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Class Actions in Canada 2012

The Year in Review and The Year Ahead

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Introduction

The bar and bench in Canada witnessed yet another brisk year of class action activity in 2012. The plaintiffs' bar issued a number of new claims on the heels of high-profile domestic and international cases (such as *SNC-Lavalin* and e-books), and they achieved a number of record settlements (including a landmark settlement in principle with Ernst & Young LLP in the *Sino-Forest* case, for a settlement payment of $117 million). Moreover, in a number of contested cases in the common law provinces, the courts have reaffirmed yet again that a plaintiff's evidentiary threshold to establish commonality and preferability at the certification stage is a relatively low hurdle. In Quebec, the courts certified a number of significant class actions, including one of the largest environmental class actions in Canada. However, there were a number of significant (and, in some cases, surprising) developments in 2012 that favoured defendants, including the outcome of a number of large common issues trials as well as a number of key certification and other rulings. These developments suggest that 2013 may be a tipping point for the maturing class action jurisprudence in Canada.

In particular, the defence bar in Canada witnessed the following favourable developments:

- The courts in Ontario released a number of significant common issue trial decisions that resulted in the outright dismissal of the plaintiffs' claims. In a similar vein, the Quebec Court of Appeal overturned a decision of the Superior Court on the merits of a large class action relating to the application of consumer protection legislation to federally regulated financial institutions. These cases serve as an important reminder that success at certification is no guarantee of success at trial.
- The Supreme Court heard argument on the evidentiary threshold for certification in three certification appeals coming out of British Columbia and Quebec. In addition, the Supreme Court granted leave to appeal to hear argument in respect of another certification appeal from Quebec relating to pension benefit rights.
- In spite of the low evidentiary threshold for certification that has been set by a number of prior courts, the courts in Ontario and British Columbia reaffirmed that they will rigorously scrutinize the viability of a plaintiff's pleadings at the certification stage. Indeed, in a number of high-profile cases, courts denied certification on the basis that the plaintiff had failed to plead a proper cause of action in law.
- In a significant secondary market securities class action, the Ontario Superior Court reaffirmed that the court will exercise an important gatekeeping function at the certification stage and at the leave stage under the Ontario *Securities Act*.
- The Ontario Court of Appeal released a trilogy of decisions that questioned the suitability of class proceedings for certain types of employment claims.
- In a leading franchise case, the Ontario Superior Court confirmed that there are strategic opportunities to bring parallel motions for summary judgment and certification.

The collective impact of these developments suggests that 2013 will continue to be a busy year for plaintiffs and defendants alike, but that parties may have to revisit their class action playbook relating to the delivery of pleadings, certification strategy and early dispositive motions – particularly in light of the Supreme Court of Canada's expected ruling in the three certification appeals that will likely be forthcoming in the spring of 2013.

Class Action Practice Developments

To begin, in 2012, the courts issued a number of important decisions relating to class action practice, including such diverse matters as the timing for delivery of a statement of defence, the treatment of limitation periods, the approval of third-party funding arrangements, the use of letters of request in cross-border class actions and the utility of the Canadian Bar Association's new cross-border protocols. While these developments do not uniformly cut one way for the benefit of either plaintiffs or defendants, they do appear to generally open the door to a range of significant and dispositive motions by defendants prior to certification. They have also simplified the process for settlement approval in multi-jurisdictional litigation, to the benefit of both plaintiffs and defendants.

THE TIMING FOR DELIVERY OF A STATEMENT OF DEFENCE

During a fifteen year period from 1996 to 2011, the prevailing convention in class action practice in Canada was that a defendant was not required to deliver a pleading or statement of defence until the court had ruled in respect of class certification. In other words, while a defendant in ordinary civil litigation is subject to a general obligation to deliver a pleading within a set period of time following service of the plaintiff's claim, a defendant in a class proceeding is typically relieved of this obligation until the court has ruled on certification. In practice, given the lengthy process for class certification in most provinces, this convention has meant that parties defending class proceedings were not required to respond to the merits of a claim – or to comply with their discovery obligations – for a number of years following service. The underlying rationale for this practice was that until the court had identified the common issues (if any) that might be subject to a common issues trial, there was little utility in requiring a defendant to plead to the merits of a claim that might never be certified or that might be certified in a very different form by the certification judge.

In 2011, Justice Perell of the Ontario Superior Court questioned this prevailing practice in *Pennyfeather v. Timminco*. In his decision, Justice Perell suggested that the legislature in Ontario had in fact intended that defendants would normally deliver a pleading prior to certification and that a statement of defence might actually assist the certification process.[1] In 2012, Justice Perrell reaffirmed this conclusion in *LPFCEC v. Sino-Forest Corporation* and elaborated the rationale for requiring statements of defence before certification. He concluded that requiring statements of defence advances the goals of the *Class Proceedings Act* and "recognizes the maturity of the class action jurisprudence" in Canada.[2] Indeed, he observed that many defendants may benefit from the practice, since a robust pleading may "take the sting out of the plaintiff's argument[s]" at certification.

Justice Perell's twin decisions in *Pennyfeather* and *Sino-Forest* have opened a lively debate among the class action bar and bench in Canada, with important consequences for defendants – particularly if early pleadings are going to open doors to merits discovery. However, following these decisions, the practice in Canada remains idiosyncratic. In many cases, class plaintiffs still do not insist on a pleading prior to a certification

[1] *Pennyfeather v. Timminco*, 2011 ONSC 4257.
[2] *LPFCEC v. Sino-Forest Corporation*, 2012 ONSC 1924.

motion, and in other cases, defendants may voluntarily deliver a pleading. To the extent that Justice Perell's approach gains traction in other provinces, defendants in class proceedings must turn their attention to their strategy on the merits at an early stage in the proceeding. Moreover, these rulings may open the door to a range of motions that are normally associated with the pleadings and the merits – including potentially dispositive motions to strike or for summary judgment. In other words, these rulings may create opportunities for defendants to pursue early challenges on the merits before an expensive certification process.

LIMITATION PERIODS ARE APPLIED AND ENFORCED

In 2012, the courts also released a number of decisions that reinforced the continuing importance of statutory limitation periods in class proceedings practice.

Most Canadian class proceedings statutes contain a general provision that stays limitation periods pending the determination of certification (i.e., putative class members do not have to rush to file individual claims in order to protect their rights once a class proceeding has been filed). However, a number of statutes provide for specialized statutory limitation periods, and it remains a matter of statutory interpretation as to whether the generalized provisions of the *Class Proceedings Act* will trump the operation of an express limitation period in another statute.

