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IN THIS ISSUE

NEW CASES
Blackberry Service Outage Class Action
Blackette v. Research in Motion Ltd.

Reebok "EasyTone" and "RunTone" Class Action
Markus v. Reebok Canada Inc., Reebok International Ltd., and Adidas Canada Ltd.

Full Tilt Poker Sued in National Class Action in Quebec
Schnurbach v. Full Tilt Poker Ltd. et al.

Armtec Infrastructure Inc. Defendant in Quebec Securities Class Action

CASE UPDATES
Turner v. York University

General Motors of Canada Limited v. Abrams

Windsor Glass Company Ltd. et. Al. v. AGC Flat Glass North America

IN THE NEWS
Plaintiffs will seek leave to appeal in Port Colborne action (Smith v. Inco.)

Class Action certifications on the rise?

Recent events to fuel future class actions?

Conversely, potential class actions are being credited for policy changes in at least two recent cases

SPECIAL FOCUS
Broadening the Scope of Discovery - Mayotte v Ontario and Axiom Plastics Inc. v. E.I. DuPont Canada Co.

Smith v. Inco: Environmental Class Action Reversed on Appeal

Amendments to Alberta's Class Proceedings Act may pave the way for national class actions

NEW CASES

Blackberry Service Outage Class Action
Blackette v. Research in Motion Ltd.

Overview:
On October 25, 2011, Consumer Law Group launched a national class action lawsuit against Research in Motion on behalf of individuals who have Blackberry smartphones and who pay for a monthly data plan but were unable to access their email, Blackberry Messenger service ("BBM"), and/or internet for the period of October 11 to 14, 2011.

Details:
Lawyers for the Plaintiff - Consumer Law Group Inc.
Court File Number – 500-06-000583-118 (Montreal)

TOP

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Reebok "EasyTone" and "RunTone" Class Action
Markus v. Reebok Canada Inc., Reebok International Ltd., and Adidas Canada Ltd.

Overview:
The Petitioner seeks authorization for a national class action on behalf of individuals who purchased "EasyTone" footwear and "RunTone" running shoes (the "Toning Shoes"), which were developed, marketed and sold by the Respondents. The action alleges that the advertising of the Toning Shoes was deceptive, misleading, false and unfair with respect to the Shoes' ability to:

- Tone and strengthen key leg muscles while walking, and
- Tone and strengthen the glutes (28%), thighs (11%), and calves (11%) muscles by a specific percentage more than walking in a regular shoe.

An independent study by Dr. John P. Porcari et. al., Departments of Physical Therapy and Exercise and Sport Science, University of Wisconsin-La Crosse, found no evidence to support the claims that the Toning Shoes had any positive effect on exercise heart rate, oxygen consumption, or caloric expenditure compared to walking in a regular running shoe.

The Petitioners alleges that class members were induced by the alleged fitness results into purchasing the Toning Shoes, which fitness results were false and misleading. The Petitioner seeks a refund of the purchase price of the Toning Shoes.

Details:
Petitioner's Lawyers - Jeff Orenstein, Consumer Law Group Inc.
Court File Number - 500-06-000582-110 (Montreal)

Comments:
This proposed class action follows on the September 28, 2011 announcement by the U.S. Federal Trade Commission that it had reached a settlement agreement with Reebok USA to refund $25 million to American purchasers of the Toning Shoes and certain toning apparel. That settlement agreement further provided that Reebok USA would be barred from:

- Making claims that toning shoes and other toning apparel are effective in strengthening muscles, or that using the footwear will result in a specific percentage or amount of muscle toning or strengthening, unless the claims are true and backed by scientific evidence;
- Making any health or fitness-related efficacy claims for toning shoes and other toning apparel unless the claims are true and backed by scientific evidence; and
- Misrepresenting any tests, studies, or research results regarding toning shoes and other toning apparel.

TOP

Full Tilt Poker Sued in National Class Action in Quebec

Schnurbach v. Full Tilt Poker Ltd. et al.

Overview:
Consumer Law Group Inc. has launched a national class action lawsuit against Full Tilt Poker on behalf of all residents in Canada (and Quebec) who have money being held in their Full Tilt Poker Player Accounts since approximately June 30 2011.

