KIM ORR CLASS ACTION MONITOR

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IN THIS ISSUE

NEW CASES:

Proposed class action commenced against Blue Buffalo Pet Food

Overview:

On February 5, 2016, Toronto resident B. Hardwick commenced a proposed class action on behalf of all residents in Canada who have purchased any of the Blue Buffalo Pet Food Products (*Hardwick v. Blue Buffalo Company, Ltd. et al.*).

Blue Buffalo Pet Food Products are premium lines of dog and cat food products, including “Basics”, “Blue”, “Freedom”, “Longevity”, “Organics” and “Wilderness”. Each of these products prominently displays a “True Blue Promise”, which states:

> **Formulated with the Finest National Ingredients**
>
> *NO Chicken/Poultry By-Product Meals*
>
> *NO Corn, Wheat, or Soy*
>
> *NO Artificial Preservatives, Colors or Flavors*

The plaintiff alleges that the Blue Buffalo Pet Food Products do not live up to the “True Blue Promise”, which is used to justify a price premium over other standard pet food products. In particular, independent testing in 2014 commissioned by a rival pet food company, Nestle Purina Petcare Company, revealed that several of the Blue Buffalo Pet Food Products contained measurable amounts of chicken/poultry by-product meal or grains. The plaintiff further alleges that emails between Blue Buffalo's suppliers

and the company indicate that the defendants actually contracted to purchase Chicken Meal Blend and Turkey Meal Blend, which each contain by-product meal.

The plaintiff advances claims for breach of express and implied warranty, civil fraud, fraudulent concealment, negligent misrepresentation, breach of the *Sale of Goods Act*, R.S.O. 1990, c. S. 1, breach of the *Consumer Packaging and Labelling Act*, R.S.C. 1985, c. C-38, breach of the unfair practice provision in the *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Sched. A, and the parallel provisions in the *Competition Act*, R.S.C. 1985, c. C-34. The plaintiff seeks aggregate general damages for pain and suffering, as well as special damages to compensate for the purchase price of the Blue Buffalo Pet Food Products or in the alternative, the overpayment of the purchase price of the Pet Food Products.

Details:

Plaintiff: B. Hardwick

Defendants: Blue Buffalo Company, Ltd. and Blue Buffalo Pet Products, Inc.

Lawyers for the plaintiff: Jeff Orenstein and Andrea Grass (Consumer Law Group P.C.)

Court: Ontario Superior Court of Justice

Court File No.: 16-67441

Comments:

This proposed class action follows a $32 million settlement in the United States of substantially similar class actions alleging false advertising of Blue Buffalo Pet Food Products. The settlement, announced in December 2015, resolved 13 separate class actions, commenced in five different states, which were consolidated as multi-district litigation in Missouri federal Court in October 2014. A lawsuit launched by the Nestle Purina Petcare Company against Blue Buffalo, alleging false advertisement, commercial disparagement, and unjust enrichment, remains ongoing.

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Action alleging misleading advertising filed against Red Bull

Overview:

On February 18, 2016 Quebec resident, Michael Attar, filed an application to authorize a class proceeding against Red Bull Canada Ltd., and Austria-based Red Bull GMBH (collectively, “Red Bull Companies”). The action alleges that the Red Bull Companies breached various provincial consumer protection laws by misleadingly and/or falsely advertising that Red Bull enhances physical and cognitive performance more than generally available and cheaper products containing caffeine, such as coffee. Mr. Attar alleges that as a result of this advertising, consumers were duped into paying more for what they believed was a premium product. The proceeding seeks reimbursement for amounts paid as well as $100 per class member in punitive damages. The proposed class includes all residents of Canada who purchased Red Bull, with a separate sub-class proposed for Quebec residents.

Details:

Plaintiff: Michael Attar

Lawyers for the plaintiff: Simon et Associés (Montreal)

Defendants: Red Bull Canada Ltd., and Red Bull GMBH

Comments:

Similar class actions were launched in the United States in California and New York, and resulted in a $13 million settlement for US residents who purchased Red Bull between January 1, 2002 and October 3, 2014.

Related Cases:

Wolf et al. v. Red Bull GmbH, et al, Court file No. CV13-01444-MWF(JCGx)

Benjamin Careathers v. Red Bull North America, Inc., Court file No. 1:13-CV-0369-VM

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CASE UPDATES:

Labourer's Pension Fund of Central and Eastern Canada (Trustees of) v. Sino-Forest Corp.

2016 CarswellOnt 2901 (Ont. S.C.J. [Commercial List])

Decision:	Defendant's motion for a declaration that *CCAA* settlement and release bars subsequent CPAO regulatory proceedings—motion dismissed Date of Decision: December 15, 2015
Judges:	G.B. Morawetz R.S.J.
Court:	Ontario Superior Court of Justice
Lawyers:	

Lawyers for Chartered Professional Accountants of Ontario: Brian P. Bellmore and Paul Farley
Lawyers for the defendant, David Horsley: Simon Bieber and Terrence Liu

Background:

On June 20, 2011, the plaintiffs commenced a class action on behalf of individuals who acquired securities of Sino-Forest Corporation (“Sino-Forest”) on the primary and secondary market. Defendants named included Sino-Forest, former directors and officers, underwriters, auditors and experts.

