanding insurance industry practice of allowing deductibles in total loss cases had been expressly authorized by the Ontario insurance regulators through the approval of insurers' rate filings that took them into account. On the motion for summary judgment, these insurers asserted that, on the basis of the extensive evidentiary record that was not available to the Court of Appeal in *McNaughton*, it was open to the Superior Court of Justice to decline to follow the decision in that case.

In ruling on these summary judgment motions, the motions judge, Mr. Justice Haines, held in 2003 that, despite the extensive evidentiary record that supported the insurers' interpretation of Statutory Condition 6(7), the 2001 Court of Appeal decision was a binding precedent. Accordingly, he held, it was not open to the lower court to depart from *McNaughton*.

Following the release of the motions judge's decision, the Alberta Court of Appeal and the British Columbia Supreme Court dismissed similar proposed class proceedings that had been launched in those provinces with respect to similar provisions under their *Insurance Acts*. The Alberta and B.C. courts held that insurers in those provinces rightfully applied deductibles when taking title to the salvage in total loss cases.

The insurers appealed the dismissal of the summary judgment motion to the Ontario Court of Appeal. The Chief Justice of Ontario, at the insurers' request, ordered a special five-member panel of the Court of Appeal convened to consider whether to overrule the 2001 *McNaughton* decision.

Court Of Appeal Recognizes Error and Discretion to Overrule Itself

The first issue considered by the Honourable Mr. Justice Laskin (who wrote the unanimous decision of the Court) was whether the Court of Appeal in *McNaughton* had misinterpreted Statutory Condition 6(7). Laskin J.A. observed that the principal rationale for deductibles is that they address the "moral hazard" inherent in insurance. In other words, the presence of a deductible helps to address the possibility that an insured will have an incentive to engage in loss-causing behaviour should it be the case that receipt of a payment under the policy would leave the insured better off after the loss than before it.

The Court held that the modern approach to statutory interpretation required it to interpret the statutory provision in question within in its total context, which includes its basic purpose, its mandatory inclusion in the standard Ontario automobile policy, the wording of the policy, and the important role of deductibles in the Ontario automobile insurance regime. The Court also held that it should take into account all relevant and admissible indicators of legislative meaning. Taking the total context and all indicators of legislative meaning into account, the Court concluded that the insurers' interpretation of Statutory Condition 6(7) best conforms to the legislative text, promoting the legislative purpose while producing a reasonable and sensible meaning.

Accordingly, the Court held that the 2001 *McNaughton* decision misinterpreted Statutory Condition 6(7) by wrongly assuming that it quantified the insurer's payment obligation when the insurer elected to pay the actual cash value of the vehicle and take the salvage. The Court also held that the substantial legislative record filed by the insurers overwhelmingly demonstrated that Statutory Condition 6(7) was meant solely to codify the principle that on paying the insured the full value of the damaged car, the insurer is entitled to take the salvage.

The Court then considered whether the determination that the previous Court of Appeal panel had erred in its interpretation of Statutory Condition 6(7) required that its decision be overruled. The Court found that the ordinary principles for departing from the binding rules of *stare decisis* did not apply because all of the evidence that had been filed by Economical, Liberty Mutual and Federation had been available to Co-operators and could therefore have been filed in support of the *McNaughton* appeal. However, the Court held that the Court of Appeal does retain the discretion to overrule its own decisions where the interests of justice require it to do so. Whether this discretion should be exercised in a given case is a question to be determined by weighing the advantages and disadvantages of correcting the error in the previous decision.

