Top Ten Cases from the ROC from the 2007-2008 Class Action Season

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1. Introduction

There has been considerable development by the common law courts of some important points that class action counsel will find useful in their practices.

Notably, there have been some important carriage decisions. We have also seen a growing recognition of the ability to use the tools in the "back half" of the class proceedings legislation in order to facilitate certification.

Some important decisions have come down in the ever-ambiguous area of national class actions. Whether clarity has actually been achieved will be left to the reader to decide.

Costs decisions should strike fear or at least vigilance in class counsel's consciousness' with the reminder of the importance of properly informing prospective representative plaintiffs of the risks inherent in class actions, mostly particularly of course, in those provincial regimes where costs are more routinely awarded in favour of successful defendants. Courts have also narrowed the scope of what cases will be viewed as "novel" in order to waive the ordinary rule of costs.

Against that backdrop, it is our view that the Top 10 decisions from the past year are:

1. *Joel v. Menu Foods Genpar Ltd.* 2007 BCSC 1248*,* 2007 BCSC 1248; *Whiting v. Menu Foods Operating Limited Partnership*, [2007] O.J. No. 3996; *Sirois v. Menu Foods Income Fund* 2007 QCCS 5808, 2008 QCCA 2
2. *Markson v. MBNA Canada Bank*, 2007 ONCA 334, [2007] S.C.C.A. No. 346
3. *Cassano v. Toronto Dominion Bank*, 2007 ONCA 781
4. *Ledyit v. Bristol Myers Squib Canada Inc.* (03-CV-259300CP, September 13, 2007), [2008] O.J. No. 119
5. *Ring v. Canada (Attorney General)* 2007 NLTD 213
6. *Sollen et al v. Pfizer Canada Inc et al* (05-CV-29379CP, March 5, 2008)
7. *McLaine v. London Life Insurance Co*., [2007] O.J. No. 5035
8. *Kerr v. Danier Leather*, 2007 SCC 44

9. *Authorson (Litigation Administrator of) v. Canada (Attorney General)*, 2007 ONCA 599, 2007 ONCA 501, [2007] S.C.C.A. No. 472
10. *Poulin v. Ford Motor Co. of Canada*, 2007 OJ No. 4988 (S.C.)

2. Carriage battles: the Menu Foods decisions

In ***Joel v. Menu Foods Genpar Ltd.*** 2007 BCSC 1248 a national consortium of law firms (of which the author is a member), sought carriage of a proposed class action against the Menu Foods group of defendants for the recovery of damages by owners of pets affected by the consumption of what they allege was contaminated pet food manufactured and distributed by the defendants.

The national consortium first established that the court has jurisdiction to hear the carriage motion prior to certification in *Joel v. Menu Foods Genpar Ltd.* 2007 BCSC 1248.

The carriage motion played out between the Joel action brought by British Columbia counsel in the national consortium and the Ewasew action brought by the Merchant Law Group, a firm with offices in a number of Canadian cities. The Ewasew action named trust and fund entities that are part of the Menu group, as well as retail distributors and individual directors of the Menu Foods company, and brought claims for misrepresentation, unjust enrichment, and breach of contract. The Joel action preferred to focus on a common negligence claim for negligence in the manufacture and sale of pet food against the most exposed defendants.

In evaluating the theories advanced by counsel in the two actions, Justice Hinkson favored the streamlined approach adopted by the national consortium on the basis that "less was more". He found that the consortium's plan to pursue the most exposed defendants first was the proper approach in terms of speed and maximizing the prospects for certification.

Shortly after the Joel decision, the national consortium also won carriage of the Ontario action in ***Whiting v. Menu Foods Operating Limited Partnership***, [2007] O.J. No. 3996. The court found that the consortium had more experience and Ontario presence and also favoured the streamlined approach proposed by the consortium.

As in *Joel*, the Ontario court applied the factors laid out in *Vitapharm Canada Ltd. v. F. Hoffmann-Laroche Ltd.*, [2000] O.J. No. 4594 and *Richard v. British Columbia* (2004), 30 B.C.L.R. (4th) 336 to be considered in a carriage motion. In assessing the nature and scope of the causes of action advanced by counsel, Justice Lax said at paragraph 21, that the comparison of the pleadings should be on the basis of the pleadings that were originally filed:

> The disposition of the carriage motion should be based on the Powell Action as originally pleaded. Otherwise, this criterion would be without meaning as it is always open for

> counsel to amend their claims based on the more comprehensive and well-researched pleadings by competing counsel that demonstrates a higher degree of preparation.