This problem was recently highlighted in a number of class proceedings that asserted claims for secondary market liability under the *Securities Act* (Ontario). Under the *Securities Act*, a person who purchased securities on a secondary market has a potential right of action to recover damages from an issuer that made a misrepresentation in an ongoing disclosure document. However, the regime under the *Securities Act* provides that no action may be commenced without leave of the court, and no action may be commenced more than three years after the document containing the misrepresentation was released.

In *Sharma v. Timminco*, the Ontario Court of Appeal ruled that as a matter of statutory interpretation, the limitation period under s. 138.3 was only suspended by operation of the *Class Proceedings Act* after the court had granted leave – with the implication that if the process for seeking and obtaining leave took more than three years, the underlying action would be time barred[3]. Given that many litigants had previously (and erroneously) assumed that the three-year limitation period had been suspended by the stay provisions of the *Class Proceedings Act*, the Ontario Court of Appeal's ruling in *Timminco* led to a number of motions for dismissals and/or clarification relating to the three-year limitation period, resulting in inconsistent rulings.

For example, in *Green v. CIBC*, the Ontario Superior Court ruled that while the plaintiff had otherwise met the test for leave and certification, the plaintiff had failed to obtain leave within three years and its claim was time barred.[4] In *Silver v. IMAX*, the Ontario Superior Court found that the plaintiff was the victim of circumstances beyond its control and granted leave under the *Securities Act nunc pro tunc* – with the retroactive effect of circumventing the limitation period.[5] In *TMRCOPFT v. Celestica*, the Court found the existence of special circumstances and similarly granted leave *nunc pro tunc*.[6]

3 *Sharma v. Timminco Ltd.*, 2012 ONCA 107. The Supreme Court subsequently denied leave to appeal in the fall of 2012. See 2012 CanLII 43819 (SCC).
4 *Green v. CIBC*, 2012 ONSC 3637.
5 *Silver v. Imax*, 2012 ONSC 4064.
6 *Trustees of the Millwright Regional Council of Ontario Pension Fund Trust v. Celestica Inc.*, 2012 ONSC 6083.

Given the significant implications of *Timminco* for class members and given the inconsistent approach of the courts in enforcing the limitation period under the *Securities Act*, it is almost certain that appellate courts will intervene to provide further guidance to litigants. And in the interim, plaintiffs and defendants will continue to test the limits of the stay provisions in the *Class Proceedings Act*, particularly in cases where the duration of initial motions and proceedings approach the expiry of statutory limitation periods.

THIRD-PARTY FUNDING ARRANGEMENTS

In 2012, the courts also provided important guidance relating to the legality and process of approval for third-party funding arrangements in class proceedings. Under the class proceeding regimes of many (but not all) provinces, a representative plaintiff that prosecutes an unsuccessful claim may be exposed to a significant adverse cost award. In these "loser pays" jurisdictions, if a representative plaintiff is not successful on certification or the merits, the plaintiff may be ordered to pay a portion of the defendant's costs – and those costs can be substantial following a contested certification motion. While there are some means that may be available to mitigate the potential consequences of an adverse cost order,[7] class counsel in a number of recent cases have explored the possibility of financial protection through private third-party funding.

In simple terms, under these proposed funding arrangements between class counsel and a third-party investor, the investor will typically agree to cover the cost of certain significant disbursements and the risk of an adverse cost award in exchange for a percentage or fixed portion of any successful recovery in the class proceeding. Historically, the courts in Canada have frowned upon such third-party arrangements, on the reasoning that they constituted a form of "intermeddling" in litigation that was actionable under the traditional principles of maintenance and champerty. But with the advent of modern contingency arrangements, the courts in Canada have gradually come to accept these arrangements. In *Metzler v. Gildan Activewear*, Justice Leitch of the Ontario Superior Court considered a third-party funding arrangement in a securities class action, but ultimately determined that she did not have authority to approve the arrangement prior to certification.[8] In *Dugal v. Manulife Financial*, Justice Strathy considered a similar arrangement and, after a detailed review of the applicable law, he concluded that he did indeed have jurisdiction to approve the arrangement prior to certification. Moreover, he concluded that the proposed funding agreement was not contrary to the modern principles of champerty and was ultimately in the best interests of the class.[9]

In a significant decision in 2012, Justice Perell reaffirmed in *Fehr v. Sun Life* that the court has jurisdiction to approve a third-party funding arrangement prior to certification, and that these types of arrangements do not inherently offend public policy.[10] However, in his ruling, Justice Perell underscored that class plaintiffs must obtain court approval of these arrangements in an up-front and

7 For example, there are certain public funding arrangements that are available through government institutions in certain provinces (e.g., the Class Proceedings Fund of the Law Foundation of Ontario).
8 *Metzler Investment GMBH v. Gildan Activewear Inc.*, [2009] OJ No. 3315 (SCJ).
9 *Dugal v. Manulife Financial Corp.*, 2011 ONSC 1785.
10 *Fehr v. Sun Life Assurance Company of Canada*, 2012 ONSC 2715.

transparent way, with full disclosure of the underlying arrangement to the defendants. While he noted that a defendant may not have standing to challenge many aspects of the arrangement, a defendant is entitled to review the arrangement and to file materials and evidence opposing the arrangement if it is potentially prejudicial to their interests.

In short, in *Fehr* and a subsequent decision to the same effect in *LPFCEC v. Sino-Forest*,[11] Justice Perell appeared to set out a road map for the approval of future third-party funding arrangements, and his decisions will undoubtedly encourage plaintiffs to seek approval of similar agreements in other class actions. While these decisions reflect a liberalization of traditional principles of maintenance and champerty, they also raise larger policy concerns about the proposed role of third-party investors in the conduct of class proceedings. In addition, the risk of an adverse cost award has traditionally served an important function in discouraging plaintiffs from pursuing questionable cases under the class proceeding statutes. If these risks are outsourced to third parties, there is a concern that plaintiffs may be relieved of some of the adverse consequences of poor case selection, resulting in more strategic class action litigation in Canada.

CROSS-BORDER EVIDENCE GATHERING

In 2012, the Ontario Court of Appeal also issued a significant ruling in connection with cross-border class action practice. In *Treat America v. Leonidas*, the Court of Appeal broadly affirmed the ability of U.S. class action plaintiffs to gather evidence in Canada from Canadian witnesses, even in circumstances where Canadian class action plaintiffs would be precluded from gathering similar evidence under Canadian discovery rules.[12]

In *Treat America*, following the announcement of a significant antitrust investigation in Canada, plaintiffs on both sides of the border filed parallel class proceedings against a number of manufacturers. In support of their case for certification and on the merits, a group of U.S. class plaintiffs sought to compel a Canadian resident (the former CEO of one manufacturer) to attend a deposition in Canada to give evidence relating to an alleged price-fixing conspiracy. The U.S. plaintiffs obtained a letters of request order from the applicable U.S. court and subsequently sought to enforce that order in Canada. The former CEO opposed enforcement of the order in Canada, largely on the basis that (i) the U.S. class plaintiffs were seeking a form of merits discovery that was generally not available in Canada prior to class certification, and (ii) the deposition would potentially violate his constitutional rights in Canada, since he remained subject to criminal investigation and he enjoyed a clear right to silence under the *Charter*.