Sino-Forest was a publicly-traded Canadian forestry company that operated out of China. In June 2011 Sino-Forest stock collapsed after allegations surfaced that the company had been vastly overstating its assets and revenues while engaging in extensive related-party transactions. A number of class proceedings were commenced in Ontario, Quebec and New York against the company, its directors and officers, underwriters, auditors and experts.

On March 30, 2012 Sino-Forest applied for and was granted *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36 (“*CCAA*”) protection. Through a series of negotiations and consultations a Plan of Compromise and Reorganization (“Plan”) was created, which included a settlement structure whereby the plaintiffs and certain defendants in the class proceeding could settle the class action claims in exchange for a broad *CCAA* release [2012-23—Special Focus—“Sino-Forest Corp. (Re): Releases and opt-out rights against “third party” class action defendants under the CCAA and the *Class Proceedings Act*”]. The Plan was approved on December 3, 2012 by an overwhelming majority of Sino-Forest's affected creditors.

Under the Plan settlement structure, the plaintiffs settled with Ernst & Young LLP, one of the named auditor defendants, for $117 million [2013-07—Special Focus—“Sino-Forest Corp. (Re): Court approves $117 million class action settlement with

auditor as distribution under the CCAA and grants third party release"]. The plaintiffs subsequently settled with the Chief Financial Officer, David Horsley (the "Horsley Settlement").

The Chartered Professional Accountants of Ontario ("CPAO") seeks to commence regulatory proceedings against Horsley alleging breaches of their Rules of Professional Conduct on the basis that he failed to maintain the good reputation of the profession of chartered accountants and failed to practice his profession with the necessary due care for his actions while employed as CFO of Sino-Forest. The CPAO seeks, *inter alia*, a $75,000 fine and two-year suspension from the practice of accounting.

The defendant Horsley brought a motion seeking a declaration that the CPAO is precluded from bringing regulatory proceedings as they are bound by the *CCAA* settlement plan and the Horsley Settlement, which contains releases against further claims.

Update:

Justice Morawetz dismissed Horsley's motion, finding that the CPAO is not bound by the *CCAA* Plan or the class action settlement agreement, and as such is free to instigate disciplinary proceedings against Horsley.

Justice Morawetz found that the CPAO allegations did not give rise to a claim within the meaning of the *CCAA*. In doing so, he largely relied in the Supreme Court of Canada's decision in *AbitibiBowater Inc., Re*, 2012 CarswellQue 12490, 2012 CarswellQue 12491 (S.C.C.) ("*Abitibi*"). In *Abitibi*, the Supreme Court dealt with whether orders issued by regulatory bodies can be treated as monetary claims under the *CCAA*, and found that they can be only where three conditions are met:

(1) there must be a debt, liability, or obligation to a creditor;

(2) the debt, liability or obligation must be incurred before the debtor becomes bankrupt; and

(3) it must be possible to attach a monetary value to the debt, liability or obligation.

Justice Morawetz found that the CPAO allegations are not against the debtor Sino-Forest or against Horsley in his capacity as an officer and director of Sino-Forest, but rather are in respect to Horsley's professional conduct as a chartered accountant. Additionally, Justice Morawetz noted that the CPAO allegations relate to the period between October 1, 2005 and April 30, 2012, which is largely after Horsley had already ceased being a director of Sino-Forest.

Justice Morawetz also found that the CPAO allegations are not captured by the definition of "Horsley Claim" in the class action settlement agreement. A "Horsley Claim" requires that the claim relate to Sino-Forest or to Mr. Horsley's conduct as a director or officer of Sin-Forest. For the same reason that the allegations deal with Horsley's actions as a chartered accountant rather than in a defined role with Sino-Forest, the release against claims in the settlement agreement does not capture this regulatory proceeding. Justice Morawetz noted that, to construct claims so broadly as to capture the CPAO allegations would lead to absurd results. His example noted that, as agreed by Mr. Horsley's counsel in the hearing, this interpretation would include a fact scenario where Mr. Horsley was driving a Sino-Forest owned automobile and was at fault in an automobile accident causing personal injury to a third party. Justice Morawetz found it would be an absurd result to find that the settlement agreement would preclude that third party's claim against Horsley in the same way it would preclude the CPAO's allegations as a third party.

Having dismissed the motion and found that the CPAO proceeding could proceed against the defendant Horsley, Justice Morawetz awarded costs to CPAO in the agreed upon amount of $10,000 inclusive of disbursements and HST.

Related Cases:

Smith v. Sino-Forest Corp., 2012 CarswellOnt 3480 (Ont. S.C.J.)

Smith v. Sino-Forest Corp., 2012 CarswellOnt 6149 (Ont. S.C.J.)

Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corp., 2013 CarswellOnt 3361 (Ont. S.C.J. [Commercial List]); leave to appeal refused 2013 CarswellOnt 8896

Sino-Forest Corp., Re, 2013 CarswellOnt 8896 (Ont. C.A.); leave to appeal refused 2014 CarswellOnt 3023, 2014 CarswellOnt 3024 (S.C.C.)

Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corp., 2013 CarswellOnt 18807 (Ont. C.A.); leave to appeal refused 2014 CarswellOnt 3023, 2014 CarswellOnt 3024

Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corp., 2014 CarswellOnt 1268 (Ont. S.C.J. [Commercial List])

Sino-Forest Corp., Re, 2014 CarswellOnt 3023, 2014 CarswellOnt 3024 (S.C.C.)

Labourers' Pension Fund of Central and Eastern Canada (Trustees of) v. Sino-Forest Corp., 2014 CarswellOnt 15024 (Ont. S.C.J.)