The British Columbia and Ontario decisions were followed by the Quebec carriage decision in ***Sirois v. Menu Foods Income Fund*** 2007 QCCS 5808, in which the national consortium also won carriage.

An important part of the analysis in the Quebec carriage decision focused on the issue of naming the proper parties. The court found that the Sirois action was a nullity, having sued a trust rather than a proper legal entity.

The Quebec court also examined the "first to file" rule and found that while the rule certainly avoids lengthy and costly debates, one must still ensure that its application does not result in class members being prejudiced. In that sense, Justice Prevost imported a certain degree of flexibility to the "first to file" rule.

Leave to appeal this decision has been granted by the Quebec Court of Appeal in *Sirois v. Menu Foods Income Fund* 2008 QCCA 2.

Aside from the Ontario decision, where Justice Lax examined the logistical considerations of competing counsel appearing before the Ontario courts, it is apparent that judges continue to be reluctant to consider the competing competence, reputation, resources and experience of counsel, despite this being one of the listed factors to consider in the *Vitapharm* and *Richard* cases. There is no question that this analysis is certainly uncomfortable amongst members of a collegial bar but one wonders whether this "shyness" ultimately serves the best interests of the prospective or existing class members. We continue to maintain our belief that for a "reasonable class member", the experience and expertise of counsel is a central consideration. That is certainly how they hire counsel in individual cases. Why would or should it be different in class actions, where the court is fulfilling that role on the part of the class?

The need for three carriage decisions is also telling. In the absence of a regularized system to manage national class actions (more on this below), this repetitive and inefficient structure may have to continue.

3. Certification

The Ontario Court of Appeal allowed certification in ***Markson v. MBNA Canada Bank*** 2007 ONCA 334. *Markson* is one of a number of cases alleging that the combined effect of compound interest and transaction fees on short terms cash loans amounts to a criminal rate of interest contrary to section 347 of the Criminal Code. Unlike the payday loan cases, the defendant in *Markson* is a financial institution and the lending is done through credit cards.

At trial, Justice Cullity had refused to certify the class on the basis that the restitution and breach of contract claims did not raise common issues and because a class proceeding was not the preferable procedure. The fundamental question on appeal, therefore, was

whether a class proceeding is appropriate where all members of the class are at risk of being charged a criminal rate of interest but only some members of the class could actually be considered to be victims of the defendant's practice and entitled to damages and restitution.

In response to the defendant's argument that examining each and every individual transaction is far too onerous, the Ontario Court of Appeal found that this was an appropriate case for an aggregate assessment of monetary relief under section 24 of the *Class Proceedings Act*. Justice Rosenberg noted that the challenge with section 24(1)(b) is whether it can apply in cases where it is alleged that the question of whether or not an individual was affected by a breach of contract or violation of the Criminal Code can only be evaluated on a case by case basis. At paragraph 48, Justice Rosenberg explained that he was satisfied because,

> In my view, condition (b) is satisfied where potential liability can be established on a class-wide basis, but entitlement to monetary relief may depend on individual assessments. Or, in the words of s. 24(1)(b), where the only questions of fact or law that remain to be determined concern assessment of monetary relief.

In other words, section 24(1)(b) together with the statistical sampling methods permitted by s. 23 of the Act, appropriately addressed the individual assessment concerns.

The defendant also argued that since it is the cardholder that controls the amount of the cash advance and the amounts and period of repayment and whether or not to engage in the transactions at all, the voluntariness defence applies in this case. The court found that the availability of the voluntariness defence could be considered as a common issue at paragraph 64:

> However, that defence would apply across the class. It is not apparent to me why decisions, such as the date of repayment, would give rise to a voluntariness defence in one case and not another. At least at this stage, I cannot see why it will be necessary to determine the application of the defence on an individual basis. Accordingly, in my view, the possible availability of a voluntariness defence does not stand in the way of certification. I would therefore include the following as a common issue.

