BRINGING AND DEFENDING CLASS ACTIONS: 10 THINGS PLAINTIFFS' AND DEFENSE COUNSEL NEED TO KNOW

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CLASS ACTIONS FOR LITIGATORS
Law Society of Upper Canada

November 15, 2016

I. TAKING THE CASE: PLAINTIFF's COUNSEL (Linda Visser)

It is important to carefully assess the strengths and weaknesses of a potential class action before jumping into litigation. You should approach the investigation stage of a class action with the assumption that you will be taking the case to trial. It is a mistake to assume that a defendant will settle the case early or as soon as the action is certified.

In selecting the right class action, a number of factors should be considered by plaintiffs' counsel, including:

(a) **Does the plaintiff have a valid legal claim**? Consider whether there is an actionable cause of action and whether any limitation issues exist.

(b) **Are there common issues**? Not all good cases are suitable for class certification. At certification, you will required to establish "some basis in fact" that the issues are common among class members.

(c) **Is the class action economically viable**? Consider what the damages are and if they are recoverable. In addition to general solvency concerns, defendants located in certain countries may be difficult to serve with the proceedings or enforce a judgment against.

(d) **Consider the costs associated with pursuing the class action**. Generally, class actions are pursued on a contingent fee basis with plaintiffs' counsel investing their time and advancing the expenses incurred in the litigation. Disbursements (including expert fees) can easily be in the hundreds of thousands, including to get the case to certification. For example, in the LCD price-fixing case, the plaintiff incurred approximately $350,000 in disbursements (largely made up of expert fees) in respect of the certification motion.[1] Plaintiffs' counsel will typically indemnify the representative plaintiff(s) against any adverse cost award. Adverse cost awards are often significant, especially in cases requiring substantial expert opinions. For example, in *Martin v AstraZeneca Pharmaceuticals PLC* (a pharmaceutical class action), the plaintiffs were required to pay costs of approximately $700,000. This included approximately $126,000 in expert fees.[2] In *MacQueen v Sydney Steep Corp.* (an environmental class action), the plaintiffs were ordered to pay costs of approximately $738,000.[3]

When your investigation has led to a decision to pursue a class action, there are a number of initial steps you must take. These include:

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[1] *Fanshawe College of Applied Arts and Technology v LG Philips LCD Co., Ltd.* (21 October, 2011), London 54054CP (Ont Sup Ct)

[2] *Martin v Astrazeneca Pharmaceuticals PLC*, 2012 ONSC 4666, aff'd 2013 ONSC 1169 (Div Ct).

[3] *MacQueen v Sydney Steep Corp.,* 2014 NSCA 96, leave to appeal refused 2015 Carswell NS 259 (WL) (SCC)

(a) **Drafting a good pleading**. While you may be in a rush to file at the courthouse, it is important to take the time to draft a strong pleading. This document will frame the theory of your case and will impact the court and defendants' first impression of your case.

(b) **Drafting a good retainer**. Ensure that the representative plaintiff's retainer agreement is compliant with all relevant legislation. Remember that the retainer agreement will be subject to court approval.

(c) **Deciding where to file**. If you have the option, consider what courthouse to file the claim in. Some courts are busier than others, and this may result in delays in your case.

(d) **Consider possible funding services**. Decide whether to apply to the Class Proceedings Fund or a third party funder. The benefit to obtaining funding is that your disbursements and any adverse cost award will be financed by the Fund. The main disadvantage is that the Fund is then entitled to 10% of any recovery in the case. Third party funders might offer a more favourable percentage, but could also want some control in decision making.

(e) **Register with the National Class Action Database**. The Database lists all class actions filed in Canada after January 1, 2007 that are sent to the Canadian Bar Association. Its goal is to address some of the challenges for the administration of justice and effective management of judicial resources that arise from multi-jurisdictional class actions. To post a proceeding on the Database, complete the Database Registration Form and send it along with the original pleadings and certification motion to the CBA at classaction@cba.org.[4]

(f) **Consider whether to collaborate with another firm** (see Playing Together – section III below).

II. GETTING THE CASE: DEFENDANT COUNSEL (Laura Cooper)

Upon being retained to defend a class action, either by an existing client or as a result of a pitch or proposal process, it is very important to begin to develop a comprehensive plan for the action at the outset.

Early case assessment

The plaintiff's notice of action or statement of claim will be the starting point for the early assessment of the case. Upon receiving the notice of action or statement of claim it is important to begin to consider the defence of the case from both a procedural point of view and with regard to the ultimate merits of the case. Discussions should also take place with the client regarding

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[4] See http://www.cba.org/Publications-Resources/Class-Action-Database/About

other issues of particular importance to them in including reputational risk, exposure from other proceedings, and potential impact of a negative decision on their manner of doing business.

At the outset, consideration should be given to whether or not there are any available challenges to jurisdiction or venue of the class action. This will require an assessment of the pleaded case, the law, and often specific facts relating to the client. It is important to avoid inadvertently attorning to a jurisdiction by delivery of a notice of intent to defend or appearance or taking some other step before a determination is made with respect to jurisdiction or venue. In the interim, counsel can participate in case conferences and other initial matters without delivering a notice or appearance by expressly stating to the plaintiff counsel, and the court as necessary, that such appearance or involvement is not to be taken as an attornment and is without prejudice to any positions on jurisdiction or venue. At some point a date will be set by which a notice must be delivered or a motion to challenge brought, but until then counsel can monitor the proceedings and participate in calls and case conferences without making a final determination.