The Ontario Court of Appeal rejected the former CEO's challenge and upheld an order that enforced the request. The Court found that there was no basis to object to the order on the ground that discovery rules are narrower in Canada. Moreover, the Court found that there were sufficient protections under the order to protect the individual's *Charter* rights in a future criminal prosecution in Canada. In so ruling, the Court clarified the ground rules for U.S. class plaintiffs who seek to obtain evidence from Canadian residents in support of class proceedings before the U.S. courts and underscored the importance of international comity in considering requests for evidence gathering in cross-border class actions.

[11] *LPFCEC v. Sino-Forest*, 2012 ONSC 2937.
[12] *Treat America Limited v. Leonidas*, 2012 ONCA 748.

THE CBA'S PROTOCOL FOR MULTI-JURISDICTIONAL CLASS ACTIONS

In 2012, the class action bar in Canada also had its first experience implementing the CBA's recently adopted class actions protocol for complex, multi-jurisdictional settlements.

Approximately two years ago, the CBA formed a task force to explore the creation of a protocol that would facilitate the management of multi-jurisdictional class actions across Canada, particularly following one high-profile carriage dispute that raised the possibility of conflicting and duplicative judgments across a number of provinces. The task force originally proposed an ambitious case management proposal, but following significant opposition from the bar and lingering constitutional concerns, the task force ultimately focused its efforts on advancing a more modest proposal that was focused on streamlining the process for settlement approval – particularly in cases where a plaintiff and a defendant were seeking to implement a pan-Canadian settlement that required court approval in a number of provinces.

The CBA approved a formal protocol relating to such settlement approvals in August 2011. In short, a party that is seeking approval of a national class settlement across a number of provinces can bring a motion before each court for adoption of the protocol. If the motion is granted by each of the courts, the protocol empowers the relevant courts to communicate for the purpose of considering the settlement, to schedule contemporaneous settlement hearings in multiple provinces by tele-conference and/or video-conference, as well as to supervise the process for adjudicating the content of the approval orders, determining the manner and form of notice to class members and completing the administration of the settlement.

In 2012, the courts had their first experience implementing the protocol for complex, multi-jurisdictional settlements, and to date, the protocol has worked successfully: In *Osmun v. Cadbury Adams*,[13] the Ontario, Quebec and B.C. courts approved the application of the protocol for a complex settlement involving Hershey Canada in the chocolate class actions, including the imposition of a bar order across a number of provinces that precluded contribution claims by the non-settling defendants. In *Osmun*, the courts convened a simultaneous hearing, and the streamlined process facilitated the approval of the settlement and the resolution of objections through one appearance, thereby dramatically reducing the costs incurred by the various parties and the risk of conflicting judgments.

The successful use and approval of the protocol in *Osmun* has led and will continue to lead to its use in a number of other multi-jurisdictional settlements as the process can create significant cost efficiencies for plaintiffs and settling defendants. Unfortunately, the protocol has limited application outside the settlement context. However, its successful adoption may embolden policy-makers to consider expanded protocols for contested class actions.

[13] *Osmun v. Cadbury Adams Canada Inc.*, 2012 ONSC 3837.

Common Issues Trials

In 2012, the courts continued to demonstrate their ability to manage lengthy and complex common issues trials in Canada. To date, based on a recent survey, the courts in Canada have conducted over 90 class action trials since the adoption of class proceeding legislation in Canada, with the vast majority of these trials having been conducted in Quebec.[14] In 2012, the courts released six additional trial decisions that added to this jurisprudence. Based on the reported jurisprudence, the Ontario courts released four trial decisions, the Quebec courts released one trial decision, and the Newfoundland court released one trial decision.

The four trial decisions that were released in Ontario illustrate the two extremes of class action practice. Three of the four cases took more than a decade to reach a trial decision and resulted in an outright dismissal of the underlying claims. The fourth case was resolved in four years, required a two-day common issues trial, and resulted in a class-wide finding of liability on certain grounds, subject to further individual issue trials on liability as well as damages.

The first trial decision – in *Andersen v. St. Jude* – underscored the potential magnitude and complexity of a common issues trial.[15] The representative plaintiffs issued their claim in 2000; the trial proceeded in 2010 and 2011; written and oral submissions were made in the autumn of 2011; and Justice Lax of the Ontario Superior Court released her decision on the merits of the common issues trial in June 2012. During the common issues trial, the Court heard 138 days of witness testimony from 40 witnesses, including 23 expert witnesses. The parties introduced more than 2,200 documents into evidence, and they delivered "voluminous written submissions". Justice Lax's decision is almost 600 paragraphs long, not including schedules. After considering the enormous record of evidence, Justice Lax dismissed the plaintiffs' claim in its entirety – proving yet again that success on class certification does not necessarily lead to success on the merits. The representative plaintiffs have filed a notice of appeal. To date, the litigation process in *St. Jude* has taken twelve years, with no immediate conclusion on the horizon.

The second common issues trial – in *Berry v. Pulley* – was similarly lengthy and complex.[16] The claim was issued in 1997, certified in 2001, and resulted in at least 14 reported decisions from various levels of court before the common issues trial commenced. Justice Pepall of the Ontario Superior Court described the evidentiary record as including 43 volumes of documents, evidentiary read-ins from 30 transcripts and trial testimony from approximately 20 witnesses. Justice Pepall's decision is more than 550 paragraphs long and similarly resulted in dismissal of the plaintiffs' claims.

The claim in the third common issues trial decision – in *Mandeville v. Manufacturers Life*[17] – was issued in 2001 and certified in 2002. It took ten years from certification to reach the common issues trial, and the trial was heard over 29 days in the spring of 2012. In August 2012, Justice Newbould of the Ontario Superior Court dismissed the plaintiffs'

[14] See J. Foreman et al., "Class Action Trial Decisions in Canada" (OBA Class Action Colloquim, December 2011). Based on this survey, the courts in Canada have conducted approximately 90 class action trials as of the end of 2011, with over 60 trials in Quebec and 16 common issue trials in Ontario.

[15] *Andersen v. St. Jude Medical, Inc.*, 2012 ONSC 3660.

[16] *Berry v. Pulley*, 2012 ONSC 1790.