Full Tilt Poker is an on-line poker game website. The company froze customers' accounts in the United States on April 15, 2011. Canadian players were able to access their accounts until June 29, 2011, when the gaming commission of Alderney, the British Channel Islands, where Full Tilt holds a gaming license, suspended its license. As a result, Full Tilt shut down its internet card rooms to all players.

Since that time, Full Tilt Poker has not permitted Canadian players to make cash out requests, and has denied them access to the funds in their accounts.

The named defendants are Full Tilt Poker Ltd., Tiltware LLC, Koylma Corporation A.V.V., Poket Kings Consulting Ltd., Filco Ltd., Vantage Ltd., Ranston Ltd., Mail Media Ltd., Howard Lederer, Chris Ferguson, Jennifer Harman-Traniello, Erick Lindgren, Erick Seidel, Andrew Bloch, Mike Matusow, Allen Cunningham, Johnson Juanda, Raymond Bitar, Nerlson Burtnick and Philip Ivey Jr.

Details:
Lawyers for the Plaintiff – Consumer Law Group Inc.
Court File Number – 500-06-000578-118 (Montreal)

TOP

Armtec Infrastructure Inc. Defendant in Quebec Securities Class Action

Overview
This action was filed against Armtec Infrastructure Inc. in the Quebec Superior Court on October 20, 2011 on behalf of all persons and entities resident in Quebec who acquired securities of Armtec (TSX: ARF) between March 30 and June 8. The action will be co-ordinated with a parallel case filed in Ontario by Siskinds LLP in July 2011.

The Ontario action alleges that Armtec should have known when it raised capital in the public market that it did not have sufficient earnings to pay dividends.

Armtec shares plummeted by 50 per cent in June after it announced a widening of its first-quarter loss and the planned suspension of the 40 cent per share dividend.

Armtec, which is based in Guelph, makes construction materials such as precast concrete and tubing. It said it will vigorously defend the action. It blamed an unusually late and wet spring across the country during the quarter for its inability to pay the dividend.

Details
Lawyers for the Plaintiff – Siskinds, Desmeules

Comments
A similar action was commenced in Ontario in June 2011 by Sutts, Strosberg LLP. We expect that this will give rise to a carriage motion in the near future. We will continue to update developments in this action.

TOP

CASE UPDATES

Turner v. York University
2011 CarswellOnt 11051 (Ont. S.C.J.)

Decision: Motion for leave to amend the Statement of Claim. Date of decision: October 18, 2011.

Judge: C. Horkins J.

Court: Ontario Superior Court of Justice

Lawyers: Henry Juroviesky and Kevin Caspersz, for the Plaintiff (Moving Party)
Ronald G. Slaght and David Quayat, for the Defendant (Respondent)

Background:
The action arose as a result of a strike that commenced at York University in November 2008 that resulted in the cancellation of classes for students. The University subsequently implemented remedial measures extending the semester and permitting the students to finish the year. A motion to certify the action as a class proceeding was dismissed in September 2010 on the basis that the statement of claim failed to disclose a cause of action.

The plaintiff appealed to the Divisional Court on the basis of proposed amendments to the statement of claim. The Divisional Court determined that a motion to amend the pleading would be required before the amendments could be considered. The appeal was stayed and the plaintiff brought the motion for leave to amend the statement of claim and for directions with respect to a fresh hearing of the certification motion.

Update:
Motion denied, leave to appeal the Statement of Claim refused.

The Court dismissed the motion for leave to amend the statement of claim. The Court found that it was plain and obvious that the proposed amended statement of claim will not succeed. The flaws identified at the hearing of the certification motion remained, and for this reason the motion was *res judicata*.

The claim sought damages for breach of contract, breach of the Consumer Protection Act and disgorgement by way of a constructive trust of all tuition and other fees paid by the students.

