

CLASS ACTION RESPONSE STRATEGIES

Recent trends and developments in class actions in Canada

- a) Quebec class actions
1. Impact of the 2003 reform of the Code of Civil Procedure: Where are we?

Creation of the Class Action Chamber. Impact of Case management. Possibility of filing evidence and cross-examining representative Plaintiff. Presentation of preliminary Motions.
 2. Is Quebec still a class action heaven?
 - a) *Pharmascience vs. Piro*

Is the Superior Court going back to a more balanced approach towards certification?
 - b) The recent Court of Appeal trilogy

George vs. Attorney General of Quebec: Application of the Supreme Court of Canada judgment in *Western Canadian Shopping Centers vs. Dutton* and *Hollick vs. Town of Toronto* by the Quebec Court of Appeal. Objective definition of the class. Predominance of common questions over individual issues?

Service aux marchands détaillants Limitée (Household Finance) vs. Gagné and *Bouchard vs. Agropur Coopérative*: The necessity for the representative Plaintiff to have a cause of action and standing to sue each of the Respondents. How to conciliate the decisions in *Gagné* and *Agropur*, i.e. the necessity for the representative Plaintiff to meet the criteria of art. 1003 C.C.P. What is the impact of the statement made by the Court of Appeal regarding art. 4.2 C.C.P. and the rule of proportionality. Confirmation that punitive damages cannot be awarded against Respondents if no compensatory damages are awarded. How does it impact the cases filed pursuant to the *Consumer Protection Act*, especially when collective recovery is involved.

3. The Supreme Court of Canada decision in *Bisailon vs. Concordia University*

Confirmation that the procedural vehicle has not changed the substantive law. The importance of the role of the class representative.

4. Arbitration of class action proceedings: the next trend?

Some Quebec judges have suggested the arbitration of class proceedings as an answer to the overload of work for the Superior Court resulting from the proliferation of class actions. What are the advantages and disadvantages of such a suggestion? Can a Superior Court judge delegate its power to an arbitration panel when it comes to the liquidation of individual claims or collective recovery? Why it could be detrimental to Defendants to use arbitrators in class action proceedings.

b) Ontario class actions

1. A more liberal approach to certification?

What is the impact of the two recent Ontario Court of Appeal decisions? (*Pearson* and *Cloud*) Is it the beginning of a more liberal approach to certifying class actions? Waiver of tort class action certified in Ontario (BC court refused to strike out claim), will this have any real impact?

2. Securities class actions

Does Bill 198 amending the Ontario *Securities Act* make Ontario the Canadian forum of choice for securities class action litigation? The new amendments certainly make it easier to certify class actions relating to misrepresentation in the secondary market but will they have a real impact. The first class actions under Bill 198 were recently filed *Silver v. Imax Corp.* and *Cohen v. Imax Corp.*. The two claims allege that Imax misrepresented its revenues during the period from March to August 2006. The Court of Appeal unanimous reversal of the Ontario Superior Court trial decision in *Kerr vs. Danier Leather* is a relief to issuers and their advisors. What will be the impact on future cases?

c) Western Canada class actions

Although there are no real trends in Western Canada interesting decisions are being seen as the courts in Alberta, Saskatchewan and Manitoba apply their provinces new class action legislation. Is the approach to certification more restrictive than in Quebec and Ontario? (see *Hoffman v. Monstanto*) Is Manitoba the new class action haven given its no costs regime and national classes? Are

these factors enough to move a class action to Manitoba as a juridical advantage?
(see *Ward v. Attorney General of Canada* 2006 MJ No.356).

d) Eastern Canada class actions

New legislation in New Brunswick is on the way. What approach will the Courts in Eastern Canada take?

e) National and cross-border class actions

With jurisdictional differences and the likelihood of copycat class actions in different provinces, the ability to litigate national classes has become a key issue in class action litigation. The treatment of national class actions differs between jurisdictions. Foreign class action judgments can be enforced in Canada if certain requirements are met. This is confirmed by the Ontario Court of Appeal (*Currie vs. MacDonald Restaurants*). However, the Quebec Superior Court refused to recognize a class action judgment rendered in Ontario. (*HSBC Bank Canada vs. Hocking*). How does it impact the settlement negotiations of a multi-jurisdictional class action?