[17] *Mandeville et al v. Manufacturers Life Insurance Company*, 2012 ONSC 4316.

claims. He held that Manufacturers Life did not owe the class members a duty of care nor a fiduciary duty. He also expressly commented on the difficulty associated with making findings of fact in respect of events that took place many years ago, noting that "[m]emory of past events is difficult". The plaintiffs have appealed the decision.

In contrast with these lengthy common issues trials, the fourth Ontario trial decision – in *Ramdath v. George Brown College* – demonstrated that certain cases may be tried on a class-wide basis without consuming years of court time.[18] In *George Brown*, the trial was completed approximately four years after the claim was issued and approximately two and a half years after the class was certified. Both the evidence and the submissions were heard over two days, as the parties adduced the evidence by way of affidavits and read-ins.

In result (and also in contrast to the other three trials in Ontario), Justice Belobaba of the Ontario Superior Court found George Brown College liable for breach of the "unfair practices" provisions in the *Consumer Protection Act* on the basis that the representation at issue was inaccurate, misleading and untrue. The Court also made some findings with respect to certain elements of the plaintiff's negligent misrepresentation claim, but concluded that individual inquiries may be needed to establish individual reliance and therefore liability. In other words, while the Court did supervise an efficient process for trying certain statutory claims, the Court still has to grapple with a series of individual issues trials to resolve the question of George Brown College's liability for negligent misrepresentation and, possibly, to quantify the class members' damages.

In Quebec, the Superior Court released a decision arising from a landmark environmental class action trial. In particular, the Court considered the merits of a class proceeding that sought compensation for water contamination and health-related injuries allegedly arising from environmental contamination in *Spieser v. Canada (A.G.)*.[19] The Court convened a long trial – the trial spanned 115 days, with testimony from 74 witnesses, including 23 experts. In the result, the Court found that the defendant was liable, but only with respect to the water contamination.

Finally, on the east coast, the Newfoundland and Labrador Supreme Court convened its first reported common issues trial. In *Sundance Saloon v. Newfoundland and Labrador Liquor Corporation*, the plaintiffs brought a class proceeding that alleged that a charge levied on liquor licensees in the province was either an indirect tax that was *ultra vires* to the province or an unlawful direct tax.[20] The case was certified in 2007 and the trial was conducted in 2011 largely on the basis of an Agreed Statement of Facts. The trial was heard over a week and a half in December 2011, with closing arguments heard over two days in January 2012. The trial judge rendered his decision orally on January 30, 2012, dismissing the action against both defendants. The court found that the charge was not, in fact, a tax, but was rather a price increase which the Newfoundland and Labrador Liquor Corporation was entitled to charge in exploitation of its monopoly. The plaintiffs have filed an appeal with the Court of Appeal.

[18] *Ramdath v. George Brown College*, 2012 ONSC 6173.
[19] *Spieser v. Canada (A.G.)*, 2012 QCCS 2801.
[20] *Sundance Saloon v. Newfoundland and Labrador Liquor Corporation*, 2007 01T 0748 CP.

The outcome of these class actions trials has led a number of observers to question whether the certification and trial process that led to these decisions has advanced the goals of the class proceedings legislation given the enormous cost and investment of judicial resources and the questionable outcomes for plaintiffs. There remain a number of significant trials in the pipeline for 2013, including one of the largest class action trials to date in Canada – namely, a $27 billion class action against a number of tobacco manufacturers that is now being tried before the Quebec Superior Court. The trial commenced in March 2012 and is expected to last at least two or three years.

In summary, the courts in Canada have demonstrated their ability to manage large and complex common issues trials. But the duration and size of these cases have placed enormous demands on the judiciary and it remains unclear whether these trials will ultimately advance the three goals of class proceedings legislation – namely, access to justice, judicial economy and behaviour modification. Given the large class actions trials underway in Quebec and elsewhere, we can expect another landmark year in class action trial jurisprudence in 2013.

Class Actions in Quebec

Given the unique class action regime in Quebec, the developments in Canada's only civilian jurisdiction merit special attention. To begin, in August 2012, the Quebec Court of Appeal released an important decision on an appeal from a high-profile class action trial in Quebec.[21] In *Bank of Montreal v. Marcotte*, the Quebec Superior Court had originally ordered nine major banks and the Desjardins Credit Union to reimburse more than $300 million in foreign exchange conversion fees to credit card holders. The initial proceedings were filed in 2003, the class actions were authorized in 2006, and the trial on common issues lasted for more than three months in 2008. On appeal, the Quebec Court of Appeal overturned the Superior Court's decision which had qualified foreign exchange conversion fees as "credit charges" under the Quebec *Consumer Protection Act*. In its reasons, the Court concluded that since certain provisions of the statute had not been breached, there was no need to analyze the underlying constitutional questions (the federally chartered banks had also challenged the constitutional applicability of provincial consumer legislation to their operations). However, in *obiter*, the Court indicated that had an analysis of the constitutional questions to be performed, it would have concluded in the existence of an operational conflict between the provisions of the *Consumer Protection Act*, and the *Bank Act* and *Cost of Borrowing Regulations*.

In 2012, the Quebec courts also issued a number of significant certification decisions that reaffirmed the relatively low bar to "authorization" of a class proceeding under the *Code of Civil Procedure*. In *Deraspe v. Zinc Électrolytique du Canada*, the Quebec Superior Court authorized an environmental class action that sought damages for $900 million arising from an emission of toxic gas from a large refinery – one of the largest environmental class actions ever certified in Canada.[22] In *Dell'Aniello v. Vivendi Canada*, the Quebec Court of Appeal also authorized a large class action relating to pension benefits.[23] In particular, the Court of Appeal reversed a decision of the Superior Court and authorized a class proceeding in connection with post-retirement health benefits provided to retirees in Quebec. Vivendi sought leave to appeal this decision to the Supreme Court, and in August 2012, the Supreme Court granted leave. As a result of this appeal and a separate appeal originating from Quebec in respect of competition class actions (discussed below), the Supreme Court will get a unique opportunity in 2013 to consider the test and threshold for authorization in Quebec.

As noted previously, the courts in Quebec are also currently trying one of the largest class actions that has ever been certified in Canada - namely, the $27 billion class action against a number of tobacco manufacturers. As a result, 2013 promises to be a watershed year that will test the institutional capacity of the judiciary in Quebec and elsewhere to manage and adjudicate extraordinarily large class action trials.

[21] *Banque de Montréal v. Marcotte*, 2012 QCCA 1396.
[22] *Deraspe v. Zinc Électrolytique du Canada Ltée*, 2012 QCCS 1043.
[23] *Dell'Aniello v. Vivendi Canada Inc.*, 2012 QCCA 384.