The Court of Appeal also made some interesting general comments on the preferability analysis. Indeed, the court found that not only was a class proceeding a preferable procedure in this case, it was also the only viable procedure for remedying the alleged wrong and calling the alleged wrongdoer to account.

The court set out the following principles in relation to the preferability analysis at paragraph 69:

> (1) The preferability inquiry should be conducted through the lens of the three principal advantages of a class proceeding: judicial economy, access to justice and behaviour modification;
> (2) "Preferable" is to be construed broadly and is meant to capture the two ideas of whether the class proceeding would be a fair, efficient and manageable method of

> advancing the claim and whether a class proceeding would be preferable to other procedures such as joinder, test cases, consolidation and any other means of resolving the dispute; and,
> (3) The preferability determination must be made by looking at the common issues in context, meaning, the importance of the common issues must be taken into account in relation to the claims as a whole.

The application for leave to appeal filed by MBNA was dismissed by the Supreme Court of Canada in ***MBNA Canada Bank v. Stephen Markson*** [2007] S.C.C.A. No. 346.

In ***Cassano v. Toronto Dominion Bank***, 2007 ONCA 781, Chief Justice Winkler further extended this liberal approach in granting certification in the VISA foreign exchange action, overruling two lower court decisions. The central allegation in that case is that the Toronto Dominion Bank breached its contract with the holders of its VISA credit cards by charging undisclosed and unauthorized fees in relation to foreign currency transactions.

The Court made a number of interesting comments in certifying the action. In the assessment of common issues and the assessment of damages as part of the necessary elements of the cause of action, the Court considered whether the nature of the breach of contract requires an individual assessment of cardholder behaviour in order to quantify damages:

> [31] In my view, the motion judge fell into error in concluding that the damages assessment flowing from the alleged breach of contract in this case would require an individual assessment of cardholder behaviour. In arriving at this conclusion, the motion judge relied on the approach to assessing damages that applies in cases where the defendant repudiates a contract that has alternative modes of performance…
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> [32] I am of the view that this principle for assessing damages has no application to the case at bar because the defendant did not have alternative modes of performing the contract...
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> [36] ….The terms of the Cardholder Agreement do provide the defendant with an option of disclosing fees and amending the agreement. They do not, however, provide the defendant with an option of presenting cardholders with a hypothetical choice of asking what they would have done in the event that disclosure of certain fees had been made retroactively in accordance with the terms of the Cardholder Agreement. The motion judge fashioned such an option, and in so doing, he engaged in the tort-like approach to assessing damages... In other words, the motion judge asked what would have happened if the defendant had not breached its contractual obligations, rather than asking whether the defendant had alternative means of complying with its existing contractual obligations.
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> [37] Thus, I do not accept the motion judge's conclusion that a determination of compensatory damages in this case is an unmanageable prospect because of a need to assess how individual cardholders would have behaved had they known of the allegedly undisclosed fees.

Justice Winkler also considered whether this was an appropriate case for aggregate damages as contemplated in *Markson, supra*:

> [45] In my view, there is a "reasonable likelihood" that condition (c) [of the aggregate damages section] would also be satisfied. [E]stablishing the extent of TD's liability does not require making individual inquiries of cardholders to determine what they would have done if they had known of the fees. Rather, the aggregate of TD's liability may reasonably be expected to be capable of proof by resort to TD's records of the amount of fee income it collected during the relevant time frame...
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> [47] Condition (b) remains to be considered. In *Markson*, Rosenberg J.A. concluded that this condition is satisfied where potential liability can be established on a class-wide basis, but entitlement to monetary relief may depend on individual assessments. In the present case, if a finding were made that there had been a breach of contract in relation to the charging of the fees, there would be no "questions of fact or law other than those relating to the assessment of monetary relief" remaining to be determined. The finding that there had been a breach of contract would make all such fees improper.

Justice Winkler rejected the argument that the cost of individual assessments would overwhelm the damage claim by an individual as the damages calculation would only be necessary if TD is found to have breached the contract with its cardholders. He found that on a policy level, it would not be reasonable to permit a defendant to retain a gain made from a breach of contract because the defendant estimates its costs of calculating the amount of the gain to be substantial. Indeed, one of the principal purposes of the Act is to facilitate recovery by plaintiffs in circumstances where otherwise meritorious claims are not economically viable to pursue. The Court further found that in any event, certification does not turn on whether damages can be assessed on an aggregate basis. He found that even if the trial judge were to conclude that an aggregate assessment of damages is inappropriate in this case, the nature of the claim asserted is such that other provisions of the CPA might well be utilized so as to make a class proceeding under the statute the preferable procedure for the resolution of the class members' claims.