The Plaintiff amended the pleading to allege that the 2008/2009 Undergraduate Calendar constituted the contract that was breached. The causes of action remained the same. The Calendar provided that students were to receive "approximately" 26 weeks of instruction over the course of the session. The students alleged a breach of contract because they actually received only 24 weeks of instruction due to the strike. The Court relied on the Court of Appeal decision in Gauthier v. Saint-German (2010 CarswellOnt 2601) for the proposition that it was not enough to plead the particulars of the contract and the terms that were allegedly breached. The pleading must contain particulars to show that the university exceeded its broad discretion to organize and carry out its programs.

The Court found that the contractual term alleged to have been breached did not exist, and that the plaintiff failed to plead sufficient particulars to demonstrate that the University exceeded its discretion. As the same finding was made at the certification hearing, the Court determined that the issue was also res judicata. The Court found that although the Plaintiff was entitled to amend the pleading as of right, it was not appropriate to force the Defendant to bring a motion to strike the amended pleading.

Related Cases:
Turner v. York University, 2011 CarswellOnt 4145 (Ont. Div. Ct.)
Turner v. York University, 2010 CarswellOnt 10563 (Ont. S.C.J.)

TOP

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General Motors of Canada Limited v. Abrams
2011 CarswellOnt 9366 (Ont. S.C.J.)

Decision: Motion for approval of settlement. Date of decision: September 13, 2011.

Judge: Perell J.

Court: Ontario Superior Court of Justice

Lawyers: D. Stamp and C.T. Lockwood, for the Plaintiff;
P.H. Griffin, R. Slaght, and B. Gray for the Defendants Barbara Abrams, Bernie Heming, Les MacDonald, Jackie Finn and Tony Sisti;
M. Gold, S. Archer and J. Ptak for the Defendants Ken Lewenza and Peter Kennedy;
A. Farrer and L.C. Brown for certain objectors.

Background:
This was a proposed class action arising out the economic crisis of 2008 and 2009, which impacted the automobile industry in North America. GM Canada sought emergency government funding to complete a restructuring. The governments of Canada and Ontario made the funding conditional on the establishment of a health care trust. GM sought certification of a defendant class action against its retired employees for a declaration that it could unilaterally alter or terminate the employees' health care benefits. The employees were sued as a defendant class. Residents of Quebec were excluded due to the existence of a parallel proceeding in Quebec.

Update:
Motion allowed; settlement approved.

The defendant employees reached a negotiated settlement agreement with GM. The Court noted that the settlement was factually similar to an approved settlement in a case involving Chrysler (*Chrysler Canada Inc. v. Gatens*, 2010 CarswellOnt 7419 (Ont. S.C.J.)), but that the settlement obtained in this case was not as favourable to the employees as the settlement in the *Chrysler* action.

The settlement provided that a trust would be established to administer all future post-retirement health care benefits to eligible recipients. The trust would be funded by a lump sum cash payments and the issuance of promissory notes from GM Canada to the trustees. The funding would be insufficient to maintain the health care benefits at the same standard as provided in the past.

The Court considered the certification criteria and certified the action as a class proceeding. The Court approved the settlement after considering numerous objections on various grounds. The Court found that although the

settlement was weak in some areas (including the limited role of the employees in the governance of the trust), these weaknesses were not a sufficient basis to reject the settlement.

TOP

Windsor Glass Company Ltd. et. Al. v. AGC Flat Glass North America
2011 CarswellOnt 11198 (Ont. S.C.J.)

Decision: Motion to approve settlement. Date of decision: September 12, 2011

Judge: Patterson J.

Court: Ontario Superior Court of Justice

Lawyers: Heather Rumble Peterson, Charles M. Wright, for Plaintiffs and Class
Donald B. Houston, for Defendant, Pilkington
Katherine Kay, for Defendant, Guardian
Lawrence Thacker, for Defendant, PPG
William McNamara, for Defendant, AFNA

Background:
The plaintiffs alleged that certain glass manufacturers conspired to raise, maintain, fix or stabilize the prices of, or allocate markets and customers for, construction flat glass in Canada from July 1, 2002 through December 31, 2006. Construction flat glass is formed through the "float" process for use in construction or the architectural sector, and includes coated float glass, clear and tinted float glass, low emissivity glass (i.e., glass coated with thin metal or metallic oxide layers to improve its insulating qualities), laminated glass and unprocessed mirror glass. On June 6, 2011, a national class was certified on behalf of all persons who purchased construction flat glass for pick up or delivery during the class period. The opt-out period expired August 15, 2011. A settlement approval motion was brought on September 12, 2011.