Securities Class Actions

In 2012, the class action bar continued to observe significant activity in the prosecution of securities class actions in Canada. There were a number of new filings that were premised on alleged material non-disclosures (such as *Agnico-Eagle*) or that followed regulatory investigations (such as *SNC-Lavalin*). In the context of these cases, the courts issued important certification and carriage decisions, as well as rulings relating to third-party-funding arrangements and limitation periods. The class action bar also witnessed a number of significant settlements – including a landmark settlement in principle for $117 million by Ernst & Young in the *Sino-Forest* case. But in addition to these developments, the courts also released two important decisions relating to jurisdiction and the leave requirement in the Ontario *Securities Act*.

In particular, in *Abdula v. Canadian Solar*, the Ontario Court of Appeal considered whether an issuer whose securities are listed only on a foreign exchange can be a "responsible issuer" under Part XXIII.1.[24] In *Canadian Solar*, the Court held that given the particular facts (Canadian Solar was a *CBCA* corporation with its head office and principal business operations in Ontario), Canadian Solar met the definition of a "responsible issuer". The Court found that the claim was, in essence, "an Ontario plaintiff seeking to have Ontario law apply to a defendant carrying on business in Ontario". The Court also placed specific emphasis on the fact that certain documents containing alleged misrepresentations emanated from Ontario. The Court found that these facts collectively amounted to a connection between Ontario and the defendant that was sufficient to potentially subject the defendant to a statutory cause of action under Part XXIII.1.

With respect to the leave requirement, the Ontario Superior Court released a significant decision in *Gould v. Western Coal Corporation* that renewed hope among defendants that the leave requirement in Part XXIII.1 of the *Securities Act* would serve a functional role in screening clearly unmeritorious claims.[25] In his decision in *Western Coal*, Justice Strathy endorsed the prevailing low threshold for leave that had been set in *Silver v. IMAX* – namely, that the plaintiff need only establish a "mere" possibility of success at trial to obtain leave. However, Justice Strathy underscored that this low threshold nonetheless imposed a meaningful evidentiary burden on class plaintiffs. The parties in *Western Coal* filed competing expert evidence, and Justice Strathy conducted a rigorous assessment of this evidence. In light of the record before him, Justice Strathy found "no reasonable possibility" that a trial judge would accept the plaintiff's expert evidence in preference to that of the defendants' expert evidence. With respect to the remaining claims for conspiracy, Justice Strathy declined to certify these claims on the basis that the plaintiff had failed to demonstrate "a sufficient evidential basis for the existence of the common issues". While he acknowledged that "[a] certification motion is a procedural step and not a merits-based analysis", he found that he could not "ignore the fact that the cornerstone of the claim has been assessed and found wanting".

[24] *Abdula v. Canadian Solar*, 2012 ONCA 211.
[25] *Gould v. Western Coal Corporation*, 2012 ONSC 5184.

Western Coal is a welcome reminder that the courts will exercise an important gatekeeping function at the leave stage and the certification stage, and this gatekeeping function may include a rigorous assessment of the expert evidence and a threshold evaluation of the merits. While there was one notable case in 2012 where the defendants consented to leave and to certification in a significant securities class action,[26] Justice Strathy's decision in *Western Coal* will likely lead to contested leave and certification motions in 2013 – and likely on an accelerated pace given the Ontario Court of Appeal's decision in *Timminco* (discussed above).

[26] *The Trustees of the Drywall Acoustic Lathing and Insulation Local 675 Pension Fund v. SNC-Lavalin Group Inc.*, 2012 ONSC 5288.

Competition Class Actions

During the past year, the plaintiffs' bar continued to be very active in prosecuting class actions for anti-competitive conduct in Canada. The plaintiffs' bar commenced a number of new national class actions in response to new and ongoing international antitrust investigations (such as auto parts, e-books and lithium ion batteries). Moreover, the plaintiffs' bar was successful in securing a number of significant settlements for Canadian class members (including a $17 million settlement payment from Micron in the DRAM case and a $9 million settlement payment from Nestlé Canada in the chocolate case). However, these developments were overshadowed by three appeals from British Columbia and Quebec that were argued before the Supreme Court of Canada in October 2012 relating to (i) the viability of indirect purchaser claims in Canada, and (ii) the standard of certification under the *Class Proceedings Act*.

In late 2010, the B.C. Court of Appeal issued two significant decisions on appeals from certification in the *Microsoft* and *Sun-Rype* cases.[27] In both cases, the plaintiffs sought to represent a class that included indirect purchasers (i.e., class members who had allegedly been harmed by buying the product through a retailer or wholesaler, without a direct contractual relationship with the manufacturer),[28] and the courts had certified the classes at first instance. On appeal, the B.C. Court of Appeal set aside certification in whole or in part on the basis that indirect purchasers had no cause of action in law – with the effect that consumers would generally be precluded from asserting claims for damage under the *Competition Act*. In a separate certification appeal in Quebec in *Infineon*, the Quebec Court of Appeal reached the opposite conclusion.[29] In light of the significance of the issue and the apparent appellate conflict, the Supreme Court of Canada granted leave,[30] and the three appeals were argued together before the Court in 2012.

The appeals were particularly significant as this is the first time since the Supreme Court's ruling in *Hollick*[31] that the Court has heard argument relating to the evidentiary standard for certification. The Court heard vigorous argument from all parties and the Court reserved judgment. Based on historical practice, we can likely expect a ruling from the Supreme Court in March or April 2013, although the timing of the decision is entirely within the Supreme Court's control.

Given the uncertainty created by the appeal, there were a number of contested motions in 2012 as to whether the inventory of antitrust class actions pending across the country should be "paused" or "stayed" pending the outcome of the appeals. In a number of decisions, the courts have generally ruled that class plaintiffs are within their rights to continue to press for certification of these pending actions.[32] However, in spite of these rulings, class plaintiffs have been selective in choosing the cases in which they will press for certification given the

[27] *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2011 BCCA 187; *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2011 BCCA 186 (CanLII), 2011 BCCA 186.
[28] The proposed class in *Microsoft* included only indirect purchasers, and the proposed class in *Sun-Rype* included both direct and indirect purchasers.
[29] *Option Consommateurs v. Infineon Technologies*, 2011 QCCA 2116 (CanLII).
[30] *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2011 CanLII 77189 (SCC); *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2011 CanLII 77282 (SCC); *Samsung Electronics Co. Ltd. v. Option Consommateurs*, 2012 CanLII 26718 (SCC).
[31] *Hollick v. Toronto (City)*, [2001] 3 SCR 158.
[32] See, e.g, *Osmun v. Cadbury Adams Canada Inc.* (Unreported, Direction dated Sept. 20, 2011); *Watson v. Bank of America Corporation*, 2012 BCSC 146.

cost and other risks associated with an adverse decision from the Supreme Court. Most notably, the class plaintiffs have continued to push aggressively for certification in the credit card class actions in B.C., and the certification hearing is scheduled for April 2013.