The Court concluded that there were seven considerations that justified overruling the *McNaughton* case, as follows:

> The courts in Alberta and British Columbia have questioned the reasoning in the *McNaughton* case, raising concerns about consistency in the interpretation of automobile insurance regimes across the provinces;
>
> The interpretative analysis undertaken in *McNaughton* may be wrongly applied in other contexts;
>
> Although the doctrine of precedent promotes the value of certainty, that value has little application to the question at stake because insureds have not governed their conduct on the basis of *McNaughton*;
>
> *McNaughton* was a relatively recent decision;
>
> The five-person panel had the benefit of the legislative history filed by the insurers, which was not available to the earlier panel;
>
> A substantial amount of money was at stake; and
>
> The Court of Appeal should not be less willing to depart from its own decisions because the Supreme Court of Canada can correct the Court of Appeal's errors.

On the basis of these factors, the Court overruled *McNaughton*. Laskin J.A. noted, on behalf of the unanimous Court, that "in the exercise of our responsibility for the state of the law in this jurisdiction, I think that the proper course is to correct the *McNaughton* error now."

Economical, Liberty Mutual and Federation were represented by Alan L.W. D'Silva (adsilva@stikeman.com) and Bradley M. Davis (bdavis@stikeman.com) of Stikeman Elliott's National Litigation Group.

Can Mandatory Arbitration Clauses In Consumer Agreements Prevent Class Actions?

Ontario Legislature Says "Never"; Quebec Court Says "It Depends"

Canada's two largest provinces have recently taken distinct approaches to the effectiveness of mandatory arbitration clauses in consumer agreements. Ontario has passed legislation that gives the consumer the right to proceed by class action even where he or she has agreed to a mandatory arbitration clause—unless the agreement came after the dispute arose. In contrast, a Quebec court has ruled that where the consumer demonstrably had knowledge of a mandatory arbitration clause, it is possible that in some situations the existence of that clause would create an enforceable obligation to proceed by arbitration rather than class action.

The following articles by members of our National Litigation Group discuss the new developments.

QUEBEC

Dell Computer Decision Holds That Mandatory Arbitration Clauses Can Sometimes Be Effective

By Dominique Ménard

Under Quebec law, can class actions over consumer contracts be avoided by means of a contractual provision that any dispute must be resolved exclusively by arbitration? While no Quebec court has yet granted a motion allowing parties to a consumer contract to proceed to arbitration on the basis of such a clause, a May 30, 2005 decision of the Court of Appeal, *Dell Computer Corp. v. Union des consommateurs*, J.E. 2005-1136, seems to have opened the door to such a possibility.

Dell Computer, the applicant, is of course the well-known retailer of computer systems, operating over the Internet. The sales offer on the Dell website professed to incorporate an external document entitled "Terms and Conditions of Sale", according to which disputes between Dell and its customers are to be resolved exclusively and finally by binding arbitration administered by the National Arbitration Forum (NAF). Thus, when the Union des consommateurs (Consumers' Union) filed for certification of a class action against Dell in Quebec Superior Court, Dell countered that the arbitration clause prohibited any such proceeding.

At trial, the Superior Court judge agreed with the Union des consommateurs, interpreting the arbitration clause as requiring that disputes be taken before the NAF in the United States. He based his ruling on Article 3149 of the *Civil Code of Quebec* (CCQ), according to which Quebec tribunals have jurisdiction to hear actions concerning consumer contracts, a right on which consumers can insist in spite of any waiver they might have signed. On July 22, 2005, the Supreme Court of Canada, in its decision in *GreCon Dimter Inc. v. J.R. Normand Inc.*, 2005 SCC 46 (CanLII), recognized this exception to the fundamental substantive rule of the autonomy of parties in a private international law context. On appeal, Dell argued that the trial judge had erred in concluding that the arbitration was to take place in the United States. The NAF, is simply an arbitration management service, and there was therefore no reason that the arbitration could not proceed in Quebec under Quebec law. The Court of Appeal agreed. Dell's customers had not waived the jurisdiction of Quebec tribunals, it held, and there was accordingly nothing in the contract that prevented the arbitration from taking place in the province.