Labourers' Pension Fund of Central and Eastern Canada (Trustees of) v. Sino-Forest Corp., 2015 CarswellOnt 621 (Ont. S.C.J.)

Labourers' Pension Fund of Central and Eastern Canada (Trustees of) v. Sino-Forest Corp., 2015 CarswellOnt 1306 (Ont. S.C.J. [Commercial List])

Labourers' Pension Fund of Central and Eastern Canada (Trustees of) v. Sino-Forest Corp., 2015 CarswellOnt 9198 (Ont. S.C.J.)

Labourers' Pension Fund of Central and Eastern Canada (Trustees of) v. Sino-Forest Corp., 2015 CarswellOnt 9738 (Ont. S.C.J.)

Labourers' Pension Fund of Central and Eastern Canada (Trustees of) v. Sino-Forest Corp., 2015 CarswellOnt 15742 (Ont. S.C.J.); leave to appeal refused 2016 CarswellOnt 1486 (Ont. Div. Ct.)

Related Articles:

2012-05—Case Updates—"*The Trustees of the Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corp.*"

2012-05—In the News—"Sino-Forest Corporation files for CCAA protection resulting in stay of class action"

2012-14—Case Updates—"*Sino-Forest Corp., Re*"

2012-21—In the News—"Court refuses to lift stay in *Sino-Forest* litigation"

2012-22—Case Updates—"*Sino-Forest Corp., Re*"

2012-23—Special Focus—"Sino-Forest Corp. (Re): Releases and opt-out rights against "third party" class action defendants under the CCAA and the *Class Proceedings Act*"

2013-07—Special Focus—"Sino-Forest Corp. (Re): Court approves $117 million class action settlement with auditor as distribution under the CCAA and grants third party release"

2013-18—Case Updates—"*Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corporation*"

2014-04—Case Updates—"*Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corporation*"

2015-07—In the News—"Leave to appeal denied in Sino-Forest proceedings; potential settlement negotiated with Chinese"

2014-23—Case Updates—*"The Trustees of the Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corporation"*

2015-03—Case Updates—*"Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corporation"*

2015-03—In the News—"Settlement reached with the Underwriters in the Sino-Forest Corp. class action"

2015-07—In the News—"Sino-Forest defence bill currently sits at $41 million"

2015-12—Case Updates—*"The Trustees of the Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corporation"*

2015-20—Case Updates—*"The Trustees of the Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corporation"*

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Charbonneau v. Apple Canada Inc.

2016 CarswellQue 1139 (C.S. Que.)

Decision:	Respondents' motion for leave to conduct preliminary examination of the petitioner prior to authorization hearing—motion granted Date of Decision: February 19, 2016
Judge:	Peacock J.C.S.
Court:	Quebec Superior Court of Justice

Lawyers:
Lawyer for the petitioner: David Assor
Lawyer for the respondents: Kristian Brabander

Background:

In December 2014, the petitioner brought a motion for authorization of a class action against Apple Canada Inc. and Apple Inc. (collectively, "Apple"), on behalf of all persons in Canada who purchased and/or owned a 2011 MacBook Pro laptop equipped with an Advanced Micro Devices ("AMD") graphics processing unit ("GPU"). The petitioner alleges that the affected laptops suffer from a hardware defect, wherein a poor connection between the AMD GPU and the laptop motherboard causes users to experience random graphics defects which worsen over time until the laptop becomes completely unusable. The petitioner alleges that the hardware defect was caused by Apple's decision to use a lead-free solder to connect the two components, and that Apple knew of the defect and failed to warn the putative class members.

The petitioner also alleges that, as a result of Apple's failure to recall the defective laptops or to repair the defect, the putative class members were forced either to replace their laptops or to repair them at an expense of approximately $600 each. The petitioner seeks damages on behalf of the putative class for reimbursement and/or repair of the laptops.

The motion for authorization has not yet been heard. The respondents applied for court approval to conduct a preliminary examination of the petitioner, pursuant to Art. 574, para. 3 of the *Code of Civil Procedure*, regarding:

1. the relief provided to the petitioner by Apple, whether before or after he learned of Apple's Repair Extension Program ("REP");

2. the petitioner's research, knowledge and testing done of the alleged graphics defect;

3. the petitioner's knowledge regarding the proposed class, including his knowledge of relevant complaints by putative class members and his knowledge of their interactions with and any relief provided by Apple; and

4. the details of the petitioner's communications with putative class members.

The respondents also sought authorization to submit affidavit evidence into the Court record pertaining to the REP.

Update:

Article 574 states that "[a]n application for authorization may only be contested orally, and the court may allow relevant evidence to be submitted". Justice Peacock noted that the permissive wording of the provision allows for an exercise of judicial discretion which must be in conformity with legislative intent and case law regarding the authorization of class actions—namely, to act only as a screening mechanism for frivolous applications. Justice Peacock further noted that the submission of evidence at the authorization stage must be an exception rather than the rule, since the facts alleged in the motion for authorization are taken to be true, and since it is a general principle that assessing the appropriateness of proof is to be done narrowly.

Request for examination

Applying the guiding principles adopted by the Court of Appeal in *Agostino c. Allstate du Canada, cie d'assurance*, 2012 CarswellQue 3439 (C.A. Que.), Justice Peacock granted only one of the respondents' four requests (#3) regarding the proposed examination.