Update:
The settlement was approved.

Justice Patterson approved a settlement for $1,760,303.24. Following payment of class counsel fees and administrative expenses, the net settlement fund of $1,133,514 will be divided 90%-10% into a "Direct Purchaser Fund" ($1,020,162.60) for the benefit of Class Members who are direct purchasers from a Defendant and an "Indirect Purchaser Fund" ($113,351.40) for the benefit of Class Members who did not make their purchases directly from a Defendant. The "Direct Purchaser Fund" will be distributed to claimants based on the ratio that each direct purchaser's total purchases have to the total purchases of all direct purchasers whose claims are accepted in the action provided their share works out to more than $50. The "Indirect Purchasers Fund", along with any remaining money in the Direct Purchasers Fund and any remaining administrative expenses, will be distributed on a cy pres basis to Habitat for Humanity Canada and the Canadian Green Building Council, two national not-for-profit organizations. The deadline for claims is January 20, 2012.

TOP

IN THE NEWS

Plaintiffs will seek leave to appeal in Port Colborne action (*Smith v. Inco.)*

The plaintiffs in an environmental class action will seek leave from the Supreme Court of Canada to appeal the recent Court of Appeal decision reversing a $36-million trial. One of only a handful of class actions to go to trial, the claim was brought on behalf of all of the owners of residential properties within a defined area of the city of Port Colborne. Alleging that emissions from the Inco refinery contaminated the soil and the related negative publicity depressed property values, the Plaintiffs sought compensation in a class action that took many years and several reframings before it reached trial. While initially successful, the trial verdict was overturned by the Ontario Court of Appeal in reasons released earlier this month (*Smith v. Inco.,* 2011 CarswellOnt 10141 (Ont. C.A.). The three-member panel of the Court found unanimously that the Plaintiffs had failed to prove any liability on the part of Inco or that their property values had in fact suffered.

In a statement released on October 19, Plaintiffs' counsel has confirmed that they will seek leave to appeal that judgment to the Supreme Court of Canada. If leave is granted, the Plaintiffs will ask that the trial judge's decision be restored.

TOP

Class Action certifications on the rise?

On September 27, 2011, the National Insurance Conference of Canada (NICC) in Vancouver heard that certifications are on the rise. In an article by CanadianUnderwriter.ca dated September 28, 2011, Laura Cooper, a partner with Fasken Martineau, was quoted as saying, "With respect to class actions generally, I'm sorry to say the news isn't great… In the past year, in Ontario, where I primarily practice, out of 24 certification motions that were contested, 20 of them were certified. That was a change from the previous record of some 60% certification."

The article went on to say (not a quote from Ms. Cooper): "…in some circumstances, insurers have fought hard throughout the certification process knowing that the plaintiff counsel's side had limited or depleted resources for a class action trial. Thus, if the defendant's side knows it has more resources than the plaintiff's side, it might be beneficial tactically to start a war of attrition by fighting certification from the very outset."

Despite any increase in certification motions being granted, the article speaks to the challenge faced by any plaintiff bringing a class action against Canadian corporate defendants. The insurer's strategy may be to bankrupt the plaintiff before the case reaches certification.

For this reason, alternative funding sources are now being considered (and employed) by plaintiff firms in an attempt to even the playing field. Such alternatives include third party funding (see "The Changing Landscape of Third Party Funding" - link) and recent discussions in the media around the ability for law firms to issue share capital, as has recently been permitted in the United Kingdom.

TOP

Recent events to fuel future class actions?

There has been much speculation recently that events in the news may give rise to future class actions in Canada and elsewhere.

The dismantling of the Canadian Wheat Board is expected to give rise to at least one class action. The government intends to introduce legislation to end the CWB's monopoly over wheat and barley sales. According to the Winnipeg Free Press, a group called Friends of the Canadian Wheat Board is contemplating a class action on behalf of grain growers so they can recoup any lost profits.