> [60- [A]lthough much of the focus of the argument on the motion below and the appeal in this court focused on the provisions of the CPA that permit an aggregate assessment of damages, it must be noted that the certification decision does not necessarily turn on whether damages can be assessed on an aggregate basis. Indeed, assessing damages on an aggregate basis is usually the exception to the general rule in class proceedings, in that it is akin to determining the whole of the litigation through the common issues trial. While the common issues trial is obviously an essential component of a class proceeding, it is not the whole of the proceeding. The statute is a powerful procedural mechanism that permits the court to take a variety of approaches in resolving the claims of class members....
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> [64] Therefore, what is called for in addressing the preferable procedure requirement is to look not just at the common issues trial, but at the other procedural options for conducting the class action litigation pursuant to the CPA. In this regard, I note that s. 25 of the CPA confers broad jurisdiction on the common issues trial judge to fashion

> procedures to be followed where, among other things, damages cannot be assessed in the aggregate.

Contrary to the result in *Markson*, Justice Winkler was not inclined to make defences a common issue. In his view, this was only appropriate when they constitute a defence to an entire subclass, otherwise they pose the risk of compromising the defendant's position at the common issues trial.

4. National Class Issues

The national class action debate forges on with still no clear and unanimous strategy on how to proceed. Several cases have come down this past year which have analyzed comity and *forum non conveniens* in the context of certifications of national class actions. While these contain some analysis on those fundamental legal principles, the courts continue to avoid direct consideration of how to resolve competing actions, relying or hoping on interjurisdictional cooperation between counsel.

Two factors are beginning to play significant roles in the jurisdictional debates: (1) whether there would be more delay in one or the other jurisdiction; and (2) whether there is a "no costs" regime. Interestingly, while the latter of these two factors is often tagged on to the analysis in an after the fact manner, it seems that the existence of a "no costs" regime is the elephant in the room. We wonder whether this issue could become an unspoken trump card in future proceedings, particularly in efforts outside Ontario to maintain a case in a local jurisdiction.

In ***Ledyit v. Bristol-Myers Squibb Canada Inc.*** (03-CV-259300CP, September 13, 2007), the Ontario court allowed the addition of Quebec plaintiffs to cure a "Ragoonanan problem", as there were defendants for whom there were no associated plaintiffs. The court noted that the defendant had an office in Ontario, and sold the product throughout Canada. Hence, the court found it had jurisdiction to include Quebecers in the class. The defendant challenged whether there was jurisdiction to allow Quebecers to be a representative plaintiff. The court noted that the rules of jurisdiction had to be "adapted" in the context of class actions. The court found that if there was jurisdiction to certify a national class, then there was no reason not to allow an extraprovincial representative plaintiff. The court also concluded that there would be personal jurisdiction over the Quebecers claims. In the key passage of the endorsement, the court stated:

> I do accept Ms. Lang's submission that, even if the court has jurisdiction, considerations of comity may militate against its exercise where overlapping proceedings are pending in another jurisdiction. I agree, also, that where such proceedings are being actively pursued, it may be considered to be an abuse of process to permit persons whose claims have a real and substantial connection with the jurisdiction to be included in a class certified in Ontario. In this case, I was informed by counsel that similar claims to those in this action have been made in a proceeding in Quebec against Apotex and others. My understanding is that the proposed class is limited to those who purchased, or consumed, nefazodone in that province. I was also informed by Mr. Rochon that, if, in this case, the

> proposed amendments are accepted - and a national class is certified - the plaintiff's counsel in the Quebec proceeding have agreed not to proceed with claims against Apotex on behalf of putative class members who consumed Apo-Nefazodone....Co-operation among counsel in different jurisdictions to resolve multi-jurisdictional problems in class actions is to be encouraged, and agreements of the kind referred to by Mr. Rochon are not uncommon. In the circumstances, therefore, I am not prepared to find that, in view of the proceedings in Quebec, it would be an abuse of process to approve the proposed addition...