Also important is an analysis of the certification test in relation to the pleaded claim. The claim should be carefully reviewed and considered, and any necessary research conducted, in order to determine what defences are available to certification. In most cases it will also be important to conduct at least a limited factual review with respect to certification issues. An early assessment of the likelihood of certification is helpful in determining overall strategy and providing the client with sufficient information to make an informed decision as to how to best defend the case. It is important to perform this assessment at the outset, in order to focus the client's expenditures on what is most likely to support the long-term strategy in respect of the case.

In class proceedings, a full merits review may be delayed somewhat by the procedural nature of the certification process. However, it is important early on to conduct a sufficient factual review to be able to determine whether or not the client is likely to ultimately be successful at trial, if the action is certified. Given the relatively low bar for certification in recent jurisprudence, it may make sense in some circumstances to focus efforts on the merits phase rather than at certification, depending on facts and the procedural strength of the class action defences. In other situations it may be worthwhile for various reasons to defend certification vigorously.

An initial assessment of the potential damages exposure should also take place at the outset, so that the client can evaluate its risk having regard both to liability and damages issues and make decisions with respect to how to defend on that basis.

Contact with other counsel

Shortly after being retained defence counsel should contact plaintiff counsel to inform them of their involvement. If this initial contact takes place in a phone call or in person, it should be followed by correspondence, confirming that counsel has been consulted in connection with the class proceeding on behalf of a particular defendant or defendants, are taking steps to review issues of jurisdiction and venue, and will be in touch in due course. The letter should also request that no steps be taken to the detriment of that named defendant without advance notice to you as defence counsel, and indicate that if there is any issue with proceeding on this basis plaintiff counsel should so indicate immediately.

Most class proceedings involve multiple defendants. If you are not aware of the identity of counsel for other defendants, you may wish to ask plaintiff counsel to let you know who else is involved, so you can contact other defence counsel and ask to be included in any defence counsel group to be formed.

III. PLAYING TOGETHER: PLAINTIFF'S PERSPECTIVE (Linda Visser)

There cannot be more than one class action in the same jurisdiction certified to advance the same claim on behalf of the same class. When multiple plaintiff-side firms choose to pursue the same case, there are two options: collaborate with the other firm(s) or engage in a carriage battle.

Collaboration

Collaborating with one or more other law firms can be advantageous in a number of respects. At the outset, it allows class counsel to focus on moving the litigation forward rather than fighting among themselves. As the litigation progresses, counsel teams can divide the workload, share expenses, consult on strategic decisions, and benefit from complementary expertise. These considerations may be particularly pertinent to small firms or firms with limited class action experience (or little experience in a particular area), who would benefit from partnering with class counsel with relevant experience. If you chose to work with other law firms, it is worth taking the time to formalize an agreement. An agreement might address how work is to be divided, strategic decisions are to be made and fees are to be shared, as well as the manner in which time and expenses are recorded and shared with co-counsel, and how any disputes are to be determined.

The main disadvantages to working with other counsel include sharing fees, the potential for duplicative work, and slower decision making.

Counsel teams may encourage opportunistic filers (these are firms who file claims late in the day with the sole goal of joining a team and negotiating a fee-sharing agreement). However, the recent decision in *Bancroft Snell v Visa*[5] may deter such practices. *Bancroft* was a class action commenced in Ontario that dealt with an alleged conspiracy to increase or maintain the fees paid by merchants on credit card transactions. Similar class actions were commenced in British Columbia, Alberta, Saskatchewan, and Quebec by parties represented by the same lawyers acting for the plaintiffs in *Bancroft*. Subsequently, the Merchant Law Group ("Merchant") filed competing actions in Alberta and Saskatchewan.

In the context of a carriage motion in Alberta, Associate Chief Justice Rooke (the Alberta case management judge) urged class counsel and Merchant to attend a two-day Judicial Dispute Resolution Conference presided over by Justice S. Martin. With the assistance of Martin J., class counsel entered into a fee-sharing agreement with Merchant in exchange for Merchant staying its rival class actions in Alberta and Saskatchewan. On a motion to approve fees, Justice Perell

5 *Bancroft Snell v Visa*, 2015 ONSC 7275.

found the agreement with Merchant to be unauthorized, unenforceable and possibly illegal as champerty and maintenance. Justice Perell reasoned that it was not fair, reasonable or just for class members to pay what amounted to a ransom fee in order to stay the late-arriving actions in Alberta and Saskatchewan. He concluded that Merchant did not make a contribution to the achievement of the settlement and his services were useless to the class, hence the firm should not share in the recovery.[6]

A decision of the Queen's Bench for Saskatchewan in the diamonds price-fixing litigation may also be a deterrent.[7] The diamonds litigation relates to allegations of price-fixing in the market for gem grade diamonds. An action was commenced in British Columbia on behalf of the residents of that province who purchased gem grade diamonds. Similar litigation was commenced in Ontario on behalf of a national class, excluding BC residents. Ontario and BC class counsel decided to work cooperatively, and agreed that the BC action would take the lead. Subsequently, Merchant filed a competing national multi-jurisdictional action relating to the same subject matter in Saskatchewan.