In spite of this, the Court of Appeal dismissed Dell's motion for what in Quebec civil law is called a "declinatory exception", which would have allowed the parties to proceed with the arbitration. The problem wasn't the jurisdictional issue, but the fact that the arbitration clause was to be found in an external document. The Court found that Dell could not demonstrate that its customers had knowledge of this clause, as is required of external addenda to consumer contracts by Article 1435 of the CCQ. Prospective Dell

CLASS ACTIONS: What's Next in Canada?

ABOUT STIKEMAN ELLIOTT LLP

LITIGATION GROUP

CLASS ACTION PRACTICE

About Stikeman Elliott LLP

Firm Profile

With over 400 lawyers, Stikeman Elliott is one of Canada's largest and most global law firms. For over 50 years, we have been providing domestic and international clients with seamless legal service in all areas of business law, most notably corporate/commercial, mergers and acquisitions, tax, corporate finance and securities, banking, insolvency and restructuring, competition, real estate, intellectual property, and litigation at all levels of Canadian courts. Our lawyers also possess in-depth expertise in many globally significant industry sectors, such as energy, mining and technology.

Chambers & Partners' guide to *The World's Leading Lawyers 2004* and other international publications consistently rank Stikeman Elliott as a leader in banking and finance, communications, competition/antitrust, M&A, energy, insolvency, real estate, tax and litigation. Domestically, Stikeman Elliott partners were recognized in the Lexpert/ American Lawyer Media publication the *2005 Guide to the Leading 500 Lawyers in Canada* as leading practitioners in virtually every area of business law practice. Lexpert magazine also indicated that in 2004 Stikeman Elliott was involved in 6 of Canada's 10 top-ranked corporate deals and 8 of the country's top 15 cross-border deals.

Widely regarded as a benchmark in the Toronto and Montreal markets, Stikeman Elliott is also a major presence in Calgary, Vancouver and Ottawa. The firm's international practice began in 1969 in London, England and has since expanded to New York, Sydney and Asia. Because its offices are fully integrated-the firm has grown through internal expansion, not mergers-all Stikeman Elliott clients benefit from the full range of its national and international expertise. Our international focus ensures that we are active in areas of the world where we may not have offices, including South America and the Caribbean, Central and Eastern Europe, South and South-East Asia, and Africa. A leader in both common law and Quebec civil law, the firm offers its full range of services in both English and French.

Litigation Group

A Canadian Leader in Business Law Litigation

Stikeman Elliott's business law practice is supported by one of Canada's strongest litigation teams. The Litigation Group at Stikeman Elliott has earned a reputation as a market leader in Canada's largest business centres. Members of the group regularly act on a wide range of litigation relating to commercial contracts, class actions, securities, tax, competition/antitrust, product liability, intellectual property, professional negligence, directors' and officers' liability - including breach of fiduciary duty, defamation, insurance, real estate, insolvency, fraud, construction, employment, human rights, environmental and constitutional matters.

The group has been ranked as a "Leading Firm" for the General Commercial Litigation practice area in Chambers Global World's Leading Lawyers 2004. Stikeman Elliott has five litigators (representing its Toronto and Montreal offices) cited in the prestigious *2004 Guide to the 500 Leading Lawyers in Canada*, a joint publication of *The American Lawyer* and Lexpert. In addition, *The Canadian Legal Lexpert Directory 2005* cites Stikeman Elliott litigators as "repeatedly recommended" in the Class Action, Corporate Commercial and Securities sectors.

Experience at Every Level of Canada's Courts and Tribunals

Members of the Litigation Group are regularly retained to act in a wide range of proceedings, from injunction applications to complex trials and appeals at all levels of provincial and federal courts. Members of the group appear regularly before securities regulators, energy regulators, municipal boards, the Competition Tribunal, the National Transportation Agency, the CRTC (Canada's communications regulator), liquor licensing boards, human rights commissions, arbitration panels, commissions of inquiry and the governing bodies of various institutions and professional disciplines.