With regard to Request #1, Justice Peacock found that the petitioner's Amended Motion for Authorization adequately detailed the relief provided to the petitioner, and that further examination on this point would speak inappropriately to the merits of the case.

With regard to Request #2, Justice Peacock found that the petitioner's research, knowledge and testing of the alleged graphics defect pertain to the merits of the case. He held further that the subject matter of the request could be argued by reference to the facts already stated by the petitioner.

With regard to Request #3, Justice Peacock found that examination on this point was warranted, since it would assist with assessing whether the certification criteria at Art. 575, paras. 1 and 3 are met. Since the petitioner had received a new MacBook Pro from Apple, as well as a refund for the amount he paid for repairs, Justice Peacock noted that the petitioner's situation may now be different than the situations of other putative class members. Therefore, he held that an examination on this point could be useful in determining whether the putative class definition is workable and whether the putative class members have sufficiently similar claims.

With regard to Request #4, Justice Peacock found again that the Amended Motion for Authorization provided sufficient facts (assumed to be true) regarding this issue.

Request to file affidavit evidence

Justice Peacock refused permission for the respondents to file an affidavit "[providing] a description of the REP", since the petitioner had already given details of his understanding of the REP and his interactions with said program. Justice Peacock noted that it would be open to the respondents to seek admission of evidence on the basis that the petitioner's Amended Motion for Authorization was false or inaccurate, but that they submitted their request only on the basis of providing additional detail and context.

Justice Peacock did, however, grant permission for the respondents to file an affidavit which would "provide indicative sales numbers and describe the response to the REP to date", on the basis that it would assist with judging whether the putative class members have sufficiently similar claims. The respondents sought to admit this proposed affidavit under seal, but did not

provide any justification for that request, so Justice Peacock reserved judgment in order to allow the respondents to provide justification, and then decide whether to file the affidavit or not, depending on whether the sealing order was granted.

Motion for confidentiality

At the motion hearing, the petitioner moved to have three exhibits pertaining to submissions and documents from putative class members and other MacBook Pro laptop owners sealed. Justice Peacock held that, since the respondents and their counsel had already received copies of the exhibits, there had been only a restricted waiver of litigation privilege, and that it would be "more prudent" to permit the sealing of the exhibits at the pre-authorization stage. He ruled, however, that if the application for authorization were to be granted, then the petitioner would be required to justify the continuance of the sealing order.

Related Articles:

Issue 2014-27—New Cases—"Class action filed in Quebec against Apple alleging MacBook Pro graphics defect"

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Naylor v. Coloplast Canada Corp.

2016 CarswellOnt 2648 (Ont. S.C.J.)

Decision:	Motion for discontinuation of class action and for approval of counsel fees—motion granted Date of Decision: February 22, 2016
Judge:	Perell J.
Court:	Ontario Superior Court of Justice

Lawyers:
Lawyers for the plaintiffs, Deborah Naylor and Catherine Houghton: Charles M. Wright and Jill S. McCartney
Lawyers for the defendant, Coloplast Canada Corporation: Timothy O. Buckley and Cheryl Woodin

Background:

The plaintiffs' proposed class action was one of several product liability class actions relating to transvaginal pelvic mesh ("TPM"), and was brought against a Canadian based manufacturer of TPM devices, Coloplast Canada Corporation ("Coloplast"). TPM devices are used to treat Pelvic Organ Prolapse ("POP") and Stress Urinary Incontinence ("SUI").

Ms. Naylor was implanted with one the devices as part of treatment for POP, and alleged she suffered personal injuries caused by Coloplast's negligently manufactured TPM device. Ms. Houghton brought a claim pursuant to s. 61 of the *Family Law Act*, R.S.O. 1990, c. F.3.

The parties agreed on a pre-certification settlement, for an undisclosed sum, for the claims of the plaintiffs and other known claims of putative class members. The plaintiffs then brought a motion pursuant to s. 29 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("*CPA*") for leave to discontinue the proposed class proceeding against Coloplast and for approval of legal fees and disbursements; other putative class members may negotiate settlements of their individual claims within 120 days after the discontinuance comes into effect.

Update:

Motion granted.

In a decision that stressed the Court's role in adequately accounting for prejudice to putative class members when determining whether to allow the discontinuance of a proposed class proceeding, Justice Perell concluded that the benefits of discontinuing the proposed class proceeding outweighed the deleterious effects.

Justice Perell noted that commencement of the proposed class proceeding suspended the running of the limitation period—pursuant to s. 28(1)(e) of the *CPA*, this protection ends once the action is discontinued. The prejudice was ameliorated in this case because the discontinuance was to take effect 90 days from the date of notice. Based on the publicity that had surrounded the case, Justice Perell found that there were likely a number of class members relying on the tolling protection, such that notice of the discontinuance and the potential impact on their rights was important. Justice Perell therefore modified the proposed notice to emphasize the impact of the discontinuance on the resumption of the limitation period.

Justice Perell approved the discontinuance, finding that providing advance notice of the effective date of the discontinuance would permit class members to seek legal advice and to take steps to protect their interests, including commencing individual actions, joinder of claims, finding another class counsel to start a new class action, and participating in the Settlement Program.

Justice Perell also approved payment to class counsel of $100,000 under the Settlement Agreement for fees and disbursements.

Related Cases:

O'Brien v. Bard Canada Inc., 2015 CarswellOnt 5377 (Ont. S.C.J.)