Blackberry maker Research in Motion now faces a national class action lawsuit as a result of service issues that affected the devices over a three-day period in October 2011. The problem resulted in customers' inability to access e-mail and Blackberry messenger communications. RIM has not offered to compensate users for the problems, but has said that it will provide free Blackberry applications to subscribers, with a total value of approximately $100.00 per customer.

The first such action appears to have been commenced on October 25, 2011 on behalf of a national class of Blackberry smartphone users by the Quebec law firm Consumer Law Group Inc.

TOP

Conversely, potential class actions are being credited for policy changes in at least two recent cases

Proposed policy changes at the Ontario Securities Commission, including giving immunity to wrong-doers who enter into settlements without an admission of wrongdoing, have been blamed on class actions. Securities regulators are often criticized for their lack of responsiveness to shareholder complaints. The regulators do not usually provide redress for shareholders who have been harmed; shareholders must turn to civil litigation for redress.

Typically, a settlement with the regulator includes an agreed statement of fact, which may give potential plaintiffs all the information they need to pursue a class action. The new statutory regime permitting actions for misrepresentation in secondary market disclosure has resulted in numerous class actions being commenced against public issuers since the law came into force.

The new regime will not require the wrongdoer to admit liability. Critics say that such policies do not provide a sufficient deterrent mechanism and could result in a serious backlog of cases at the OSC. The proposed changes will be open for comment until December 20.

Finally, the threat of a class action has reportedly resulted in a Montreal Roman Catholic order agreeing to a settlement regarding allegations of sexual abuse. Former students of three institutions run by the Congregation of Holy Cross, which are now defunct, alleged that they had been sexually abused as children by priests at the schools. It is thought that at least 85 people will be eligible for compensation. The settlement includes a payment of $18 million and an apology for the years of abuse inflicted on the children. The order previously denied allegations of abuse at the schools.

TOP

SPECIAL FOCUS

Broadening the Scope of Discovery - *Mayotte v Ontario and Axiom Plastics Inc. v. E.I. DuPont Canada Co.*

Two recent Ontario Superior Court of Justice decisions have added definition and broadened the scope of discovery. Both decisions arose in the context of class proceedings before Justice Perell.

In July 2011 the parties brought motions for refusals made during examination for discoveries in Mayotte v. Ontario, 2011 CarswellOnt 7393 (Ont. S.C.J.) and Axiom Plastics Inc. v. E.I. DuPont Canada Co., 2011 CarswellOnt 7387 (Ont. S.C.J.).

Justice Perell found that in class proceedings more than a simple examination of the class period or the certified common issues is necessary. The reasoning of the judge in the certification decision will assist in determining the limits of discovery.

In Mayotte a class proceeding was certified against the Ontario government for unfairly and unreasonably under-compensating the private entities to which it outsources the issuance of driver's licences and the registration of vehicles.

The representative of the defendant was examined for discovery, answering over 1500 questions, but refusing certain questions on a number of grounds. One ground of refusal was that the questions were related to events that occurred before the certified class period began. The plaintiff subsequently brought a motion to determine whether the questions refused were proper.

Justice Perell held that if the questions were probative for the common issues trial, even if they were beyond the class period, they were relevant. The majority of questions refused for being outside of the class period were ordered to be answered. Three questions that were refused as being prior to the class period were found irrelevant and therefore properly left unanswered.

The plaintiffs in Axiom Plastics Inc. allege a price-fixing scheme against the dominant supplier of engineering resins in the market. The action was certified by Justice Hoy in relation to "Credit Upon Proof of Sale" transaction systems and not in relation to Tier 1 manufacturers.

During examination for discovery of the defendant's representative over 4,800 questions were answered. Seventy-six questions were refused by the defendant citing irrelevance to the certified issues.

On the refusals motion the plaintiffs took the position that questions on examination for discovery were relevant in relation to conspiracy of Tier 1 manufacturers even though Justice Hoy had refused to certify the issue. The court disagreed with the plaintiffs that all questions related to conspiracy and Tier 1 manufacturers were relevant. Justice Perell did find that questions related to Tier 1 manufacturers unduly limiting supply were relevant thereby requiring answers.