In a motion to stay the Merchant action, the Queen's Bench for Saskatchewan noted that "the Ontario and British Columbia plaintiffs have done the heavy lifting to date," while the "Saskatchewan plaintiffs have been building on the work of the Ontario and British Columbia plaintiffs." Moreover, in the face of the Ontario action already having been commenced, the Merchant action amounted to a duplicative proceeding, the existence of which created the prospect of complication, greater expense, delay, inefficiency and risk of conflicting decisions. The court therefore determined that Ontario was the more appropriate venue for the multi-jurisdictional class action, and stayed the Merchant action until a decision on certification is rendered in the Ontario action.[8]

Carriage

The advantage to engaging in a carriage battle is that, if you are ultimately successful, you will not have to share your fees or work with any firms that you would rather not partner with. By keeping all of the work at one law firm, you may also avoid some of the inefficiencies common to counsel groups (e.g. duplicative work, overstaffing, etc.). However, keep in mind that in a carriage motion, the defendants will watch as rival plaintiffs' firms review and criticize each other's work, pointing out any weaknesses in the other firm's case.

In a carriage motion, the focus of the courts is not which law firm "wins" on the most factors. Rather, the focus is on the best interests of the class and fairness to the defendants, having regard to access to justice, judicial economy and behaviour modification.[9]

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[6] *Bancroft Snell v Visa*, 2015 ONSC 7275 at paras 23, 64, 68-69 and 72-76

[7] *Ammazzini v Anglo American PLC*, 2016 SKQB 53.

[8] *Ammazzini v Anglo American PLC*, 2016 SKQB 53 at paras 28-30 and 58; leave to appeal granted 2016 SKCA 73. A settlement has since been achieved in the BC and Ontario action on behalf of a national class.

[9] *Mancinelli v Barrick Gold Corp.*, 2016 ONCA 571 at para 22.

Courts generally consider a long list of non-exhaustive factors in determining which action should proceed.[10] The relevant factors include: (i) the nature and scope of the causes of action advanced; (ii) the theories advanced by counsel as being supportive of the claims advanced; (iii) the state of each class action, including preparation; (iv) the number, size and extent of involvement of the proposed representative plaintiffs; (v) the relative priority of commencing the class actions; (vi) the resources and experience of counsel; (vii) the presence of any conflicts of interest; (viii) funding; (ix) definition of class membership; (x) definition of class period; (xi) joinder of defendants; (xii) the plaintiff and defendant correlation; and (xiii) prospects of certification. Class counsel's fee agreement may be an additional factor.

The courts will generally not engage in a "beauty contest" as between firms. For instance, a history of judicial criticism will not necessarily disqualify a firm from being awarded carriage of a class action. In *Mancinelli v Barrick Gold Corp.*, [11] the motion judge awarded carriage to a consortium of law firms including Merchant. In affirming the motion judge's decision, the Ontario Court of Appeal noted that the court has a duty to protect class members and a broader duty to the administration of justice when approving counsel in a carriage motion. This duty may, at times, require the court to exclude counsel due to prior misconduct or a history of commencing class actions, not pursuing them, and then using them to demand ransom from other counsel in carriage disputes. However, in this instance the motion judge was aware of these duties and of Merchant's background, and it was within his discretion to award carriage to a consortium that included Merchant.[12]

IV. PLAYING TOGETHER – DEFENDANT'S PERSPECTIVE (Eliot Kolers)

Many class proceedings have multiple defendants, each of which will typically be represented by different counsel. In such circumstances, it is generally highly beneficial for the defendants to form a joint defence group cloaked with a common interest privilege so they can work together to respond to the claim. Doing so increases efficiency by avoiding the duplication of efforts, increases the likelihood of consistency in approach, and permits the sharing of expert and some other costs. Of course, if one or more defendants are differently situated from the others, or have unique strategic circumstances, they may wish to stay outside a joint defence group in order to pursue their own interests or simply because they don't have a fully common interest with the others; these considerations will have to be made on a case-by-case basis.

Joint Defence Agreements

In circumstances where defendants have agreed to form a joint defence group, they will need to consider whether to enter into a written Joint Defence Agreement or simply to agree to operate under an express oral agreement to similar effect. The former typically would contain provisions acknowledging the common interest among the defendants and setting the parameters for

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[10] See *Mancinelli v Barrick Gold Corp.*, 2016 ONCA 571 at paras 14-18.

[11] *Mancinelli v Barrick Gold Corp.*, 2014 ONSC 6516 aff'd 2016 ONCA 571.

[12] *Mancinelli v Barrick Gold Corp.*, 2016 ONCA 571 at para 72.

cooperation, privilege and confidentiality, and the termination of the agreement. An oral agreement would similarly confirm the common interest of the parties and the fact that any party who no longer believes they share the common interest has an obligation to inform the group and remove themselves from further joint communications and efforts. The typical reason for a party to terminate a joint defence arrangement would be where the party reaches an agreement in principle to settle the case with the plaintiff.

Where defendants are working together, it is common for them to share the cost of expert witnesses. The apportionment of costs among the defendants will be an area of negotiation and may relate to proportionate liability, proportionate market share (if different from liability), or to match a division among the same defendants in a different jurisdiction where the parties are already working together. It may also make sense to simply divide the costs equally among the defendants. Typically, a party is responsible for its share of the costs until the cost is fully incurred or until the party gives notice that it is exiting the group (for example if a settlement has been reached by the party), but this can also be the subject of negotiation.

Tolling Agreements

Finally, in circumstances where there are multiple defendants, the defendants may wish to assert claims for contribution and indemnity against one another. Under the current state of the law in Ontario,[13] defendants have 2 years from the date on which they are served with a claim to commence a claim over for contribution and indemnity. Doing so, however, may interfere with joint defence efforts and also projects an image to the court of a divided defence group. It has therefore become fairly common for defendants to enter into tolling agreements among themselves in order to preserve their ability to bring claims over if and when the need arises, but allows them to continue to work together in common to resist the claims in the short and medium term. Tolling agreements should have provisions that clearly halt the running of the limitations periods and also provide a mechanism for a party to exit from the agreement on notice at an appropriate time.