In a subsequent certification decision at [2008] O.J. No. 119, Justice Cullity approved certification nationally solely for the purposes of implementing a settlement which was based largely on its sister case in the United States.

In ***Ring v. Canada (Attorney General)*** 2007 NLTD 213, the court certified this "Agent Orange" class action on a national class basis. The action was one of nine actions filed across the country for damages allegedly suffered by the plaintiffs, when Agent Orange and other chemicals were sprayed at Canadian Forces Base in Gagetown, New Brunswick, between 1956 and 2004.

In August 2007, Justice Barry had stayed the Newfoundland certification order pending further submissions on New Brunswick's newly proclaimed class action legislation. The plaintiffs applied to lift this stay arguing that prejudice would result in the event of further delay, that the Newfoundland counsel and court have already expended significant efforts, and that the benefits of discovery in the Newfoundland action could be applied in New Brunswick.

The plaintiffs further argued that comity and cooperation amongst counsel in different provinces is common in class action cases. The Crown argued that *forum non conveniens* should be determined at this stage of the proceeding and that the proper jurisdiction ought to be New Brunswick. The court said the following on the issue of choice of forum and a national class:

> [22] [T]he existence of a certified class action may provide a sufficient connection to justify assuming jurisdiction over non-residents. I agree with this conclusion....
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> [24] Should the presence of two third parties, who do not reside in the province, influence the Court's conclusion regarding its authority to assume jurisdiction? I think not.....
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> [30] I have previously noted the many connections between the tortious events, the parties and New Brunswick, including the location of CFB Gagetown, the applicable New Brunswick law, the larger percentage of class members there resident, and the presence of more witnesses. On the other hand, I agree with the plaintiffs that the proposed class of plaintiffs is national in scope, the alleged negligence is that of the federal Crown, which can be sued in any province, the majority of potential class members probably do not reside in New Brunswick, and, therefore, that province is probably not the most accessible or central geographic locations. Also, many of the records regarding the CFB Gagetown incidents are stored in Ottawa, not New Brunswick. Expert witnesses will probably not be based in New Brunswick. Plaintiffs who are ill will

> be greatly inconvenienced by having to sue in a jurisdiction where they do not reside. On a balancing of these factors, I am satisfied this is a case where there is more than one appropriate forum.

The court then looked to Newfoundland's favourable costs regime which provides that costs normally are not be awarded in class actions, as opposed to New Brunswick's full costs regime. But the court found that the strongest factor in proceeding with the action in Newfoundland was the delay that would result in awaiting a certification decision in New Brunswick.

The most recent pronouncement on the jurisdictional dilemmas involving national class actions is from the Ontario Superior Court of Justice in ***Sollen et al v. Pfizer Canada Inc et al* (05-CV-29379CP, March 5, 2008).** That case involved a motion for leave to discontinue an Ontario action relating to personal injuries and losses allegedly suffered from Celebrex, Bextra and Mobicox, drugs marketed and distributed by Pfizer Canada and Boehringer Canada. Both Pfizer and the Crown did not oppose the motion but Boehringer brought a cross-motion to enjoin the continuation of the Ontario action to Saskatchewan on the basis that Ontario is a more convenient forum.

Boehringer's earlier motion to stay the proceedings in the Saskatchewan Court of Queen's Bench had been dismissed. The appeal before the Saskatchewan Court of Appeal reversed and a conditional stay was ordered on the basis that the commencement and existence of the actions in both Ontario and Saskatchewan constituted an abuse of process. The Court of Appeal noted that the respondents are free to litigate in Saskatchewan but the action in Ontario would have to be discontinued in order for the stay to be lifted. The plaintiff then applied in Ontario for the right to discontinue.

The Ontario judgment found that the Saskatchewan Court of Appeal intended to leave the *forum non conveniens* question in abeyance, and therefore, the finding of the judge of first instance that Saskatchewan was a convenient forum was not in fact disturbed on appeal. The Court then reviewed general principles of comity and *forum non conveniens*, finding at paragraph 23 that the test is that:

> If the decision of the foreign court was made on a basis that generally conforms to the principles of *forum non conveniens* recognized in this jurisdiction – and if the decision on the question cannot be considered to have been unreasonable – this court should not issue an injunction on the ground that Ontario was a more convenient forum.