Vester v. Boston Scientific Ltd., 2015 CarswellOnt 19420 (Ont. S.C.J.)

Harper v. American Medical Systems Canada Inc., 2015 CarswellOnt 7877 (Ont. S.C.J.)

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IN THE NEWS

Settlement negotiation deadline extended in residential schools class action

Lawyers in a prominent group of class actions for residential school students in Newfoundland and Labrador are continuing settlement negotiations, putting the conclusion of the common issues trial on hold. The five actions, which involve five residential schools, are being case-managed and heard together. The actions are brought on behalf of approximately 1,200 class members who were not covered by the 2007 settlement agreement and subsequent apology that included most residential school survivors. While the class comprises students who attended the schools from 1949 until their closure, the five schools were founded prior to 1949, when Newfoundland and Labrador joined Canada, and thus the Canadian government's fiduciary obligation regarding those schools complicated the 2007 negotiations.

The actions had been proceeding through a high profile common issues trial in Newfoundland's Supreme Court, which has been covered by the Monitor in several issues (see Issue 2015-21—Case Updates—"*Anderson v. Canada (Attorney General)*", Issue 2015-22—Case Updates—"*Anderson v. Canada (Attorney General)*", and Issue 2015-26—Case Updates—"*Anderson v. Canada (Attorney General)*").

The settlement discussions are being held before retired judge Robert Wells. The trial was originally set to resume on February 29 if the discussions were unsuccessful, however that deadline was extended to allow further discussions, including meetings in Toronto on March 10-11. If the actions are not resolved, the hearings will resume on May 9, with closing arguments scheduled to take place June 9-10.

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Canadian securities class action filings down

NERA Economic Consulting has published its annual analysis of securities class action filings in Canada, finding only four actions were filed in 2015, down from 13 in 2014 and 11 in 2013.

The author identifies the high evidentiary "leave" requirement in order to proceed with a securities case to be the main barrier preventing new filings. Despite the Supreme Court's emphasis on leave being a low threshold in the landmark case of *Theratechnologies inc. v. 121851 Canada inc.*, 2015 CarswellQue 2764, 2015 CarswellQue 2765 (S.C.C.), and again more recently in *Canadian Imperial Bank of Commerce v. Green*, 2015 CarswellOnt 18335, 2015 CarswellOnt 18336 (S.C.C.), lower courts have been consistently dismissing cases at the leave stage (see for example: *Mask v. Silvercorp Metals Inc.*, 2015 CarswellOnt 16095 (Ont. S.C.J.); additional reasons 2015 CarswellOnt 19197 (Ont. S.C.J.)).

The leave requirement was initially proposed as a compromise to bar so-called U.S. style "strike suits", however its application has turned the process into a form of pre-discovery trial. The evidentiary imbalance at the leave stage, when key documents are often solely in the defendants' hands and, unlike at discovery, there is no requirement for complete disclosure, means that many plaintiffs face a significant evidentiary challenge when trying to meet the leave test as it is being interpreted and applied by the courts.

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Plaintiff to proceed first in battle of summary judgment motions in *Keatley Surveying Ltd. v. Teranet Inc.*

Keatley Surveying Ltd. v. Teranet Inc. is a class action brought on behalf of Ontario land surveyors, alleging that the defendant (the private corporation which contracts with the provincial government to manage Ontario's electronic land registry system) has infringed on the class members' copyright over their plans of survey. The claim seeks compensatory damages, statutory damages pursuant to s. 38.1 of the *Copyright Act*, R.S.C. 1985, c. C-42, disgorgement of any profit made from the alleged copyright infringement, and return and removal of all copyrighted works from the defendant's electronic database.

After a protracted certification battle which wound through three courts (see: Issue 2013-02—Case Updates—"*Keatley Surveying Ltd. v. Teranet Inc.*", regarding Justice Horkins' decision not to certify; Issue 2014-08—Case Updates—"*Keatley Surveying Ltd. v. Teranet Inc.*", regarding the Divisional Court's certification order; and, Issue 2015-07—Case Updates —"*Keatley Surveying Ltd. v. Teranet Inc.*", regarding the Court of Appeal's upholding of the Divisional Court's order), the merits of the claim are now being considered. In a brief decision dated February 19, 2016 (2016 CarswellOnt 2506), Justice Belobaba ruled on unsettled procedural issues prior to the summary judgment hearing on March 10-11, 2016.

First, Justice Belobaba dealt with sequencing. Both the representative plaintiff and the defendant brought summary judgment motions. The defendant's was filed pre-certification, several years ago, asking the Court to dismiss the plaintiff's breach of copyright claim. The former case management judge decided that the defendant's motion would be heard after certification. Now, post-certification, the plaintiff has cross-moved for summary judgment, asking that all of the seven certified common issues be decided summarily in its favour. Justice Belobaba noted that the defendant's motion would only answer the issues as posed by the defendant and would bind only the plaintiff and not the class. As such, he ruled that hearing the plaintiff's proper motion for summary judgment would be the only just and expeditious way to proceed, rather than risking any gaps or omissions.

Justice Belobaba also granted the plaintiff's request to supplement its four-year-old summary judgment motion record with three additional proposed affidavits. The defendant had opposed this relief, but provided no argument or evidence that it would suffer non-compensable prejudice as a result.

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Class members win suit over cancelled surgeries

A Quebec Court has dismissed the Federation of Medical Specialists' appeal in a class action involving individuals seeking compensation for missed surgeries in 2002 and 2003.