V. NATIONAL CLASS ACTIONS (Laura Cooper)

It some cases multiple class actions are commenced with respect to the same subject matter. If all actions were to proceed there could be a risk of duplication, inefficiency and potentially conflicting results. As noted above, where there is more than one proceeding in a particular province, the issue can be resolved by way of a carriage motion in which the court is asked to determine which plaintiff counsel or group will be awarded carriage of the class proceeding. However, where there are multiple proceedings in various provinces the issue is more complicated. In those cases there can be multiple plaintiff counsel firms seeking to litigate the class proceeding in their own jurisdiction on behalf of similar putative classes or in some provinces on behalf of putative national classes which overlap.

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[13] *Waterloo Region District School Board v. Truax Engineering Ltd.*, 2010 ONCA 838 (CanLII).

The United States has an "MDL" (multi district litigation) process that assists in organizing such a multiplicity of proceedings. In Canada we do not have a formal process and so multiple proceedings are dealt with in various ways.

Cooperation amongst plaintiffs

Often, when multiple proceedings have been commenced, plaintiffs' counsel will work together to form a plaintiff counsel group and will decide amongst themselves how to proceed. If, for example, there is one proceeding in each of Ontario, Quebec and BC, plaintiffs' counsel in each of those cases may agree that one case should proceed first, with others to follow if and when necessary. Agreement may also be reached on the scope of the class in each jurisdiction, with one province being home to a national class, and others restricted to classes relating to their own provinces. Generally speaking, the defendant does not have any input into this choice, although if there is something prejudicial to the defendants that issue can be raised with one of the courts.

Jurisdiction/venue motions

In some cases defendants will seek to stay an action in one or more provinces on the basis that that province lacks *jurisdiction simpliciter* over the proceeding, or the province is not the most convenient forum for litigation of the action. In considering those issues, the Ontario courts have applied the same principles in class actions as would be applicable in individual actions, which can be summarized as follows:

(a) **Multiple Proceedings** – While a multiplicity of proceedings should generally be avoided, this consideration should not be given undue weight, and overlapping proceedings are not inherently abusive or unfair. It is necessary to consider whether there are legitimate reasons for commencing and maintaining the action sought to be stayed.

(b) **Inconvenience** – Mere expense and inconvenience of litigating in two forums is not sufficient grounds to deprive a plaintiff of its choice of forum, or depriving Ontario class members of the right to have their claims adjudicated in Ontario.

(c) **FNC Factors** – The factors relevant to a *forum non conveniens* analysis will be relevant in determining whether an Ontario action should be stayed in favour of a parallel action in another province. The court may consider the juridical advantages available in each jurisdiction, as well as other practical factors that may make it more just and convenient to adjudicate the matters in issue in one forum rather than the other.

(d) **Timing** – The relevant considerations should not include which action was commenced first or certified first.[14]

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[14] See for example, *Kaynes v. BP*, plc, 2014 ONCA 580; *Mignacca v. Merck Frosst Canada Ltd.*, [2009] O.J. No. 821 (Div. Ct.). The approach taken in decisions rendered by the courts in other provinces is also generally consistent with

While a motion to stay a domestic class action in favour of a parallel class action in another province will generally be governed by the same principles that govern motions to stay individual actions, there is one respect in which the analysis may differ. Because of the procedural flexibility afforded by the *Class Proceedings Act*, arguments concerning the prejudice that the moving party anticipates if multiple actions are permitted to proceed will often carry less weight on the grounds of prematurity, as the issue may be revisited in the future depending upon how each of the parallel actions evolve.[15]

VI. MOVING OF THE CASE FORWARD TO CERTIFICATION (Linda Visser)

For the purposes of the certification motion, you will need to establish each of the elements in s. 5 of the *Class Proceedings Act*, *1992*.[16]

Cause of Action

The first element requires the plaintiff to establish that the pleadings disclose a cause of action. The court will apply the same test used in a motion to strike: assuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? This hurdle will be significantly easier to pass if you took the time on the front-end to ensure that your pleadings are strong and incorporate all of the elements of the alleged offenses. As certification is not about the merits of an action, the plaintiff is not required to provide some basis in fact for the allegations contained in the statement of claim.

Identifiable Class

Another early step you should take in the litigation is to frame the class. What is its scope? Does it include international class members? If so, does the court have jurisdiction? Class definition is critical because it identifies the persons who are entitled to notice, to relief if awarded, and who will be bound by any judgment or settlement. At certification, you will be required to demonstrate an identifiable class of two or more persons. The class must be defined by objective criteria and there must be a rational relationship between the class and the common issues.

Common Issues

The remaining requirements must be proven to the "some basis in fact" standard. Early in the litigation, you should begin to define your common issues and consider what evidence is

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these principles. See for example, *Turner v. Bell Mobility Inc.,* 2016 ABCA 21, *Lamb v. Bayer Inc.,* 2003 SKQB 442 and *Ammazzini v. Anglo American PLC,* 2016 SKQB 53

[15] *Mignacca v. Merck Frosst Canada Ltd.,*[2009] O.J. No. 821 (Div. Ct.).

[16] *Class Proceedings Act*, *1992,* S.O. 1992, c. 6, as amended.

required to certify those issues. Although "some basis in fact" is a lower standard of proof than the "balance of probabilities" standard used in civil trials, it may still be necessary to adduce expert evidence. For example, in a price-fixing class action, expert evidence is required at certification to establish fact of loss and the quantum of impact. In a pharmaceutical case, expert evidence is required to establish a common design defect or a failure to warn.