The court continued by noting the difficult interrelationship between *forum non conveniens* and class actions, and in particular, national class actions, at paragraph 25 and 26:

> [25] In applying the principles of *forum non conveniens* to class actions – and particularly to those with a national class – a number of the factors that may have considerable relevance in other actions will be less helpful. There may, as here, be multiple plaintiffs, as well as class members, resident in different jurisdictions; the acts of the plaintiffs, and the class members – and also to an extent the conduct of the defendants – from which harm allegedly resulted may have occurred in these different jurisdictions; and the laws of each of them may have to be applied. In addition, in this case, while

> Boehringer Canada, and one of the Pfizer defendants, have their head offices in Ontario, the other Boehringer defendant and the other Pfizer defendants are resident elsewhere. The Attorney-General has offices and legal staff in Saskatchewan and in Ontario. There are likely to be out-of-province witnesses whichever forum is chosen.
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> [26] The above aspects of class proceedings reduce the likelihood that one of the different jurisdictions will be clearly more appropriate than others, and will make it more difficult for a defendant to obtain a stay of a proceeding in any of the jurisdictions. The result is that – on the assumption that national classes are permitted – there are likely to be many cases of identical or overlapping class actions in more than one jurisdiction in which no stay would be justified by an application of the principles of *forum non conveniens*, whether codified as in Saskatchewan, or under the common law.

The Court also addressed an ambiguous passage from the Saskatchewan trial decision in which Justice Klebuc appears to have called into question the recognition of national classes. The Ontario court found that Justice Klebuc's comments ought not to be interpreted in such a manner, and rather, the thrust of the comments was to deny that any jurisdiction of an Ontario court to certify national classes overrides, or limits, that of a court in Saskatchewan to exercise jurisdiction over cases that have a real and substantial connection with the Province. The Ontario Court accordingly, deferred to the finding at first instance in the Saskatchewan action and dismissed Boehringer's cross motion for an anti-suit injunction.

With respect to the plaintiff's motion to discontinue the Ontario action, the Court granted this on the basis that no substantive or procedural steps have been taken in the proceedings, the statement of claim was not served by the plaintiffs (although the defendants were deemed to have notice from filing their statement of defence) and no notice of the action had been given to the class members. The fact that contrary to Ontario, Saskatchewan is a "no costs" jurisdiction was also said to be influential in supporting the decision to discontinue. The Court acknowledged that the finding would necessarily mean that some non-residents of Saskatchewan who would have been included in the Ontario action will be excluded from the Saskatchewan action as the later is an opt-in jurisdiction, but the Court noted that no notice regime is ever entirely effective.

What the court did **not** address was the effect of existing competing Ontario actions. Further, it does not appear that counsel in those competing actions was required to attend to give their position. Hence the debate about how to deal with competing class proceedings was deferred to another day.

In the authors' view, the national class action debate still requires firm legislative commitment to align provincial class proceedings legislation to create the requirement for a "national carriage motion" where there are overlapping actions in different jurisdictions and to create the ability for each province to certify national "opt out" class actions.[1]

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[1] W. Branch and C. Rhone "Solving the National Class Problem" 4th Annual Symposium on Class Actions (Toronto:Osgoode Hall Law School of York University , 2007) p.13.

Moreover, while its use has certainly increased, the National Class Action Database, maintained on the Canadian Bar Association site,[2] has the potential to be an even more useful tool if comprehensively used by class counsel across all jurisdictions. Certainly prompt and complete filing on the site ensures that class counsel have ready access to the most up to date information on the existence and status of class actions, thereby encouraging unnecessary duplication of efforts. Many provinces have enacted practice directions, and more provinces are expected to do so.

5. The Role of Counsel

In ***McLaine v. London Life Insurance Co***., [2007] O.J. No. 5035, the Divisional Court dismissed the appeal from a refusal of certification. In that action, the plaintiffs had sued banking and lending institutions alleging breaches of standard mortgage contracts. They alleged that the defendants incorrectly interpreted two mortgage provisions, in particular, annual payments on account of principal or the partial prepayment right and the early mortgage discharge provision.