Justice Perell found questions in relation to Tier 1 manufacturers that fell outside of the class period to be relevant, as well as allowing the examination for discovery to include questions on "but for" pricing as it could impact damages and was not foreclosed in the certification decision.

This broadened the terms of discovery beyond the black letter of the certified common issues, and ordered questions refused on these matters to be answered.

A four-part test was used by Justice Perell to determine the relevancy of each question posed. This test asks: whether the question is overbroad and speculative discovery; whether the question offends the proportionality principle in the sense that answering the question will offer only a modest probative return; whether the question is relevant having regard to the statement of claim but without regard to the common issues; and, whether the question is relevant having regard to the effect of the certified common issues on the scope of the examination for discovery.

Justice Perell did not explicitly use this test in Mayotte; it remains to be seen if it will emerge as a common method for analyzing questions refused on examinations for discovery.

Before Axiom Plastics Inc. and Mayotte, the general rule was that questions on examination for discovery were restricted to the issues certified. See for example 1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada, 2003 CarswellOnt 5808 (Ont. Master) and Abdulrahin v. Air France, 2010 CarswellOnt 5320 (Ont. S.C.J.).

In Mayotte and Axiom Plastics Inc. Justice Perell reasoned that relevancy for discovery purposes is in the hands of the certification judge. These two cases expand the inquiry of what constitutes a proper question to require a detailed reading of the certification judgment. This approach broadens what is possibly relevant to issues or occurrences outside of the class period or beyond the certified issues.

There is a balance to be struck between avoiding uncertainty and delay in the discovery process and ensuring information is put forth to advance claims. It seems the process established in Mayotte and Axiom Plastics Inc. which requires an in-depth examination of the certification judgment could lead to broader discovery and disputes as to what constitutes a relevant question unless certification judges make explicitly clear in their judgments what the scope of discovery will encompass.

TOP

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Smith v. Inco: Environmental Class Action Reversed on Appeal

The Court of Appeal for Ontario recently reversed the trial judgment of one of the first class actions to be tried in Ontario. At trial, the Court found that the defendant's nickel refinery depreciated the class members' property values and awarded $36 million in damages.

In *Smith v. Inco Ltd.*, 2011 CarswellOnt 10141 (Ont. C.A.), the class members claimed that their property values were adversely affected by the defendant's nickel refinery. The class members alleged private nuisance and strict liability following the rule in *Rylands v. Fletcher* because the nickel refinery caused higher than anticipated nickel levels in their soil and widespread public concern about such nickel levels. The rule in *Rylands v. Fletcher* imposes liability where four conditions are satisfied: (1) the defendant makes a "non-natural" use of his land; (2) the defendant brings onto his land something likely to do mischief if it escapes; (3) the substance escapes; and (4) damage is caused to the plaintiff's property as a result of the escape. Significantly, while there was initially concern that the nickel was carcinogenic, all allegations that the nickel was dangerous to human health were abandoned before trial.

The Court of Appeal rejected the private nuisance claim because the claimants failed to establish actual, substantial physical damage to their properties as a result of the nickel in their soil. Evidence that the nickel particles generated public concerns about potential health risks did not amount to evidence that the soil caused actual, substantial harm or damage to the property. The Court of Appeal was concerned that the trial judge extended the law of private nuisance too far. Under the trial judge's analysis, even if the public concerns were based on "junk science", Inco would still be liable in nuisance assuming that the unfounded public concerns impacted the claimants' property values.

The Court of Appeal also rejected the strict liability claim under *Rylands v. Fletcher* because the claimants failed to establish that the nickel refinery was a "non-natural use" of its property. The Court noted that the rationale of

the rule in *Rylands v. Fletcher* aims not at all risks associated with carrying on an activity, but rather with the risk associated with accidental and unintended consequences of engaging in an activity (such as floods, gas leaks, chemical spills etc.). The refinery was not a "non-natural use" of Inco's property because it was located in a heavily industrialized part of the city and did not create risks beyond those incidental to virtually any industrial operation. The Court also noted that although compliance with various environmental and zoning regulations is not a defence to a *Rylands v. Fletcher* claim, compliance is an important consideration to the "non-natural use" analysis.