In a separate development, the B.C. Court of Appeal issued an important jurisdictional ruling in *Fairhurst*.[33] The Court concluded that it could exercise personal jurisdiction over a number of foreign defendants with no presence in Canada and no direct sales in Canada in the context of a pending antitrust class action, given that the plaintiffs had pleaded the existence of an international conspiracy that resulted in potential harm to consumers in downstream markets in Canada. The defendants have sought leave to appeal from the Supreme Court of Canada.

Given these appellate developments, 2013 promises to be a watershed year for private antitrust enforcement in Canada. If the Supreme Court rules in favour of the plaintiffs' bar, we can expect a new wave of jurisprudence as the plaintiffs renew their push for certification in their large inventory of pending cases. If the Supreme Court rules against the plaintiffs' bar, defendants will be presented with a rare opportunity to bring a wide range of summary judgment motions and motions to strike, and plaintiffs will be forced to revisit or recast many of their pending claims. Regardless of the outcome of the appeals, we can expect an interesting year of activity in antitrust class actions in Canada.

33 *Fairhurst v. De Beers Canada, Inc.*, 2012 BCCA 257.

Product Liability Class Actions

In 2012, there was also considerable litigation activity in respect of product liability class actions. Among other decisions, the courts provided guidance with respect to the pleadings threshold to certify a product liability class action (*Martin v. Astrazeneca*), whether there is a viable cause of action for pure economic loss arising from negligently designed but non-dangerous products (*Arora v. Whirlpool*) and whether there is a viable cause of action for waiver of tort in a product liability case (*Koubi v. Mazda Canada* and *Andersen v. St. Jude Medical*). A number of these decisions are being appealed, and we can expect continued judicial guidance on these matters in 2013.

In *Astrazeneca*, the Ontario Superior Court refused to certify a proposed product liability class action relating to a pharmaceutical product.[34] Most significantly, Justice Horkins found that it was plain and obvious that the plaintiffs had failed to plead a viable cause of action. On the face of their claim, the plaintiffs had generally asserted that the defendants were liable in negligence, for failure to warn, in conspiracy as well as waiver of tort (with the last being pleaded as a remedy). Justice Horkins held that these claims were bound to fail because the plaintiffs had delivered a defective pleading that conflated various allegations and failed to particularize their causes of action. More specifically, she found that the plaintiffs had lumped together certain defendants in their claim, had combined allegations of negligent design with allegations of negligent manufacturing, had failed to plead the required facts for each type of negligence, and had failed to provide particulars of which warnings were given, how they were inadequate and how they could have been improved.

In short, Justice Horkins found that the pleadings were so defective that they failed to disclose a viable cause of action. In spite of this determinative holding, Justice Horkins went on to consider the other requirements of certification – and she found that none of the remaining requirements were met. She dismissed the motion and, in a later decision, awarded costs in the amount of $475,000 plus disbursements and taxes against the plaintiffs. The plaintiffs have appealed both the denial of certification and also costs.

In *Whirlpool*, the Ontario Superior Court similarly refused to certify a class action for a product liability claim in respect of a consumer product.[35] In that case, the plaintiffs claimed that Whirlpool had negligently designed a series of front-loading washers and sought to represent a broad class of purchasers in Canada. At the certification motion, the central issue was whether the plaintiffs had stated a viable cause of action. Following his comprehensive review of the applicable authorities, Justice Perell concluded that there was no cause of action for pure economic loss arising from the manufacture of a non-dangerous product. In particular, he concluded that there were policy reasons that negated a duty of care in these circumstances, since compensation for such economic losses was better regulated by the law of contract and property law. Given the absence of a viable cause of action, Justice Perell denied certification.

34 *Martin v. Astrazeneca*, 2012 ONSC 2744.
35 *Arora v. Whirlpool*, 2012 ONSC 4642.

In *Koubi*, the plaintiffs brought a proposed class action against Mazda Canada and its B.C. dealers, premised on allegations that Mazda3 vehicles contained a defective door lock mechanism.[36] In their action, the plaintiffs asserted a number of statutory claims under B.C. consumer protection legislation. At the certification motion, the B.C. Supreme Court certified the class, and subsequently granted amendments that permitted the plaintiffs to invoke a common issue relating to waiver of tort. On appeal, the B.C. Court of Appeal reversed and set aside the certification order. The Court of Appeal reviewed the history and application of waiver of tort doctrine in Canada and noted the controversy surrounding the doctrine. The Court observed that while there were numerous courts that had certified claims of "waiver of tort," there remained uncertainty as to whether it constituted a proper cause of action. Nonetheless, given the unsettled state of the law, the Court ultimately concluded that there was an arguable claim that the doctrine might exist as an independent cause of action. However, the Court held that the doctrine could not be invoked as a path to certification where the legislature had already created a comprehensive statutory regime of private remedies under consumer legislation. On that reasoning, the Court of Appeal denied certification for lack of a cause of action. The Supreme Court denied leave to appeal.

The decisions in *Astrazeneca*, *Whirlpool* and *Koubi* may be harbingers for future certification motions in Canada. In all three cases, the court refused to certify the underlying class action on the basis that the pleading did not disclose a reasonable cause of action. These three cases reinforce the fact that in spite of a low evidentiary threshold to establish commonality and preferability at the certification stage, the courts will nonetheless exercise an important gatekeeping function in evaluating the viability of the plaintiff's pleading. To the extent that class plaintiffs assert a novel claim or a claim that is not sufficiently particularized, the courts still have the means to determine whether the proposed class proceeding warrants a common issues trial, particularly given the cost and demands of such a trial.

However, in other cases where the plaintiff had pleaded a viable cause of action and had demonstrated sufficient commonality, the courts did not hesitate to certify products liability class actions. For instance, in *Stanway v. Wyeth Canada* and *Bartram v. GlaxoSmithKline*, the British Columbia Court of Appeal and the British Columbia Supreme Court, respectively, certified actions related to allegations of harmful side-effects caused by pharmaceutical drugs.[37] As both cases advance through the litigation process in B.C., the courts will now have to address how to adjudicate matters of general causation (i.e., whether the pharmaceutical drug can cause the alleged harm) and individual causation (i.e., whether the pharmaceutical drug in fact caused the harm experienced by each class member) in the context of a common issues trial.