The unique feature of the case was that the action was as purely "lawyer-driven" as any class action to date. The solicitor was said to have "combed" cases out of his own mortgage files to locate plaintiffs. It was alleged that certain of those cases accrued after the lawyer himself was aware of the identified issue.

The court found that the lower court did not err in having regard to the solicitor's conflict of interest as relevant to the consideration of certification in all actions, notwithstanding that he did not continue to act in all of the proceedings.

The court made an important observation on the role of counsel in class proceedings when it noted that the court is entitled to ask whether the litigation is driven by the class counsel or by the class members (at para.28).

The court also found that the representative plaintiffs in this action were not appropriate, because they were imbued with the knowledge of their solicitor, who knew fully the wrong he alleged was being committed and yet failed to advise them of this.

6. Costs

The distinction between the "no costs" and costs jurisdictions is growing, as the courts in the costs jurisdictions become less tolerant of class actions, and more willing to consider claims that lawyers should pay costs personally.

In October 2007, the Supreme Court of Canada rendered judgment in ***Kerr v. Danier Leather Inc.,*** 2007 SCC 44 and dismissed the class' appeal on the merits of this certified action. The case generally dealt with the continuous disclosure obligations of an issuer

[2] See http://www.cba.org/ClassActions/main/gate/index/default.aspx

seeking to sell its shares to the public by a prospectus governed by Ontario securities legislation. The plaintiffs had argued that a failure to disclose intra-quarterly results prior to closing meant that the prospectus was misleading at the time of purchase to the knowledge of the defendants.

On the issue of costs, the Supreme Court of Canada found that there was no basis to digress from the ordinary statutory rule for costs in this case by noting that:

> [65] …It has not been established that this is a "test case" in the conventional sense of a case selected to resolve a legal issue applicable to other pending or anticipated litigation. Nor have the appellants raised a "novel point of law". As we have seen, the heart of the case is simply a shareholder dispute over a lot of money requiring the application of well settled principles of statutory interpretation to particular legislative provisions. This is the usual fodder of commercial litigation (see generally Gariepy v. Shell Oil Co. (2002), 23 C.P.C. (5th) 393 (S.C.J.), aff'd [2004] O.J. No. 5309 (QL) (Div. Ct.), at para. 8; Moyes v. Fortune Financial Corp. (2002), 61 O.R. (3d) 770 (S.C.J.), at paras. 4-5)....
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> [68] We are certainly not dealing with people on either side who are historically disadvantaged. Nor, as the Court of Appeal noted, "is it a contest characterized by significant power imbalance"...Though many Canadians are investors and the resolution of the present dispute will affect future actions for prospectus misrepresentation, the Court of Appeal rightly concluded that this is, in essence, "a commercial dispute between sophisticated commercial actors who are well resourced" (*Ibid.*). If anything, converting an ordinary piece of commercial litigation into a class proceeding may be seen by some observers simply as an *in terrorem* strategy to try to force a settlement. Be that as it may, Mr. Durst was well aware that as a representative plaintiff he ran the risk of being held solely responsible for the defendants' costs if the action failed. He gambled on his interpretation of s. 130(1) and lost.
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> [69] Nor do general concerns about access to justice warrant a departure from the usual cost consequences in this case. While I agree with counsel for the appellants that "[a]n award of costs that exceeds or outweighs the potential benefits of litigation raises access to justice issues" ..., it should not be assumed that class proceedings invariably engage access to justice concerns to an extent sufficient to justify withholding costs from the successful party. I agree with the observation of Nordheimer J. in Gariepy that caution must be exercised not to stereotype class proceedings. "[T]he David against Goliath scenario" he writes, "does not necessarily represent an accurate portrayal of the real conflict" (para. 6). Class actions have become a staple of shareholder litigation. The Court of Appeal took the view that this case is a piece of Bay Street litigation that was well run and well financed on both sides. Success would have reaped substantial rewards for the representative plaintiff and his counsel. He put the representative respondents to enormous expense and I see no error in principle that would justify our intervention in the discretionary costs order made against him by the Court of Appeal.