The Court also rejected strict liability for "ultra hazardous" or "extra hazardous" activities as an extension of the common law in Ontario, which the trial judge accepted. The Court refused to extend the rule in Rylands v. Fletcher, and instead deferred to the Legislature to make such a decision.

In *obiter*, the Court made two comments about the rule in *Rylands v. Fletcher*. First, the Court said that in future cases there are compelling reasons to require objective foreseeability of the kind of damages alleged to have been suffered by the plaintiffs. Thus, the foreseeability of the depreciation of the claimants' properties some 15 years after the refinery closed could have been a live issue. This is not to be confused with objective foreseeability of escape of the thing that caused the damage, which would all but merge the rule with liability in negligence. Second, the Court commented on the "escape" component of the rule. It agreed with the trial judge that the "escape" need not be limited to a single isolated escape. More significantly, the Court doubted the applicability of the rule to consequences that are the intended result of the activity being undertaken by the defendant. Instead, an "escape" implies some kind of mishap or accident that results in damage.

Finally, the Court of Appeal held that if either of the two causes of action survived, the claimant failed to prove damages. The claimant relied on the "market comparison approach" to demonstrate that the class members' homes in Port Colborne failed to appreciate at a rate similar to homes in the comparable community of Welland, Ontario. The Court found that the trial judge failed to correct the data he relied upon for an anomaly relating to 314 vacant building lots in Port Colborne, which diminished the value of the Port Colborne properties. When the building lots were accounted for, any difference in appreciation rates between the two communities disappeared, or accrued in Port Colborne's favour.

This decision is significant not only because the case was one of the rare class actions to go to trial in Ontario, but also because it involved environmental claims. The Court of Appeal has made it clear that plaintiffs must be able to demonstrate real damages, whether economic or otherwise, to be successful in such cases. The decision will no doubt discourage environmental class actions being pursued in the future. The plaintiffs have sought leave to appeal to the Supreme Court of Canada.

TOP

Amendments to Alberta's *Class Proceedings Act* may pave the way for national class actions

On March 1, 2011, the anticipated amendments to the Alberta *Class Proceedings Act*, R.S.A. 2003, c. C-16.5, came into force after receiving approval from the provincial legislature in December 2010 (see *Class Proceedings Amendment Act, 2010*, S.A. 2010 C-15). The amendments are aimed primarily towards facilitating multi-jurisdictional class proceedings in Alberta, and could be viewed as a direct legislative response to the Supreme Court of Canada's comments in *Canada Post Corp. v. Lépine*, 2009 CarswellQue 2490 (S.C.C.). In that case, which arose out of a jurisdictional dispute over parallel class proceedings, the Supreme Court urged provincial legislatures to "pay more attention to the framework for national class actions and the problems they present" and find more effective methods for managing jurisdictional disputes (at para. 57).

Evidently, the Alberta legislature took notice, because in enacting these amendments, Alberta became only the second province in Canada to explicitly address the growing trend of multi-jurisdictional class proceedings in its legislative scheme. Closely following the Saskatchewan model, which came into force on April 1, 2008, s.5 of the Alberta *Class Proceedings Act* articulates a codified set of objectives and factors that courts must take into account when determining "whether it would be preferable for some or all of the claims or common issues raised by the prospective class members to be resolved in the proceeding commenced elsewhere" (s.5(6)). This analysis applies only when another multi-jurisdictional class proceeding with the same or similar subject matter has been commenced elsewhere in Canada. The factors for consideration listed in s.5(8) include the alleged basis of liability, the stage of each proceeding, the existence of a viable plan for the proposed multi-jurisdictional class proceeding, the location of the class members and representative plaintiff, the location of evidence and witnesses, and the advantages and disadvantage of litigation being conducted in more than one

jurisdiction. It is noteworthy that these factors are not considered exhaustive, and the Court may take into account any other matter that the Court considers relevant in making its determination on this point.

If the court is satisfied that the certification requirements set out in the Act are met, and that, having considered all the factors, Alberta is the appropriate venue for the proceeding, the court may "make an order certifying a proceeding as a multi-jurisdictional class proceeding" (s.9.1(1)). If, however, the Court is of the view that the proceeding should proceed as a multi-jurisdictional class proceeding in another jurisdiction, then the court must deny certification as a multi-jurisdictional class proceeding (s.9.1(2)).