Also consider whether damages can be assessed in the aggregate. If so, think about what methodology you will use to assess aggregate damages and what information and data will be required to support that methodology.

Notwithstanding guidance from the Supreme Court that at certification the court is "ill-equipped" to resolve conflicts in the evidence or engage in "finely calibrated assessments of evidentiary weight,"[17] defendants will typically file competing evidence in an attempt to turn the motion into a battle of the experts.

Preferable Procedure

The preferable procedure requirement generally turns on whether there are common issues that will significantly advance the litigation. Courts will also consider alternatives to a class action, including, for example, joinder of claims, arbitration, tribunal proceedings, or other alternative dispute resolution mechanisms. Consider these possibilities and be prepared to address them at certification.

Representative Plaintiff

In terms of the representative plaintiff, the most important tasks are to establish the plaintiff's membership in the class and identify any possible conflicts of interest the plaintiff has with other class members. Consider any unique circumstances applicable to the plaintiff that the defendant could point out to give the appearance of a conflict of interest.

In the securities context, additional considerations apply for claims proposed to be asserted under the secondary market civil liability provisions of the Ontario *Securities Act*.[18] To commence a statutory misrepresentation claim under Part XXIII.1 of the Ontario *Securities Act*, the plaintiff must be granted leave to proceed under s. 138.3(1) of the *Act*. Leave will be granted where (i) the claim is being brought in good faith; and (ii) there is a reasonable possibility that the plaintiff will succeed at trial. The evidentiary burden in a motion for leave is higher than in a motion for certification. While the Ontario Court of Appeal interpreted the leave standard as being "a relatively low threshold,"[19] in interpreting the Quebec equivalent of s. 138.8, the Supreme Court

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17 *Pro-Sys Consultants Ltd. v Microsoft Corp.*, 2013 SCC 57 at para 102.

18 RSO 1990, c S 5.

19 *Bayens v Kinross Gold Corporation,* 2014 ONCA 901 at paras 49-50.

held that the “reasonable possibility” threshold is more than a “speed bump” and requires the plaintiff to “offer both a plausible analysis of the applicable legislative provisions, and some credible evidence in support of the claim.”[20]

VII. DEFENDING THE CERTIFICATION PHASE (Laura Cooper)

Unless there are issues of jurisdiction or venue, the first major step in a class proceeding will usually be the certification motion. Statements of defence are typically not filed in advance of the certification motion, in large part because until a decision is reached on certification, it will be unclear what if any case is to be defended. There are exceptions to this practice, and in some cases plaintiffs’ counsel will request that defendants file statements of defence. If agreement cannot be reached the judge will be asked to determine this issue.

Consideration should also be given by defendants’ counsel to whether there are any advantages to the filing of a statement of defence. In such a case, counsel should attempt to obtain plaintiffs’ counsel’s acknowledgment that delivery of the defence at this stage does not open the door to pre-certification discovery. Without that acknowledgement, the benefit of an early defence may very well be outweighed by the risk that its delivery could prompt early discovery.

Some issues that in individual cases would be the subject of early motion may be dealt with as part of the certification motion or during the time set aside for that motion. By way of example, pleadings issues will often be addressed through the cause of action portion of the certification test. However, consideration should always be given to whether or not there are important pre-certification issues to be addressed, including pleadings issues, security for costs, or determination of a point of law. Even if the court ultimately determines that the issue should be dealt with at the time of the certification motion, the request to be heard can itself assist in identifying to the court a serious issue early on in the case.

The approach to be taken to the issue of certification must also be carefully considered. In some cases it is appropriate to mount a full defence to all aspects of certification. In other cases, in which it is clear that some components of the certification test are met, the better defence can be to focus only on those issues that can be seriously disputed, and to concede on others. Consideration should also be given early on to whether there is any benefit to be gained by negotiating a consent certification order in exchange for a narrower certified class or causes of action. In an appropriate case this can assist your client to avoid most of the cost of the certification process, while moving forward towards a merits determination which may be more likely to be favourable.

Given the time, costs and exposure involved in defending certification it is important to do an early assessment of all the relevant factors to determine at the outset how best to proceed.

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[20] *Theratechnologies Inc. v 121851 Canada Inc.*, 2015 SCC 18 at paras 38-39.

VIII. SETTLING OF A CLASS ACTION BY THE PLAINTIFF (Linda Visser)

Negotiating a Settlement

Arriving at a class action settlement can be difficult. The relevant factors to be considered in assessing the adequacy of a settlement vary depending on the circumstances of the case and can include:

(a) the number of class members likely to file a claim and the value of the claim;

(b) litigation risks, such as limitation issues, difficulties establishing causation, etc.;

(c) enforcement risks;

(d) the likely delays associated with proceeding to a common issues trial; and

(e) the volume of affected commerce or securities.

A settlement is more than a number. It is important to put careful thought into the structure of the settlement, including:

(a) **Currency –** What currency are the monies payable in? At times, it may be advantageous to negotiate in a foreign currency. Be aware of the risk that the exchange rate will fluctuate after a deal is reached.

(b) **Payment Timing –** When are the monies payable? Some defendants prefer to pay in increments. This may allow for a greater settlement amount, but requires the plaintiff to take on additional risk of non-payment and/or currency risk.