In ***Authorson (Litigation Administrator of) v. Canada (Attorney General)***, 2007 ONCA 599, the Ontario Court of Appeal was faced with the issue of whether it ought to make class counsel personally responsible for costs in this action that failed on the merits after certification. The Court of Appeal had earlier found in *Authorson v. Canada*, 2007

ONCA 501, that the Supreme Court of Canada judgment was final and binding and that there was no basis in fact or law for the class to pursue its claim, or any aspect of it, once that judgment had been rendered. The court found that the relevant statute constituted a complete bar to the claim, and that the motion judge erred by applying the doctrine of equitable fraud to overcome the Crown's limitations defence.

In the decision on costs, the Court of Appeal cautioned that counsels' conduct in pursuing the matter following the Supreme Court's decision was questionable but would still not cede to the Crown's request that class counsel be required to indemnify the Litigation Administrator and Litigation Guardian or be held personally liable for any costs assessed against them. The Court was not persuaded that there was any bad faith or order conduct that would attract costs against the solicitor personally. Leave to appeal was denied in *Authorson (Litigation Administrator of) v. Canada (Attorney General)*, [2007] S.C.C.A. No. 472.

In ***Poulin v. Ford Motor Co. of Canada***, 2007 OJ No. 4988, the court was asked to reconsider its endorsement awarding costs on a substantial indemnity basis against class counsel Will Barristers and their U.S. associate firm Motley Rice, and on a partial indemnity basis against the representative plaintiff. The court found that none of the special circumstances in s.31(1) of the Ontario Act existed to award costs on anything other than the usual basis.

In a further caution to counsel on the need to be clear on their relationship both with the representative plaintiff and inside the action generally, the Court noted the following:

> [45] Motley, Rice's role in the case at bar differs significantly from the role of U.S. co-counsel in cases such as *Gariepy* wherein fees payable to U.S. co-counsel were approved by the court. This case is noteworthy in terms of the role played by the lead attorney in the Motley Rice firm, Mr. Frederick Jeckel. Of particular significance is the fact Mr. Jeckel filed the only affidavit in aid of the certification motion. No affidavit by Mr. Poulin was prepared or submitted. It was thus necessary for the defendants to move under Rule 39.03 in order to examine Mr. Poulin as proposed representative plaintiff.
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> [46] In sum, the position taken by Costs Counsel on behalf of Motley, Rice seeking to deny the jurisdiction of this court with respect to adverse costs consequences is inconsistent and self-contradictory with the position that would have been taken had the certification motion been successful, i.e. seeking fees in their capacity as co-counsel to Mr. Poulin.
>
> [47] In the above circumstances, I conclude that this court does have jurisdiction to make an award of costs against Motley, Rice as a non-resident non-party.

In relation to Will Barristers, the court criticized class counsel for failing to have provided an indemnity to the representative plaintiff, or at minimum, for failing to have adequately explained the cost consequences. Will Barristers subsequently agreed to provide an indemnity, however, the Court found that their liability exposure was not altered or affected as a result.

The court accordingly allowed special costs awards on the basis of the lack of informed consent from the proposed plaintiff.

The need to fully inform representative plaintiffs of their rights, obligations and risks involved throughout the course of an action is no different with class actions than with any other type of action. But the stakes are higher in a class action, and the willingness of a representative to act may be much less given the poor cost/benefit analysis.

Awarding costs against a representative plaintiff in an unsuccessful action is worlds apart from how costs are ordered in other claims. The fundamental and underlying purpose of class proceedings legislation is to access to justice for plaintiffs who whose claims would generally not be advanced on an individual basis as the economic recovery would not justify the output.[3]

The authors are concerned that the expanding costs awards will deter not only frivolous claims, but meritorious claims as well. Further, these jurisdictions risk losing their "market share", as the remaining jurisdictions recognize the risk of being forced to litigate in a full costs jurisdiction.

7. Conclusion

Although the Quebec courts continue to assert their "distinct" nature when it comes to class actions[4], the trends in the common law provinces will continue to inevitably cross the border. Hopefully Quebec courts will continue to recognize the benefits of harmony in this area, and will assist in the development of such harmony.

[3] W. Branch and L. Brasil "If it ain't broke , don't fix it! If it is broke, fix it!" 4th Annual Symposium on Class Actions (Toronto:Osgoode Hall Law School of York University, 2007).
[4] Harmegnies c. Toyota Canada inc., [2008] J.Q. no 1446 (C.A.)