

Class Actions

A Summary of Class
Action Decisions

Common Issues Trial Adjourned in Newfoundland Indian Residential Schools Class Action for Further Discussions

Counsel for the parties jointly agreed today to adjourn the common issues trial to allow them to pursue further discussions. “We’ve continued to make progress since our last appearance before the court; and are moving forward in a positive way; however, we had hoped to be further along at this point”, said Kirk Baert, one of the counsel for the plaintiffs. The process which is required to move the discussions to the next level is somewhat protracted. “We are confident though that this adjournment will position the parties for this,” Baert added. Further meetings have been set in Toronto for March 10 and 11, 2016.

In a case conference with Mr. Justice Robert Stack today, the parties jointly agreed, if necessary, to complete the evidence in the case May 9 to 13 in St. Johns, with closing arguments in the case to take place in St. Johns on June 9 and 10, 2016.

[For further information regarding the Newfoundland Indian Residential Schools Class Action, please click here.](#)

Ontario Class Action Digest, January 2016

January has been a busy month for the release of class action decisions in Ontario, highlights including:

- three motions concerning summary judgment, including an appeal to the Ontario Court of Appeal from summary judgment on common issues (*Pet Valu*);
- two certification decisions, both granting certification;
- one settlement approval/fee approval motion, which was granted (*Imax*); and

- The Court of Appeal has weighed in on three appeals, which has included an analysis of the amendment of common issues at a summary judgment motion (*Pet Valu*).

Lalani v. Reeves, 2016 ONSC 424

Certification

This case concerned a class action against a single self-represented defendant whom allegedly defrauded investors. There was a four year delay between the Statement of Defence and the certification motion. Four related class actions against different defendants had been certified, all with substantially the same facts and allegations. Certification was granted. The court held that no costs could be sought by the plaintiff, as the self-represented litigant left the motion “essentially un-opposed”.

Swisscanto Fondsleitung AG v. BlackBerry Ltd., 2016 ONSC 534

Certification

Certification motion in respect of alleged misrepresentation in BlackBerry’s financial statements regarding sales of BB10 smart phones. Leave under Part XXIII.1 of the *Securities Act* was granted in a separate motion. The action was certified on the basis of statutory and common law claims of misrepresentations, with the exception that a motion be brought to determine whether a global class is appropriate.

Silver v. Imax Corp., 2016 ONSC 403

Settlement Approval, Fee Approval

Motion to approve a \$3.75 million non-reversionary settlement, inclusive of fees and disbursements in respect of a securities class action. No class members objected and the court held it was “therefore reasonable to infer that the vast majority of the class supports the settlement terms.” Funds would be distributed by way of a claims process, with an appeal right to a referee, whose decision would be final.

Class counsel requested a fee of 33% on the recovery, in accordance with their retainer. The fee represented less than 1/3 of the docketed time of class counsel, which exceeded \$4 million.

The settlement and fees of class counsel were both approved.

Papassay et al. v. Ontario, 2016 ONSC 561

Leave to Appeal, Section 5(1)(a), Crown Liability

Motion by the defendant seeking leave to appeal from a decision which held that the plaintiff’s claims satisfied section 5(1)(a) of the *CPA*. The plaintiffs were former Crown Wards and alleged the province failed in its duties as their guardian by failing to take steps to preserve their rights in respect of abuses

they suffered as children. The lower court held that “it is not plain and obvious that the Crown’s obligations to its wards does not extend to protecting their legal rights.” Leave to appeal was denied.

Locking v. McCowan, 2016 ONCA 88

Certification, Appeal, Section 5(1)(a)

Appeal from a bifurcated certification motion and the motions judge’s decision in respect of striking specific claims relating to knowing assistance of two defendants. The underlying action was brought by investors in an unincorporated real estate investment trust, which was traded on the Toronto Stock Exchange. The plaintiffs alleged that their share prices dropped as a result of an improper property transaction which had to be set aside.

The motions judge held that claims of knowing assistance in respect of two parties could not satisfy s. 5(1)(a) of the CPA. The Court of Appeal held that the motions judge erred in the interpretation of the requirements for knowing assistance and in finding that it was plain and obvious the claim could not succeed. The Court of Appeal held that “What amounts to assistance — or, in the words of the motions judge, “helping” or “taking part” — has not yet been fully explored in the jurisprudence. It may be that silence is, in certain circumstances, sufficient to constitute assistance. Thus, it is not plain and obvious that the claim against the Respondents could not possibly succeed.”

1250264 Ontario Inc. v. Pet Valu Canada Inc., 2016 ONCA 24

Summary Judgment, Appeal

Appeal by the defendant from a summary judgment motion which decided common issues in favour of the plaintiff. The plaintiff cross-appealed the lower court’s refusal to amend the common issues to add a further issue. The underlying action concerned the alleged failure of Pet Valu to pass on volume rebates to the class members who owned franchises of Pet Valu.