The action was filed in 2006 by Quebec's Council for the Protection of Patients, and alleges that medical specialists' pressure tactics led to approximately 3,360 surgeries being cancelled. At the time, medical specialists were locked in a dispute with the Quebec government over wages.

Class members are entitled to approximately $500 each, and are able to download claim forms from www.roylarochelle.com. Family members of eligible patients who have since died are entitled to compensation as inheritors.

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SPECIAL FOCUS

Ontario Superior Court signals willingness to bolster settlement approval process

Four recent Ontario Superior Court decisions demonstrate the increased scrutiny judges are placing on proposed settlements during the approval process.

In November 2015, Justice Perell and Justice Belobaba released settlement approval decisions criticizing the Saskatchewan-based Merchant Law Group (“MLG”) for their settlement-driven litigation strategy. In both decisions MLG's legal fees were either substantially reduced (*McCallum-Boxe v. Sony Corp.*, 2015 ONSC 6896, 2015 CarswellOnt 17439 (Ont. S.C.J.) [“*McCallum-Boxe*”]) or eliminated (*Bancroft-Snell v. Visa Canada Corp.*, 2015 ONSC 7275, 2015 CarswellOnt 17869 (Ont. S.C.J.) [“*Bancroft-Snell*”]).

In two decisions released this year, Justice Belobaba expressed frustration with what he described as “an almost “boiler plate” formulation of the reasons for court approval”, and sought additional affidavit evidence detailing the litigation risks, and why the proposed settlement amounts fell within a zone of reasonableness. Upon provision of further evidence, both settlements were approved (see *Sheridan Chevrolet Cadillac Ltd. v. Furukawa Electric Co.*, 2016 ONSC 729, 2016 CarswellOnt 1571 (Ont. S.C.J.) [“*Sheridan Chevrolet*”] and *AFA Livförsäkringsaktiebolag v. Agnico-Eagle Mines Ltd.*, 2016 ONSC 532, 2016 CarswellOnt 2169 (Ont. S.C.J.) [“*Agnico-Eagle*”]).

Background

Settlement approval is an essential aspect of the class proceedings regime in every province; the vast majority of actions are resolved through settlements, which are not binding unless approved by the court. While some academics have expressed concern that class action settlements pose a risk of collusion between class counsel and the defendant or its counsel and between class counsel (or class representative) and class members (see for example Janet Walker & Garry Watson, eds, *Class Actions in Canada* (Toronto: Emond Montgomery Publications, 2014) at pp. 173–179), judicial approval should alleviate any such concern, as it provides a measure of oversight and protection to all parties as well as to absent class members.

Litigation is innately adversarial. Courts have noted that this adversarial nature is absent when a settlement is presented for approval. As some authors have observed, the closest analogy to the settlement approval process is a settlement made on behalf of an infant or disabled person (see *Class Actions in Canada*, quoted above, at p. 178). While a representative plaintiff represents the interests of the absent class, judicial approval provides an additional layer of protection against an unfair or inferior settlement.

As stated by Justice Perell in *Bancroft-Snell*, the design of the approval process is meant to deter bad settlements and also ensure good settlements that achieve the goals of the class action regime—access to justice, behavior modification, and judicial economy. Since settlements by their nature aid in judicial economy, and generally have a limited effect on behavior modification, substantive and procedural access to justice will be the primary factor the Court will consider. As stated by Justice Perell, the Court's job is to "review a proposed settlement to ensure that class members have achieved access to justice through a representative action" (*Bancroft-Snell* at para. 50).

While the settlement approval requirements vary amongst the provinces, the Courts' focus will always be on whether the settlement is fair, reasonable, and in the best interest of the class as a whole. Recognizing that settlements are the product of compromise and need not be flawless, the Court in *Dabbs v. Sun Life Assurance Co. of Canada* stated [1998 CarswellOnt 2758]:

> Fairness is not a standard of perfection. Reasonableness allows for a range of possible resolutions. A less than perfect settlement may be in the best interests of those affected by it when compared to the alternative of the risks and costs of litigation.

In *Agnico-Eagle*, discussed below, Justice Belobaba similarly espoused the proposition that "a high degree of precision cannot be expected in valuing a litigation, especially regarding the estimation of the probability of particular outcomes" (*Agnico-Eagle* at para. 12). Nonetheless, a "ball park valuation" should be achievable.

The Cases

A. *McCallum-Boxe v. Sony Corp*

In *McCallum-Boxe*, Justice Belobaba approved a settlement between Sony and consumers of the company's popular "PlayStation 4" video-game console controllers. The action arose when Playstation 4 owners returned defective controllers for in-warranty repair or replacement and were forced to pay a shipping charge, which charge MLG alleged was impermissible. When MLG initiated the action in Saskatchewan and Ontario, they sued Sony for $10 million on the mistaken assumption that the class size was significant; in realty, only 400 consumers had paid the allegedly illegal shipping charge. Each of these consumers received $20 in reimbursement, leading to an $8,000 settlement that counsel for the defendants deemed "the smallest Canadian class action settlement on record". MLG asked for between $120,000 and $250,000 in legal fees.