Trusted by Business

Members of the Litigation Group have acted as counsel to significant public and private corporations in a wide variety of sectors of the economy, major Canadian and foreign financial institutions, all levels of government (including provincial regulators), and a variety of charitable institutions. Members of the group have represented trustees, receivers, monitors, creditors or debtors in most of the major insolvency and restructuring matters that have arisen in recent years. Stikeman Elliott's appointment as Canadian legal representative for the Institute of London Underwriters testifies to its experience in insurance and negligence actions, from the defence of medical negligence claims to the prosecution of auditors' negligence suits.

Canada's Cross-Border Specialists

The Litigation Group has extensive experience with legal issues that transcend Canada's borders. Whether it is an international insolvency or the defence of a class action identical to one commenced elsewhere, Stikeman Elliott litigators have earned a reputation as cross-border specialists who work effectively with lawyers and experts from other jurisdictions.

Helping Clients Avoid Unnecessary Litigation

Recognizing that most clients wish to avoid litigation, the Litigation Group regularly advises on the appropriateness of Alternative Dispute Resolution and on the different forms of ADR that should be considered. Members of the group can also advise clients on how to arrange their affairs to avoid litigation, before problems arise.

Our Clients

Some of our litigation clients include:

Air Canada
Alstom Canada Inc.
Bristol-Myers Squibb Canada Inc.
Canadian Imperial Bank of Commerce
Canadian National Railway
Cybersurf Corporation
eBay Canada Inc.
EDS Canada Ltd.
ING Canada
Liberty Mutual
Lloyd's of London
Maritime Life Assurance Company
Mazda Canada Inc.
National Bank
National Grid plc
Nortel Networks Ltd.
Royal Bank of Canada
Sempra Energy Trading Corp.
Toronto-Dominion Bank
Weyerhaeuser Company Ltd.
YBM Magnex

Involved in the Legal Community

The Litigation Group is a committed participant in Canadian legal education. Members of the group teach advocacy in the law schools of Queen's and McGill Universities as well as in the Intensive Trial Advocacy Programme. They have also served on several Canadian Bar Association's provincial continuing legal education committees and as directors of the Advocate Society. Many members have published articles on a variety of litigation and advocacy topics and have presented papers and spoken at national and international conferences.

Unsurpassed Service: On Budget, On Time

Stikeman Elliott's goal is to provide the best client service at a fair price, while observing the highest professional standards. The firm puts together teams that can work ably and efficiently, while maintaining continuity of advice and keeping to the client's budget and time requirements. Litigation clients benefit from the intellectual and technical resources of one of Canada's largest business law practices, including specialized litigation law clerks who can quickly organize documentation relevant to a client's file using Stikeman Elliott's customized document management software.

Class Actions

Stikeman Elliott is a leader in class actions defence litigation, ranked by the 2005 Canadian Legal Lexpert Directory as a "repeatedly recommended" law firm in this practice area. The firm has a breadth of experience in defending class actions commenced under many different legal causes of action and for clients who fall within many types of industries. The firm's national presence allows it to respond strategically and comprehensively to cases that are commenced in more than one Canadian jurisdiction. Because many Canadian class actions mirror actions commenced in other jurisdictions outside of Canada, Stikeman Elliott's class action lawyers emphasize a cooperative approach in dealing with our legal colleagues in other jurisdictions, creating integrated legal strategies for the benefit of clients.

Class Action Experience

Stikeman Elliott's class action litigators have the knowledge and experience to identify at the earliest stages the key strategic issues and approaches and to navigate all aspects of defending a class action, from preliminary motions, to defence of certification, and beyond. The firm's class action counsel have argued some of the leading cases in this developing area of law and have a strong record of success in preliminary challenges and opposing certification of class proceedings. They are also experts in negotiating and implementing complex and creative settlements, including securing court approvals as required across the country. Throughout, our approach is to recognize and frame the business considerations and to achieve the client's objectives in minimizing present exposure and risk of future claims.