The Court of Appeal held that there was no error in refusing the amendment to the common issues. Given the nature of the common issue sought and the fact that it was sought at the end of the summary judgment motion, such an amendment would be unfair to the defendant and could not be compensated with costs. The refusal to amend was based on the particular timing and circumstances of the case, which in the view of the Court would have tilted the hearing in favour of the plaintiff.

The Court of Appeal reversed the lower court and granted judgment to the defendant on the common issues. The Court of Appeal held that the lower court recast one of the common issues in error when granting judgment to the plaintiff.

Fanshawe College of Applied Arts and Technology v. AU Optronics Corp., 2016 ONSC 17

Summary Judgment, Leave to Appeal

Motion by defendants for leave to appeal from a refusal to grant summary judgment against the plaintiff. Underlying action concerned alleged conspiracy in price fixing of LCD panels used in monitors and televisions. Leave to appeal was granted based on the issue of whether s. 36(4) of the *Competition Act* is subject to discoverability.

Williams v. Toronto (City), 2016 ONSC 42

Summary Judgment

Summary judgment motion brought by the plaintiff seeking declaration that defendant owed the class a duty of care and breached the applicable standard. The class action was certified in 2012 after an appeal to the Ontario Court of Appeal. The class action concerned an alleged failure by the City of Toronto to deliver notices to certain tenants advising them of their entitlement to a rent reduction based on property tax reductions given to the landlord. The class members therefore did not receive rent reductions they would have otherwise been entitled to. The class consisted of between 200–500 tenants. Justice Perell found that the City owed the class a duty of care and breached the standard by failing to send the required notices.

Fehr v. Sun Life Assurance Co. of Canada, 2016 ONSC 455

Certification, Variance of Reasons

Motion by the defendant for an order varying reasons in respect of an earlier decision which dismissed part of the plaintiff's certification motion, but permitted further evidence to be filed by the plaintiff for certain claims. The defendant sought varied reasons which would clarify that certain claims by the plaintiff were statute barred. Justice Perell held that he had jurisdiction to vary his reasons but held there was no reason to do so and denied the defendant's motion.

Ontario v. Rothmans Inc., 2016 ONSC 59

Procedure, Case Management

In the ongoing action by Ontario to recover health care costs incurred as a result of tobacco-related wrongs, the defendants brought an omnibus motion to Master Short seeking further particulars or to strike portions of the amended statement of claim. Master Short noted that the action was in its eighth year, and no defence was filed. Master Short denied the vast majority of the defendant's motion and directed that all defences, cross-claims and counterclaims be served and delivered by March 31, 2016, with a discovery plan to be agreed upon "promptly".

Lundy v. VIA Rail Canada Inc., 2016 ONSC 425

Individual Issues

Motion seeking approval of an individual issues litigation plan. The defendant consented to judgment on the common issues, leaving only the issue of individual damages sustained as a result of a train derailment. Justice Perell endorsed the individual issues litigation plan as proposed which would establish the individual damages procedure for the class members.

Goldsmith v. National Bank of Canada, 2016 ONCA 22

Securities Leave, Appeal

Appeal from lower court denial of plaintiff's motion for leave to commence an action against National Bank under Part XXIII.1 of the Ontario *Securities Act*. The Court of Appeal upheld the motion judge's decision, echoing early decisions that the objective of the leave test is to "[screen] out unmeritorious claims at an early stage." The Court of Appeal also upheld that the defendant did not fit within the statutory framework as a "promoter" and that the term "requires a form of active and autonomous involvement in the organization or reorganization of a company."

Court of Appeal Maintains Denial of Leave in Securities Action

The most recent decision from the Ontario Court of Appeal on leave in securities class actions, *Goldsmith v. National Bank*, continues a trend of denying leave. The action had its origin in the demise of Poseidon Concepts in 2013, a publicly-traded energy services company. The defendant in the action, National Bank, was Poseidon's financial advisor on its public offering. The plaintiff sought to commence an action against National Bank under Part XXIII.1 of the Ontario *Securities Act* (OSA).

The motions judge denied the plaintiff's motion for leave to commence the action. The motions judge followed *Theratechnologies Inc.* in noting that the leave requirement is meant as a "robust deterrent screening mechanism" and that such a screening is intended to ensure that actions without "merit are prevented from proceeding". A key issue was whether the defendant was a "promoter" under the OSA statutory framework. The motions judge held that the defendant was "merely engaged in ordinary commercial banking" and was not a "promoter" for purposes of the OSA.

The Court of Appeal upheld the motion judge’s decision, echoing early decisions that the objective of the leave test is to “[screen] out unmeritorious claims at an early stage.” The Court of Appeal also upheld that the defendant did not fit within the statutory framework as a “promoter” and that the phrase “requires a form of active and autonomous involvement in the organization or reorganization of a company.” The Court of Appeal as well made clear that “determining whether a plaintiff has offered a plausible interpretation is something that will have to be analyzed on a case-by-case basis.”

Goldsmith v. National Bank of Canada, 2016 ONCA 22

Theratechnologies inc. v. 121851 Canada inc., 2015 SCC 18

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This edition of Class Action News was produced and edited by the Class Action Department at [Koskie Minsky LLP](#)