As noted above, the Ontario Superior Court also issued a significant trial decision in a product liability class action in *Andersen v. St. Jude*.[38] In her decision, Justice Lax provided useful guidance on a number of issues that consistently arise in product liability actions, including:

- *Causation*: Based on the expert evidence before her, Justice Lax applied a risk ratio of 2.0, requiring that the probability of medical complications be two times higher while using the product than while using an alternate product before she would presumptively find causation. This approach would have permitted the defendant to provide individualized evidence to rebut the presumption if the matter had proceeded to individual issues trials.

[36] *Koubi v. Mazda Canada*, 2012 BCCA 310. For more information on this topic, please see Osler Update, *Class Actions Development: B.C. Court of Appeal Slams the Door on Waiver of Tort in Statutory Cases* (July 20, 2012), by Christopher Naudie, Craig Lockwood, Kelly Osaka and Geoffrey Grove.

[37] *Stanway v. Wyeth Canada Inc*, 2012 BCCA 260; *Bartram v. GlaxoSmithKline Inc.*, 2012 BCSC 1804.

[38] *Andersen v. St. Jude Medical, Inc.*, 2012 ONSC 3660. For more information on this topic, please see Osler Update, *Andersen v. St. Jude Medical: Whither Waiver of Tort?* (June 29, 2012), by David Morritt, Sonia Bjorkquist, Lauren Tomasich and Patrick Welsh.

- *Standard of care*: Based on the evidence before her, she concluded that St. Jude had appropriately tested and weighed the potential utility of the product with its risks. In addition, she found that the plaintiffs had not shown that additional tests were possible or would have affected this risk utility assessment.
- *Standard of care*: Justice Lax found that St. Jude had monitored the product, warned of possible adverse events, investigated concerns and maintained an open dialogue with Health Canada and the FDA.
- *Waiver of tort*: Because Justice Lax held that St. Jude was not liable, she did not need to consider the availability and scope of the doctrine of waiver of tort. In any event, she observed that she would not have required a full factual record to consider the doctrine, since the doctrine raises larger questions about the nature of tort law and the existence and scope of the doctrine is ultimately a question of public policy.

As these decisions demonstrate, product liability class actions raise complicated legal, factual and procedural questions at both the certification stage and during the common issues trial. Given the appeals from these decisions and Justice Lax's comments about the doctrine of wavier of tort, the class action bar can expect more guidance on these complex issues in 2013.

Franchise Class Actions

In 2012, the courts released two significant franchise class action decisions that provided guidance on substantive franchise law as well as with respect to class action procedure.[39]

THE DUTY OF GOOD FAITH AND FAIR DEALING

The leading franchise decision of 2012 was Justice Strathy's certification and summary judgment decision in respect of a $2 billion franchise class action that had been brought against Tim Hortons. In *Fairview Donut v. The TDL Group*, Justice Strathy considered the merits of two substantive motions at the same hearing – namely, a motion for certification by the plaintiffs coupled with a parallel motion for summary judgment by the defendants. With respect to the summary judgment motion, Justice Strathy granted summary judgment in favour of Tim Hortons and dismissed the class action.[40] Although it was not necessary to do so, Justice Strathy also provided detailed reasons on the plaintiffs' request for certification. In his reasons, Justice Strathy concluded that he would have certified the action, subject to further submissions on the suitability of the representative plaintiff.

In his decision, Justice Strathy provided guidance with respect to a franchisor's duty of good faith and fair dealing. In particular, Justice Strathy:

- Repeated that the statutory duty of good faith and fair dealing does not replace or amend the express terms of the franchise agreement.
- Emphasized the need to assess a franchisor's good faith and fair dealing in the context of the entire relationship, considering the conduct and contract as a whole.
- Articulated the importance of requiring all franchisees to comply with the franchise system, even with those aspects of the system that are unpopular.
- Noted that the duty of good faith and fair dealing does not require franchisors to supply products at the lowest price available in the market or ensure that their franchisees profit on every product they sell.
- Held that the franchisor was permitted to change the franchise system (in accordance with the franchise agreement) even if the change had a greater financial benefit for the franchisor than for the franchisees.
- Emphasized that extensive consultation with franchisees regarding a proposed system change will assist a franchisor should litigation based on the duty of good faith and fair dealing ensue.
- Emphasized that the franchise system changes in this case were rational business decisions made for valid economic and strategic reasons, which highlights the importance of articulating and documenting the business rationale for franchisor decisions that affect the interests of franchisees.

The plaintiffs sought to appeal Justice Strathy's decision. In December 2012, the Court of Appeal for Ontario dismissed the appeal and upheld Justice Strathy's findings.

39 For more information on these topics, please see Osler Update, *Franchise and Competition Class Actions: Dismissal of Tim Hortons Class Action Is Good News for Franchisors* (March 6, 2012), by Jennifer Dolman, Christopher Naudie, Evan Thomas and Lia Bruschetta, as well as Osler Update, *1250264 Ontario Inc. v. Pet Valu Canada Inc.: In or Out? A Bold Re-Opening of the Opt-Out Period in a Franchise Class Action* (August 2, 2012), by Jennifer Dolman, Gillian Scott and Lia Bruschetta.

40 *Fairview Donut Inc. v. The TDL Group Corp.*, 2012 ONSC 1252 (CanLII).

OPTING OUT OF CLASS PROCEEDINGS

In a second significant franchise class action – *1250264 Ontario v. Pet Valu Canada* – Justice Strathy had the opportunity to consider the scope and limits of the court's role in supervising the administration of an opt-out process in a certified class proceeding.[41]

Justice Strathy had certified the *Pet Valu* class action in January 2011. As part of the published class notice, class members were advised that the opt-out process would run from July 15 to September 15, 2011. The certification order also provided that there would only be limited communications with class members before the end of the opt-out period.

Near the end of the opt-out period, a substantial number of class members opted out of the class proceeding. The evidence before Justice Strathy established that a group of franchisees (the "CPVF") used a telephone campaign and website to encourage (and pressure) class members to opt out of the class proceeding. Justice Strathy also found that some of the information provided by the CPVF to franchisees was misleading and added to franchisee confusion about the class action. Justice Strathy noted that Pet Valu itself did not interfere with the integrity of the opt-out process, nor did it directly encourage the CPVF in its efforts.

Ultimately, Justice Strathy found that the CPVF's actions subverted the opt-out process and interfered with the right of class members to access justice. He therefore granted the "extraordinary relief" requested by the plaintiffs, set aside all opt outs received after the CPVF started its campaign and postponed the opt-out process to a date after the court released its decision on motions seeking to dispose of the action on its merits.