Business Law Expertise

Stikeman Elliott's class action counsel can draw on the business expertise of a firm that consistently ranks at the top of Canadian and international surveys. Stikeman Elliott's well-recognized expertise in the substantive areas of the law which often form the basis for class action claims ensures an integrated approach to defending these proceedings. The combination of this substantive legal expertise with comprehensive knowledge of the procedural and strategic aspects of the class action legislation in multiple jurisdictions serves our clients well. The firm's class action lawyers are well-equipped to address claims arising in fields such as securities law, competition law, insurance, product liability, mutual funds, employee pension and benefits, banking, and other commercial matters.

Significant Mandates

Class action litigators at Stikeman Elliott represent clients in many significant and precedent-setting class actions. Mandates that are a matter of public record include:

CONSUMER PRODUCTS

- Defending British American Tobacco in a product liability class action brought on behalf of smokers of specific cigarette brands

- Defending Cybersurf Corporation in a class action lawsuit involving the sale of CD-ROMs software offering free Internet access for life to the Internet network of Cybersurf
- Defending RTO Enterprises Inc. in a class action brought on behalf of a consumer association under the Québec Consumer Protection Act and which involves the alleged use of unfair credit charges in rent to own contracts
- Defending Sony of Canada in class actions commenced in both Ontario and Quebec alleging defects in DVD players
- Defending Sony of Canada in a class action alleging defects in video game consoles
- Defending Sony of Canada with respect to a price maintenance class action brought on behalf of purchasers of specific consumer electronics. Stikeman Elliott successfully argued before the Ontario Superior Court that the claims for punitive damages should be struck as being unavailable as a matter of law
- Defending Sunbeam Canada in a class action brought on behalf of purchasers of specific models of smoke detectors. Stikeman Elliott successfully argued before the Ontario Superior Court that the Statement of Claim should be struck out in its entirety

SECURITIES

- Defending Brookfield Properties Corporation with respect to a class action brought on behalf of all holders of a security issued pursuant to a trust indenture for damages arising out of alleged breaches of the indenture covenants. Stikeman Elliott successfully argued before the Ontario Superior Court that the named plaintiffs ought to proceed to trial as a "test case" rather than as a class proceeding. Brookfield was successful both at trial and on appeal
- Acting for CIBC Wood Gundy relating to a lawsuit brought on by shareholders of JITEC suing the company, its president and various brokers, namely Wood Gundy, alleging conspiracy to artificially maintain high levels of the company's share price. Certification granted and defendants are currently seeking dismissal of action on preliminary grounds
- Defending British American Tobacco (BAT) with respect to a "strike suit" class action brought on behalf of all shareholders of Imasco in an attempt to block BAT's take-over bid for Imasco. Stikeman Elliott successfully moved before the Ontario Superior Court to strike out the claim as disclosing no cause of action
- Defending Merrill Lynch in a class action alleging market manipulation in the pricing of copper futures
- Defending Corporation Cinar in a class action involving securities fraud. This case was successfully settled prior to the certification hearing
- Defending CIBC Wood Gundy in a "fraud on the market" class action involving extra-contractual liability
- Defending Merrill Lynch & Co. in a professional liability class action case brought on behalf of shareholders of Internet companies alleging false and misleading recommendations offered by different co-defendant brokerage firms
- Defending Philip Services Inc. in a class action brought on behalf of all of its shareholders with respect to misstatements in a prospectus

- Acting for YBM Magnex's independent litigation supervisor in achieving a settlement of a shareholder class action