At the settlement approval hearing, Justice Belobaba asked MLG whether their retainer agreements entitled them to compensation by way of hourly rates and multipliers or contingency amounts. MLG advised that had no written retainer agreements for this class action, or "many" of their class actions, and that MLG had always intended to recover their legal fees from Sony as part of a settlement agreement. Justice Belobaba wrote that it would be "obvious to anyone who gives this even a moment's thought" that this "settlement-driven" legal fees arrangement was "fundamentally and profoundly unacceptable", and provided perverse incentives including discouraging maximum commitment on behalf of the class. Even if class counsel were to win at trial, they would not be entitled to any compensation: there was no agreement for MLG to share in the recovery with the class, nor could they recover costs since the representative plaintiff had no liability for legal expenses. According to Justice Belobaba, "[t]he MLG arrangement encourages only a minimal commitment on behalf of the class leading to sub-optimal settlements negotiated by class counsel who are primarily interested in recovering a generous legal fees payment." Justice Belobaba deemed MLG's legal fee arrangement "the very antithesis of what is in the best interests of the class", and wrote that he was "disturbed" by the situation.

MLG's fee arrangements created exactly the kind of contradictory incentives that the settlement approval process is intended to guard against. As noted by Justice Belobaba, this kind of fee arrangement will be attractive to a defendant who is willing to negotiate a tiny settlement coupled with considerable legal fees for class counsel. In this situation, the defendant would still come out ahead, but the class members' best interests are subordinated through the "glaring conflict of interest", since dollars that might otherwise form part of the settlement available are instead allocated to class counsel's legal fees. Justice Belobaba ultimately determined that the defendants should pay MLG's fees in the amount of $30,000.

B. *Bancroft-Snell v. Visa Canada Corp.*, 2015 ONSC 7275, 2015 CarswellOnt 17869 (Ont. S.C.J.)

This action arose from allegations of a conspiracy to fix certain fees paid by merchants who accepted payment by Visa or MasterCard credit cards. The first Canadian action was commenced in Ontario, but similar actions were filed by counsel to the Ontario action (Branch MacMaster, LLP, Camp Fiorante Matthews Mogerman LLP, and Consumer Law Group) in British Columbia, Alberta, Saskatchewan, and Quebec. Over a year later, MLG commenced rival proposed class actions in Alberta and Saskatchewan.

The certification motion was argued in late April and early May 2013 in British Columbia. Chief Justice Bauman reserved judgment for ten months because of the significant developments in competition and class action law after the hearing (see e.g. the Supreme Court's decision in *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2013 SCC 57, 2013 CarswellBC 3257, 2013 CarswellBC 3258 (S.C.C.)). In the intervening time, counsel in the British Columbia action began settlement discussions with one of the defendants. Simultaneously, the Saskatchewan Court had scheduled a carriage motion, and MLG took the position that a carriage motion should also be scheduled in Alberta.

The British Columbia action was certified in March 2014, and the carriage issues in Alberta and Saskatchewan were resolved in August 2014. MLG agreed to stay its rival proposed actions and share in the fees paid to class counsel upon successful resolution of the original actions. Class counsel in the original actions assumed the responsibility and cost of obtaining the stays and agreed to indemnify MLG for costs of the stayed actions. According to submissions later filed by class counsel, “[r]egardless of the merits of the carriage and stay arguments against the Merchant Law Group, the MLG Proceedings had the potential to create chaos, delay and significant prejudice to class members” (see para. 28).

In November 2015, the plaintiffs brought a motion before Justice Perell for approval of settlements reached with three of the twelve defendants, and approval of the fee arrangement with class counsel, which included approval of class counsel's fees and disbursements of almost $4 million. Justice Perell reduced class counsel's fee by 10%, and refused to approve the fee sharing agreement between class counsel and MLG, ruling it “unauthorized, unenforceable, and possibly illegal” as champerty and maintenance. Because MLG did not contribute to the settlement agreement, they had no right to share in the recovery, and Justice Perell ordered that class counsel not pay MLG any sums on account of this “possibly illegal” fee sharing agreement.

Justice Perell noted the fee sharing agreement was not in the best interest of the class, stating, “it is not fair and reasonable for the class members under the supervision of the Ontario Court to have to pay for legal services that were useless to them and that simply ran up the expense of the legal services that actually had some utility” [para. 71].

While class counsel believed that the fee sharing agreement was in the best interests of class members, their fee was nonetheless discounted. According to Justice Perell, this reflected (in part) the fact that class counsel could have incorporated the risk of a carriage fight into their contingency fee. Justice Perell stated that rather than making the agreement, class counsel should have taken on the “good fight” and opposed MLG in a carriage motion, and earned the contingency fee that they sought to have approved.

C. ***Agnico-Eagle***

Agnico-Eagle Mines is a Canada-based gold producer with operations in Canada, Finland, and Mexico. In this securities class action, the plaintiffs alleged that the defendant gold miner misrepresented the scope and effect of “water inflow” problems at one of its gold mining properties in Quebec, resulting in shareholder losses. The action was certified on consent in April 2013 (see *AFA Livförsäkringsaktiebolag v. Agnico-Eagle Mines Ltd.*, 2013 CarswellOnt 4524 (Ont. S.C.J.)). Compromises were made in advance of the consent motion for certification: the scope of the defined class was narrowed, and the plaintiffs agreed to delete claims in negligence and negligent misrepresentations and focus solely on claims under the *Securities Act*, R.S.O. 1990, c. S.5 and the statutorily capped damages awards. In the plaintiffs' view, the potential damage award under the *Securities Act* would be “more than adequate” on the facts.