(c) **Settlement Design –** Does the defendant have an interest in any monies not paid out (a "reversionary" interest) or are the monies payable only on claimants qualifying (a "claims made" settlement)? Reversionary interests or claims made settlements can create for defendants an interest in making notice less effective and claims filing more complicated and onerous.

Settlements may also offer non-monetary benefits to class members. Where the litigation is ongoing, this may include cooperation in the ongoing prosecution of the litigation as against the non-settling defendants. Cooperation may include production of documents, transcripts from related proceedings and/or evidentiary proffers. While it may seem obvious, make sure that you can make proper use of the cooperation provided. For example, ensure the documents are provided in a format that is compatible with your firm's software, you are not bound by overly restrictive confidentiality provisions, and settled defendants are obligated to authenticate the information or documents provided as cooperation in the ongoing litigation.

Consider as well if the defendants have information that could be helpful in the notice or claims process. This could include customer names and addresses and/or sales information.

Approval

All class action settlements are subject to court approval. At the settlement approval motion, you will need to satisfy the court that the settlement is reasonable and in the best interest of the class. Recent decisions in Ontario suggest that the court will be taking a harder look at how the parties arrived at the settlement value. In *Sheridan Chevrolet v Furakawa Electric et al*,[21] Justice Belobaba criticized the "boiler-plate that is found in too many of the settlement approval facta and the judges who succumb to the '*we're experienced class counsel - we know what we're doing – trust us*' kind of argumentation." Justice Belobaba maintained that "[i]f class action judges are to do their job (and be more than rubber-stamps) in the settlement approval process, and ensure that the settlement amount is indeed fair and reasonable and in the best interests of the class (and not just class counsel) then at the very least class counsel should provide affidavit evidence explaining why the actual settlement amount is fair and reasonable or more specifically, clear reasons why the settlement amount is in the "zone of reasonableness."[22]

In *Leslie v Agnico-Eagle Mines*,[23] Justice Belobaba took a similar stance, condemning the use of boiler plate documents and class counsel's "unhelpful catalogue of self-serving (almost generic) reasons why the settlement should be approved: the many litigation risks; the hard-fought negotiation; the arm's-length settlement; and class counsel's impressive credentials and litigation experience."[24] His Honour was of the view that judicial approval of class action settlements, especially securities class action settlements, needs more rigour. He contemplated that perhaps the time has come for judges in appropriate cases to appoint independent counsel in order to add a much-needed adversarial dimension to the settlement approval hearing.[25]

IX. SETTLEMENT OF A CLASS ACTION BY A DEFENDANT (Eliot Kolers)

From the perspective of a defendant, the possibility of substantial exposure to a large class claim can act as an incentive to settle rather than litigate the case. There are several considerations that will have an important impact on a defendant's decision to settle and its approach to negotiation.

The merits of the case

It may seem obvious, but the merits of the case against the defendant (and the strength of the defendant's defence) will have a significant impact on the timing of any settlement discussions

[21] *Sheridan Chevrolet v Furakawa Electric et al*, 2016 ONSC 729.

[22] *Sheridan Chevrolet v Furakawa Electric et al*, 2016 ONSC 729 at paras 11-12.

[23] *Leslie v Agnico-Eagle Mines*, 2016 ONSC 532.

[24] *Leslie v Agnico-Eagle Mines*, 2016 ONSC 532 at para 9.

[25] *Leslie v Agnico-Eagle Mines*, 2016 ONSC 532 at paras 17-18.

as well as the monetary range in which those discussions will take place. For this reason, it is important for defence counsel to have a good understanding of the merits of the case and the nature of the evidence that could be marshalled for certification or at trial in formulating settlement strategy. Otherwise, settlement discussions will be a shot in the dark and any settlement that is achieved may be on terms that are much too favourable to the plaintiff.

The timing of settlement

Counsel needs to consider when the defendant has (or may have) the greatest leverage and when the plaintiff may be most motivated to settle. This could revolve around any number of case milestones/deadlines or the motion for certification (either before or after). In cases with multiple separately represented defendants, consideration must also be given to any joint defence efforts, the possibility of a discount for the first to settle (plaintiffs sometimes like to try to create incentives to lure defendants out of a joint defence group), and the impact a settlement may have on other proceedings (perhaps relating to similar issues in other countries). Counsel for a settling defendant will need to be mindful of any obligations or restrictions that exist in relation to settlement discussions and continued participation by the defendant (or counsel) in any joint defence group.

Key terms of settlement

Probably the most essential aspect of a settlement negotiation is the consideration. The value of the settlement is a key consideration but there are also factors that can impact the value for the parties in a mutually beneficial way. For example, it may be possible to satisfy some or all of the settlement consideration by providing coupons, rebates, credits or programs (e.g., credit monitoring in a privacy breach case etc.) instead of cash. These sorts of settlements can be a way of providing value to class members that does not cost the defendant the full value of the settlement in cash. Other possibilities for reducing the impact of a large settlement include the payment of settlement funds over time and the reversion to the defendant of some of the settlement funds in the event there are class members who opt out of the settlement or if there are unclaimed amounts after completion of the settlement.

In cases with multiple defendants, a defendant who settles early may negotiate a “most favoured nation” (MFN) clause. The MFN clause provides protection to the early settler by allowing it to receive a rebate if a subsequent settlement is on more favourable terms to the defendant. The time frame over which such clauses could apply and the triggers and limits of such clauses will all be subject to negotiation. MFN clauses can pose problems for future settlements and tend to restrict the flexibility of both plaintiffs’ and defendants’ counsel in subsequent negotiations and so are often difficult terms to have included.