FINANCIAL

- Acting for CIBC in two class actions commenced by consumers under the Consumer Protection Act in Quebec, containing allegations that various practices by banking institutions, relating to credit card contracts, violate the relevant provisions of the Act. Motion for declaratory judgment brought on requesting declaration that certain provisions of the Act are inapplicable to banks
- Defending, as lead counsel, several Canadian chartered banks in a class action brought on behalf of bank clients requesting reimbursement of bank charges increases without proper notice under the Bank Act. Following examinations out of Court prior to certification, Stikeman Elliott was able to secure a discontinuance
- Acting for several major Canadian insurers in litigation relating to the longstanding practice of applying a deductible to "total loss" damage cases
- Defending Industrial Alliance Insurance and Financial Services in one of a number of class actions against financial institutions involving mortgage prepayment and discharge terms
- Acting for several insurers in "vanishing premium" class actions
- Defending Liberty Mutual insurance company in a $500 million dollar claim relating to the practice of using non-OEM parts, where appropriate, as replacement parts for vehicles
- Defending Maritime Life Assurance Company in a class action involving mutual funds
- Defending an insurance company in a case brought on behalf of employees against the company and its board of directors with respect to pension funds matters
- Defending ING Canada in a significant insurance policy interpretation class action

PENSION

- Defending certain affiliates of Invensys plc, a U.K. industrial conglomerate, with respect to a class action brought on behalf of a group of Canadian pension plan members involving pension fund investment strategy and allocation of pension plan expenses

MANUFACTURING

- Defending Ajinomoto Co. (a Japanese manufacturer) in a series of class actions commenced across Canada alleging conspiracy and price-fixing with respect to various food additives: lysine in one set of cases, and MSG and nucleotides in another. Stikeman Elliott also acted for Ajinomoto in the lysine criminal proceedings
- Defending Chevron Chemicals Company in a product liability class action brought on behalf of heating system owners. This case was successfully settled prior to certification
- Defending Hoechst AG (a German manufacturer) in a number of class actions commenced across Canada alleging conspiracy and price-fixing in certain products: sorbates in one set of cases, and MCAA in another. Together with other defendants' counsel, Stikeman Elliott negotiated a comprehensive settlement of all of the actions, which was approved by the relevant courts. Stikeman Elliott also acted for Hoechst in the sorbates criminal proceedings

- Defending Mazda Canada Inc. in a class action taken by Union des Consommateurs against eight car manufacturers and five credit companies, alleging that the defendants have misrepresented the costs of credits and rebates for all the cars they have sold, rented or financed for the last 3 years (alleged to be more than 750,000 cars)
- Defending Siemens Canada in a class action brought by residents of the Town of Kingsville, Ontario, in respect of damages arising from a fire at a local manufacturer
- Defending Temple-Inland in a class action alleging a price-fixing conspiracy in the linerboard industry

PHARMACEUTICAL

- Defending Eisai Co. (a Japanese vitamin manufacturer) with respect to several class actions commenced across Canada alleging conspiracy and price-fixing. Stikeman Elliott also acted for Eisai in earlier criminal proceedings
- Defending a pharmaceutical manufacturer in a class action alleging defects in a prescription drug
- Defending Whitehall-Robins in a class action brought on behalf of purchasers of certain over-the-counter cold remedies
- Defending Wyeth-Ayerst Canada in a diet drug class action before the Ontario Superior Court. A comprehensive settlement of a national class was negotiated by the parties and approved by the court

TRANSPORTATION/TRAVEL

- Defending Air Canada in a proposed class action brought in the Federal Court of Canada by travel agents alleging conspiracy among major North American airlines regarding commissions paid to travel agents. This case is the first class action under the new Federal Court class action procedures
- Defending Hotels Delta Ltée in a contractual liability class action. This case was successfully dismissed at the certification hearing
- Defending Solvac (Vacances Signature), a wholesale travel agency, in a class action involving different air transportation and destination services problems (such as late arrivals and hotel reservations). This case was successfully settled after certification and became a precedent

DISTRIBUTION/WHOLESALE/RETAIL

- Defending Silcorp Limited, the owners of a national convenience store chain, with respect to a class action brought on behalf of a group of former store managers. Stikeman Elliott successfully argued before the Ontario Superior Court that the claim should not be certified as a class proceeding