As this unusual case demonstrates, the court will intervene to protect the integrity of its own process, even from interference by non-parties. Given the current inventory of franchise class actions making their way through the court system, we expect to see further guidance on novel procedural questions arising in the context of franchise class actions in 2013.

41 *1250264 Ontario Inc. v. Pet Valu Canada Inc.*, 2012 ONSC 5029.

Employment Class Actions

In 2012, courts across the country released a number of significant decisions in the context of employment class actions.[42] Given the summary nature of this article, we focus on the trilogy of cases released by the Ontario Court of Appeal concerning certification in three overtime class actions – namely, *Fulawka v. Bank of Nova Scotia*,[43] *Fresco v. CIBC*[44] and *McCracken v. CN*.[45] In this trilogy, the Ontario Court of Appeal certified one "misclassification" class action (*Fulawka*) but declined to certify a second misclassification class action, explaining that misclassification cases will only be appropriate for certification in limited circumstances. The Court also certified both "off-the-clock" cases. The Bank of Nova Scotia and CIBC have sought leave to appeal from these decisions to the Supreme Court.

To date, the overtime class actions that have been brought in Canada fall within two broad categories: "misclassification" cases and "off-the-clock" cases. Misclassification cases, such as *McCracken*, involve allegations that the employer improperly classified employees who are eligible for overtime as being ineligible by designating them as managers. By contrast, "off-the-clock" cases, such as *Fresco*, centre on an allegation that there was a practice of unpaid overtime, and eligibility for overtime pay is not at issue. The *Fulawka* case involved both types of claims.

MISCLASSIFICATION CASES RARELY APPROPRIATE FOR CLASS ACTIONS

In *McCracken*, the plaintiff argued that CN employees who were first line supervisors were improperly classified as managers and denied overtime pay, which they would otherwise be entitled to under the *Canada Labour Code* (the "Code"). CN argued that there was such a diversity in the roles of first line supervisors that the managerial status of class members could not be determined on a class-wide basis. The certification motion judge agreed that the managerial status of each employee had to be assessed individually, but nonetheless certified as a common issue the question "What are the minimum requirements to be a managerial employee at CN?"

The Court of Appeal rejected this approach, holding that the absence of commonality was fatal to certification. The Court held that misclassification cases should only be certified where the class members perform similar jobs, providing a fundamental element of commonality. Furthermore, the job functions and duties of class members must be sufficiently similar that the misclassification element of the claim can be resolved without considering the individual circumstances of class members.

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42 For example, in March 2012, the B.C. Supreme Court certified a high-profile class action in *Dominguez v. Northland Properties Corp.* in respect of foreign workers who obtained employment in Canada under the Temporary Foreign Worker Program: 2012 BCSC 328.

43 *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443. For more information on this topic, please see Osler Update, *Takin' Care of Business and Working Overtime: Ontario Court of Appeal Releases Key Decisions on Overtime Class Actions* (June 27, 2012), by Laura Fric, Mary Paterson, Adam Hirsh and Karin Sachar, and Osler Update, *Overtime Claim by "Investment Advisors" and "Analysts" Cannot Proceed as a Class Action: Judge Had Earlier Certified a Different Overtime Claim* (April 30, 2012) by Laura Fric.

44 *Fresco v. Canadian Imperial Bank of Commerce*, 2012 ONCA 444.

45 *McCracken v. Canadian National Railway Company*, 2012 ONCA 445.

Somewhat presciently, in April 2012, before the Court of Appeal released its trilogy of overtime cases, Justice Strathy of the Ontario Superior Court refused to certify a misclassification case brought against CIBC.[46] Justice Strathy held that the members of the proposed class had little in common except for their titles and that the key issue of fact, namely whether or not a person had managerial responsibilities, could not be determined on a class-wide basis. The plaintiffs have appealed, and the appeal is scheduled to be heard in February 2013.

In contrast, the Court of Appeal in its trilogy of cases certified the misclassification of a subset of employees as a common issue in *Fulawka*. The Court found that those class members had sufficiently similar responsibilities such that certification was appropriate. As these decisions currently stand, misclassification cases may be certified only where class members have similar job responsibilities, and that similarity is sufficiently demonstrated by the evidence adduced by the plaintiff on the certification motion.

OVERTIME POLICIES AND PRACTICES: THE JUDICIAL APPROACH TO COMMONALITY

In both *Fresco* and *Fulawka*, the plaintiffs alleged that the respective employers systematically failed to compensate eligible employees for overtime despite the requirements in both the governing labour code and their employment contracts. The plaintiffs further alleged that the applicable overtime policies of each employer were contrary to the provisions of the Code, since they required overtime to be pre-approved by management.

The certification judges reached opposite results in the cases. Justice Lax in *Fresco* found that CIBC's overtime policy did not contravene the Code and found that there was insufficient evidence to demonstrate a systemic failure to pay overtime. By contrast, Justice Strathy certified a number of common issues, such as whether the bank had a duty to record employees' hours.

On appeal, the Court of Appeal certified both cases, on the reasoning that the proposed common issues met the threshold of commonality for the purposes of certification. In so doing, the Court favoured Justice Strathy's approach to commonality, which emphasized the underlying systemic nature of the allegations. In *Fresco*, the Court found that it was not plain and obvious that the bank's overtime policies complied with the Code and left the issue for trial.

Given that both the Bank of Nova Scotia and CIBC have sought leave to appeal to the Supreme Court and that the plaintiffs in *Brown v. CIBC* have appealed to the Court of Appeal, we may see further judicial guidance on the certification of employment class actions in 2013.

46 *Brown v. Canadian Imperial Bank of Commerce*, 2012 ONSC 2377.

Conclusion

The courts in Canada released a number of significant class action decisions in 2012 in respect of securities, competition, product liability, franchise and employment class actions. Given the sobering outcome of a number of large, complex and lengthy class action trials in 2012, and given the number of significant rulings relating to pleading challenges, dispositive motions, certification thresholds, limitation periods and third-party funding arrangements, there are signals that 2013 may be a watershed year for class action practice in Canada. One of Canada's leading class action judges observed that Canada's class action bar and jurisprudence had now reached maturity, and that this evolution had implications for future practice and cases. In light of these varied developments, plaintiffs and defendants may reconsider their strategies relating to certification, and the judiciary may rethink the availability and efficiency of class proceedings for litigants, particularly given the enormous demands that common issue trials have placed on scarce judicial resources. Finally, given the Supreme Court's pending rulings in three significant certification appeals, 2013 promises to be an interesting year for the class action bar and businesses in Canada.

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Osler's Class Actions Practice Group has successfully defended clients in many of the leading and complex class action cases in Canada. Our class action team has broad and deep experience guiding clients through the most complex business-critical challenges. For more information, please contact:

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