Also in cases with multiple defendants, a defendant who settles early may be asked by the plaintiff for cooperation with the future prosecution of the claim against the remaining defendants. Cooperation can include the provision of documents, interviews, data and trial testimony. The agreement to provide cooperation has a value to plaintiffs that should not be underestimated and it also comes with a real cost to the defendant (e.g., document production) that also must be considered. Care should be given to the negotiation of these clauses so that the

extent of cooperation is known at the time of settlement and does not become an ongoing and expanding obligation as the plaintiff prosecutes the claim against remaining defendants.

Another key settlement term will be the scope of the release given by the class. The settling defendant will want to negotiate the broadest release possible, including in respect of the time period covered, the products/transactions included and the size of the class providing it.

Finally, in many tort and competition cases involving multiple defendants, where defendants may have claims (or potential claims) for contribution and indemnity against other defendants, it is important for a settling defendant to include a requirement for a "bar order" in the settlement agreement. The bar order language would be included in the final court order approving the settlement and effectively precludes non-settling defendants from bringing claims over against the settling defendant thereby allowing the settling defendant to end its exposure to the claim. The quid pro quo for the bar order, though, is that the plaintiff agrees not to pursue the non-settling defendants for the settling defendant's proportionate share of the liability as the action moves forward. This type of arrangement is well recognized by the courts, even in circumstances where there is uncertainty about whether the non-settling defendants would even have a right of contribution and indemnity against the settling defendant.[26]

X. WHAT HAPPENS AFTER A SETTLEMENT IS ACHIEVED (Eliot Kolers and Linda Visser)

Settlement Approval Process

The settlement of a class action is not complete until the settlement agreement is approved by the court. Settlement approval is undertaken through a two-step process:

(a) **Notice –** The first step is for the settling parties to bring a motion for the court's approval of a form of notice to class members about the settlement and the forthcoming motion to seek court approval of it.

(b) **Approval –** The second step, after that form of notice has been approved and published, is for the actual settlement approval motion to be heard.

It is typical for the two motions to be 60 to 90 days apart from each other because the time is needed after the approval of the notice for the notice to be published and for there to be any dealings with any class members who come forward with questions or concerns. Where the class action is being pursued in more than one province as part of an objective to obtain national coverage, each of the two steps described above will need to be taken in each province in which there is a proceeding. This will also add to the time required to give notice and obtain approval.

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[26] See for example *Osmun v. Cadbury Adams Canada Inc.*, 2010 ONSC 2643 (CanLII), affirmed 2010 ONCA 841 (CanLII).

As part of the settlement approval process, the court will certify a class for settlement purposes. This is necessary to allow for the implementation of the settlement for the benefit of both the class as a whole and for the settling defendant(s). Certification for settlement purposes is usually granted at one of the two motions referred to above in the settlement approval context. Such certification is without prejudice to any non-settling defendants and any positions they may take in the ongoing proceedings.

At the time of the first notification of certification to the class, the class members will be given a window of time in which to opt out of the class action. Any class member who opts out of the class will be free to pursue his/her own individual action against the defendants but will not share in any benefits of the certified class action. Once the opt-out deadline passes, all members of the class are fixed and will be bound by any approved settlement or determination of the action.

One might think that a case is over once settlement has been achieved and it has been approved and sanctioned by the required orders, but there is in fact still much activity to be undertaken by the parties in a class action. In reality, most of the activity as described below is undertaken by class counsel and the role of defendants' counsel is often that of monitoring. Class counsel often takes the position that the defendants (both settling and non-settling, if any) have little say in these post-settlement matters. However, defendants will wish to have an opportunity for review and input on the forms of notices to the class in particular.

Distribution of Settlements

Class counsel will need to think about how best to distribute the settlement funds to class members. The first consideration in this regard is the timing of the distribution(s). If there will be multiple settlements in the action, counsel will want to wait until the aggregate settlement funds are large enough to have a meaningful distribution to class members. However, at some point, the court will expect a distribution to take place and may discount class counsel fees for failing to put in the work to develop a distribution plan.[27]

After the timing of distributions is determined, class counsel will develop the structure of the distribution plan. Generally speaking, distribution plans deal with who can make claims, how much they can claim for, and what proof they are required to provide. Often, by the time a distribution occurs, many years have passed since settlement class members purchased the impugned product. In many cases, settlement class members will not have retained proof of purchase. It is therefore important to develop a mechanism for proving claims that is accessible to settlement class members while still ensuring that the claims administrator receives sufficient information to properly adjudicate claims and protect against fraud. This might include allowing for flexible proof of purchase options, including, for example, receipts, serial numbers, rebate documents, or even proof of residency in an affected geographic area.[28] The distribution protocol

[27] See for example *Eidoo v Infineon Technologies AG*, 2013 ONSC 853 at paras 45-48 and 60-62

[28] For example, in the gasoline price-fixing class action, the allegations related to gasoline sold in a specific region in Eastern Ontario. The distribution protocol contemplated that claimants could make a claim for compensation based on proof of residency in Eastern Ontario. This process was based on the presumption that an individual residing in or near

might also provide for a simplified claims process for low value claims that does not require proof of purchase beyond a declaration that the settlement class member purchased the product during the class period. In a pharmaceutical case, medical records are typically required.

Where the settlement funds are relatively modest, more streamlined approaches can be taken to avoid administration costs from becoming disproportional. For example, the claims administrator might only be required to audit high value and/or a random selection of claims.