The wording of this particular provision may create some ambiguity, as it does not state that certification itself is denied in this instance, only certification as a "multi-jurisdictional class proceeding". This may leave open the possibility of an Alberta court refusing to certify a multi-jurisdictional class proceeding but certifying an amended version of the same class proceeding restricted to Alberta class members, whilst a national class proceeding including Alberta residents is prosecuted elsewhere. Section 9.1(3) of the amended Act strives to resolve the potential conflict that may arise by giving courts the power to "refuse to certify a portion of a proposed class if that portion contains members who may be included within a class proceeding, or a proceeding that is the subject of a certification application, in another jurisdiction" (s.9.1(3)). Note, however, that this power is discretionary, not mandatory, and so it does not fully eradicate the potential conflict. In the spirit of encouraging inter-provincial communication to minimize conflict, the amendments also now require that a person commencing a class proceeding to give notice of the application for certification to the representative plaintiff in any certified or proposed multi-jurisdictional class proceeding commenced in Canada involving the same or similar subject-matter (s.2(2)).

The recent amendments also facilitate multi-jurisdictional proceedings in other ways. Most notably, the amendments introduce a universal "opt-out" regime for all class members. Previously, s.17(1)(b) of the *Act* (now repealed) distinguished between resident and non-resident class members, and required that class members not resident in Alberta "opt-in" to the class proceeding in order to be bound by it. This was in contrast to some other jurisdictions, including Ontario, which adhere to an "opt-out" regime that allows for much larger and more inclusive classes (s.9). As a result, non-localized claims with members that crossed jurisdictional boundaries were often brought in class proceedings launched in Ontario or other "opt-out" provinces, rather than "opt-in" provinces like Alberta. The move in Alberta to an "opt-out" model levels the playing field for Alberta claimants and counsel, and also puts some pressure on BC, a neighboring "opt-in" jurisdiction, to follow suit (s.16). The potential for multi-jurisdictional class actions commenced in Alberta could be viewed positively on both sides of the bar, as cost savings would arise from not having to transport localized witnesses and evidence to multi-jurisdictional class proceedings in other provinces like Ontario. Given that Alberta boasts the Canadian headquarters of several major oil and gas companies, this may well prove to have significant implications in the future.

Another important amendment is to s.35 of the Act, which deals with settlement, discontinuance, abandonment, and dismissal. Previously, the section only referred to judicial oversight in relation to settlements or discontinuances of "class proceedings". Since "class proceeding" was defined in the *Act* as "a proceeding certified under Part 1", this resulted in some ambiguity about whether proceedings which had not yet been certified as class proceedings in Alberta needed court approval for settlement, discontinuance, or abandonment purposes. In practice, defendants usually imposed certification as a condition to settlement, in order to bar future liability to putative class members in the asserted claims. As a result, cases in which settlement was reached before certification often applied to the court for concurrent certification and approval of the settlement. With regards to discontinuance or abandonment of a proposed class proceeding, courts have acknowledged the plain language interpretation of the provision does not necessitate court approval, but suggested that it may still be prudent and desirable to have such applications reviewed by the court regardless: *Davey c. Canadian National Railway Co.,* 2006 CarswellAlta 1247 (Alta. Q.B.) at para.5. The amended provision accords with judicial expressions of desirability, and eliminates this loophole by substituting the word "proceeding" in place of "class proceeding", and defining "proceeding" as "a class proceeding or a proceeding that is the subject of an application for certification (s.35(1)).

These recent legislative amendments may pave the way for an increased role for Alberta in the national class action landscape. The creation of a coherent, balanced, and structured framework for dealing with multi-jurisdictional class proceedings is a welcome development in an era with an increasing number of national class actions and jurisdictional conflicts. It also sets an example for other provinces that have yet to address these issues. Although to date no decisions have been released that rely on the new provisions, it seems likely that the amendments will open the door to national class proceedings launched from Alberta, particularly those with defendants headquartered in the province and class members spanning the country.

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