Eventually, the parties agreed on a $17 million settlement and attended before Justice Belobaba on January 20, 2016 to seek approval of the settlement and class counsel's legal fees.

Justice Belobaba found it problematic that class counsel did not provide information as to why the settlement fell within a zone of reasonableness, and would have liked “information explaining why the case settled for $17 million and not … $37 million or $57 million” [para. 9]. Justice Belobaba also criticized the practice of class counsel generally to present an “unhelpful catalogue” of generic and self-serving reasons why the settlement should have been approved.

Justice Belobaba wrote that judicial approval of securities class action settlements, and class action settlements more generally, left “much to be desired”, and that judges should “do more” to ensure that a proposed settlement is in the best interests of the class [para. 2]. According to the Court, approval of class action settlements was the most problematic area of the practice, and the risk of “sweetheart” settlements, where class members' interests are compromised in favor of class counsel's are particularly prominent in the settlement of securities class action.

Justice Belobaba stated that in order to satisfy themselves that a proposed settlement is fair and reasonable and in the best interests of the class, in addition to making sure that the settlement was negotiated at arm's length, judges ought to:

A. scrutinize the actual agreement and supporting affidavit material for any so-called “structural” indicators that suggest collusion or conflict of interest; and

B. satisfy themselves that the settlement amount falls within a range or zone of reasonableness.

Not persuaded by the boiler-plate recitation by class counsel, Justice Belobaba asked class counsel for further information about to the settlement. While class counsel was resistant to producing the mediation briefs he requested because of their confidential nature, they did agree to file a supplementary affidavit describing the litigation risks and range of possible damage recoveries in more detail. Justice Belobaba was persuaded by the additional evidence, and approved the settlement.

Justice Belobaba wrote that judicial approval of class action settlements needed more rigor, and that class action judges must do more than acquiesce to the self-serving submissions of class counsel, noting that some commentators are suggesting that “the time has come for settlement approval judges to appoint independent counsel that can review and oppose the settlement if it is not in the best interests of the class” [para. 17].

D. *Sheridan Chevrolet*

This class action is one of a litany before Ontario courts that allege price-fixing in the automotive parts industry relating to automotive wire harness systems (“AWHS”), instrument panel clusters (“IPC”) and fuel senders. Yazaki and Chiyoda are both Japanese corporations, and this settlement relates to the Yazaki, defendants with regard to the AWHS, IPC, and fuel sender categories, and the Chiyoda defendants, with regard to AWHS. The various actions were settled as follows:

1. Yazaki IPC: $500,000

2. Yazaki Fuel Senders: $100,000

3. Chiyoda AWHS: $75,000

4. Yazaki AWHS settlement: $10.4 million

Each of the settlements requires the defendants to provide substantial cooperation in the ongoing prosecution of the actions.

The first three settlements were approved without issue. Justice Belobaba had “no difficulty” granting approval, given the explanations provided by counsel and his belief that the settlements were fair and reasonable and in the best interest of the class.

Justice Belobaba had qualms with regard to the $10.4 million Yazaki AWHS settlement. While he found that the class definition and proposed common issue were clear, it was the actual settlement that he found problematic: the “boiler-plate” formulation of the reasons for Court approval were insufficient to allow him to properly assess the settlement. Justice Belobaba wrote

that class counsel should provide specific and clear reasons why the settlement amount is within the zone of reasonableness. Justice Belobaba therefore requested additional information from class counsel, who filed a supplementary affidavit almost immediately. The supplementary affidavit spoke to the economics of price-fixing, the value of Yazaki's cooperation, the quantum of settlements in other jurisdictions, and the significant litigation risks. With the assistance on this additional information, Justice Belobaba found that the settlement should be approved.

Conclusion

The rulings in the securities class actions and the MLG cases were driven by vastly different circumstances, however their cumulative effect indicates that courts are increasingly willing to closely scrutinize proposed settlements to ensure they are fair, reasonable and in the best interests of the class. As part of the approval motion materials, counsel should consider providing information about the litigation risks, the quantum of damages that might be achieved at trial, as well as any other relevant factors that will permit a Court to assess the reasonableness of the proposed settlement.

Related Cases

AFA Livförsäkringsaktiebolag v. Agnico-Eagle Mines Ltd., 2016 ONSC 532, 2016 CarswellOnt 2169 (Ont. S.C.J.)

Bancroft-Snell v. Visa Canada Corp., 2015 ONSC 7275, 2015 CarswellOnt 17869 (Ont. S.C.J.)

Dabbs v. Sun Life Assurance Co. of Canada, 1998 CarswellOnt 2758, 40 O.R. (3d) 429 (Ont. Gen. Div.); affirmed 1998 CarswellOnt 3539 (Ont. C.A.); leave to appeal refused (1998), 41 O.R. (3d) 97n (S.C.C.); additional reasons 1998 CarswellOnt 5915 (Ont. Gen. Div.)

Gariepy v. Shell Oil Co., 2002 CarswellOnt 3472 (Ont. S.C.J.)

Kutlu v. Laboratorios Leon Farma, S.A., 2015 ONSC 7117, 2015 CarswellOnt 17446 (Ont. S.C.J.)

McCallum-Boxe v. Sony Corp., 2015 ONSC 6896, 2015 CarswellOnt 17439 (Ont. S.C.J.)

Sheridan Chevrolet Cadillac Ltd. v. Furukawa Electric Co., 2016 ONSC 729, 2016 CarswellOnt 1571 (Ont. S.C.J.)

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