After the distribution plan is approved, a notice of the claims process to the class must be developed. Notice of the claims process should summarize the basic terms of the distribution protocol and advise settlement class members of the deadline and process for filing a claim under the settlements. A current trend in notice programs is to reach settlement class members through digital media. For example, in the DRAM class action, notice was provided by, among other things, television commercials advising settlement class members to "Visit TheMoneyisMine.ca to get your money back." The campaign also included various social media aspects, including by asking claimants to share with their friends on Facebook and Twitter after they filled out a claims form. While expensive (the budget was $3 million), the DRAM notice campaign was extremely successful and resulted in a take-up of 1.1 million claims.[29]

Following the claims period, there are often residual funds that have not been distributed. Where it is not practicable to distribute those funds directly to the class, the court may approve a cy-près distribution. It is important that the cy-près distribution benefit the class, albeit indirectly.[30] This is generally accomplished by selecting a national charitable organization whose mission aligns with the subject matter of the class action. Class counsel should avoid selecting a group that they have any direct relationship with (for example, through past pro-bono work) to avoid the appearance that class counsel is benefitting in any way from the cy-près distribution.[31]

Often a cy-près distribution will be awarded to an organization that is national in scope.[32] However, if the amount at issue is minimal, the cy-près distribution may be awarded to a more local organization to better ensure that the award will be meaningful for the organization.[33]

Eastern Ontario would have purchased gasoline in Eastern Ontario. Claims based on proof of residency alone were capped based on the estimated value of gasoline an individual would have purchased during the class period.

[29] *Eidoo v Infineon Technologies AG*, 2016 ONSC 3628 at para 2

[30] *Sorenson v easyhome Ltd.*, 2013 ONSC 4017 at para 25

[31] *Sorenson v easyhome Ltd.*, 2013 ONSC 4017 at para 30-33

[32] For example, in the Hydrogen Peroxide price-fixing class action, the Canadian Association of Food Banks was selected as a *cy-près* recipient because it is a national charitable organization representing food banks across Canada. Canadian Association of Food Banks agreed to use any *cy-près* settlement funds received by it for the primary purpose of purchasing paper-based and pulp-based products, such as toilet paper and diapers, for distribution to its food bank members across Canada. The pulp and paper industry is a major consumer of Hydrogen Peroxide.

[33] For example, in the Cooling Compressors price-fixing class action, the HomeStart Foundation was selected as the *cy-près* recipient for a relatively modest distribution (up to $10,000). HomeStart is a furniture bank that provides essential home furnishings to people in need in the metro Vancouver area. HomeStart agreed to use any *cy-près* funds received by it to purchase and deliver compact refrigerators to clients. A Cooling Compressor is the component in many household and some light commercial refrigerators and freezers that provide the cooling function.

The above-noted procedures related to the distribution of the settlement amount largely take place in public and are subject to court approval. Where settlement is achieved with only certain defendants in a multiple-defendant case, the post settlement period is also marked by the continuation of the litigation – either towards certification or trial. For a settling defendant, this often means fulfilling the cooperation obligations if any were provided in the settlement agreement: document production, witness interviews and the provision of data.

XI. POST-CERTIFICATION (Eliot Kolers)

It is said that a class proceeding is just a procedural mechanism that does not create a cause of action, but rather simply aggregates a number of similar claims into one. At the certification stage, it often seems as though courts treat these actions in a manner that is different from non-class actions, giving the aggregated claims the benefit of the doubt or otherwise holding them to a lower evidentiary standard than would typically be tolerated in a non-class proceeding. However, after a class action is certified, the procedure that follows is similar to a non-class action (albeit often having a larger scale).

Pleading

Unlike in the United States, defendants in Canadian class actions do not necessarily need to plead a response to the plaintiff's claim or make documentary production prior to certification. As such, the first step following certification will be the delivery of a Statement of Defence in the action. This may occur after the plaintiff amends the claim as a result of any developments arising out of the certification process (e.g., certification of a class that is defined differently than initially pleaded).

Discovery

As in a non-class proceeding, document production and oral examinations for discovery will typically follow the close of pleadings (or will follow certification if the pleadings were completed before). A feature of discovery in class proceedings that can complicate the post-certification and pre-trial processes is the possibility of the disparity of information between the defendant(s) and the representative plaintiff. Because the representative plaintiff need only be a class member with a claim in common with other class members, he/she may only have records or knowledge of a single transaction or event whereas the defendant will need to make production and answer questions about the entire matter in issue. This disparity can become a point of ongoing contention as the defendant tries to learn the case it has to meet.

Summary judgment

Because of the high stakes of a trial and the relatively low threshold for certification, defendants will consider summary judgment to try to get a full or partial determination of the issues. This

can be an effective means of forcing the plaintiff to put its evidence forward prior to trial and possibly to save some or all of the exposure faced by defendants at trial. A good of example of this approach being successful is *Fairview Donut Inc. v. The TDL Group Corp*.[34]

Decertification

This post-certification consideration is uniquely applicable in a class proceeding. *The Class Proceedings Act* provides for variations to the certification order to be made as part of the ongoing case management and consideration of the action as it proceeds towards trial.[35] It is quite possible that evidence, including admissions, obtained by the defendants on examination for discovery could provide a basis to challenge the initial certification order. This could result in a motion either to divide the class into subclasses or to decertify the action altogether. As such, counsel will need to remain mindful of the bases for the initial certification order and whether it can be challenged on a motion after additional evidence is obtained.

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[34] 2012 ONSC 1252 (CanLII); aff'd 2012 ONCA 867 (CanLII).

[35] *Class Proceedings Act,* 1992, S.O. 1992, c.6, as amended, section .10.