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Evolving Trends in Class Actions

The Advocates' Society – Class Actions Advocacy

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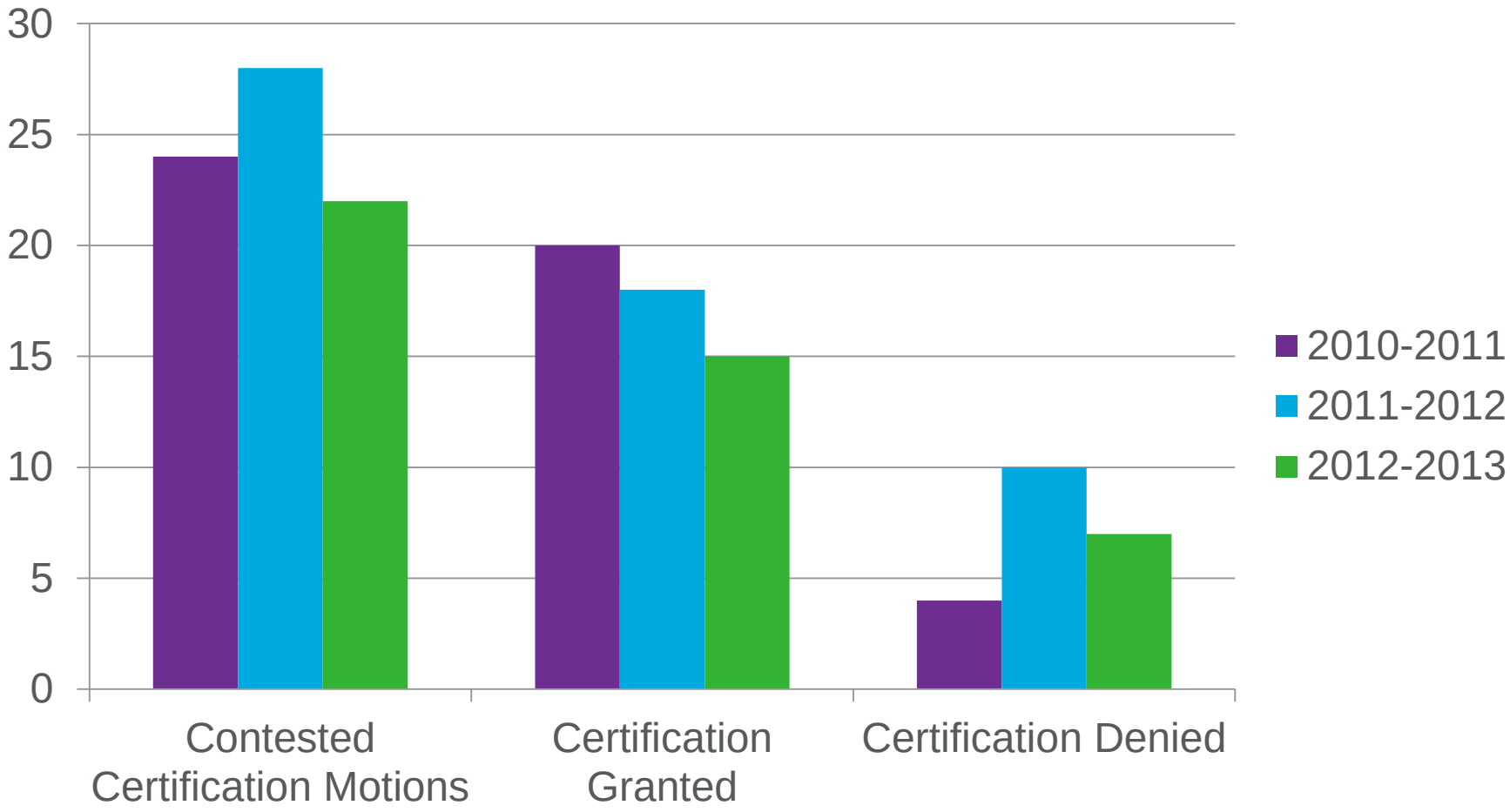
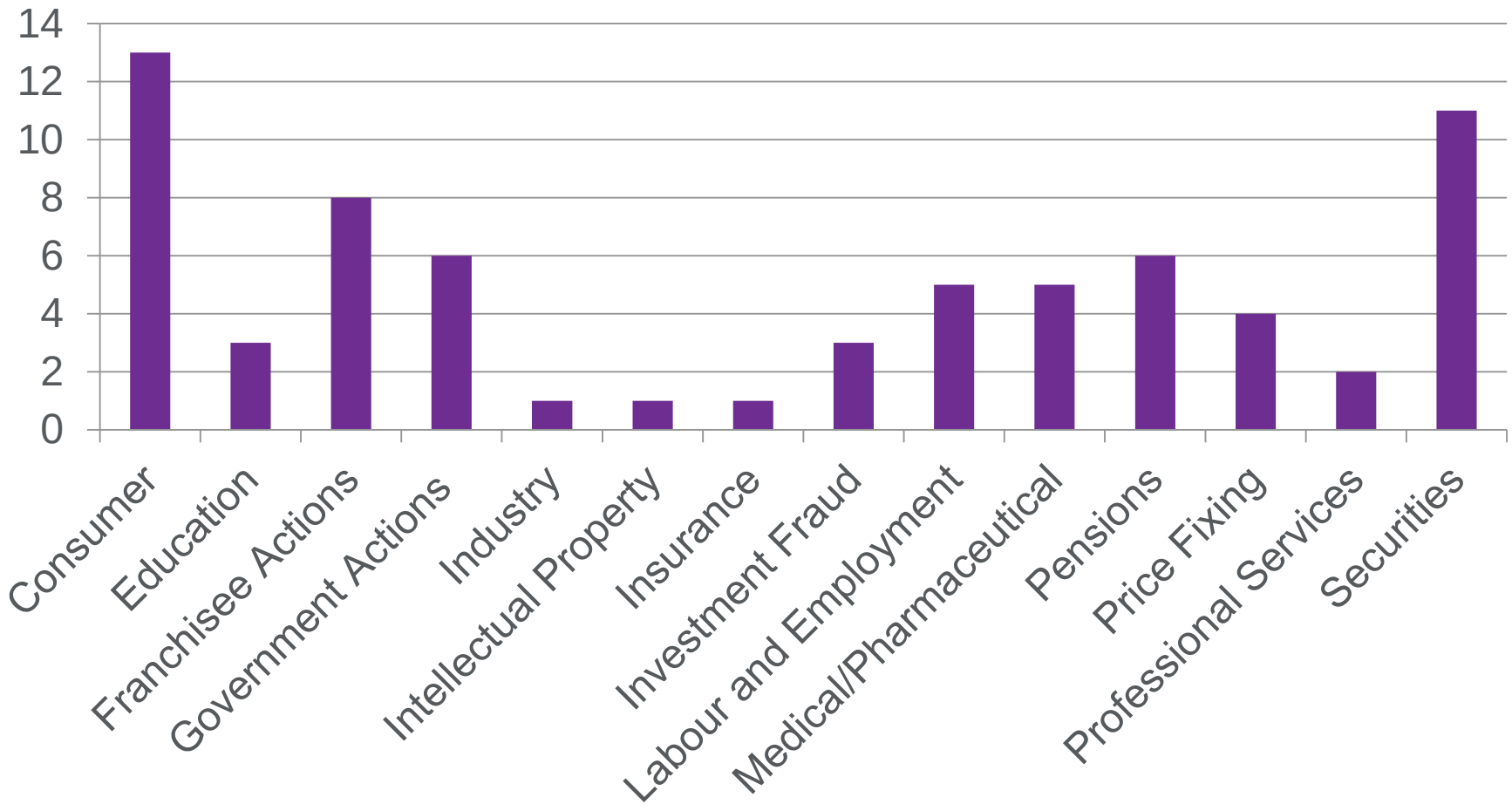
Class certification motions



*All data relates to the period January 1, 2010 to December 31, 2013

Class action trends



*All data relates to the period January 1, 2010 to December 31, 2013

Procedural updates

Treat America Limited v. Leonidas, 2012 ONCA 748

- The Court upheld an Order permitting a deposition of the former CEO of a Canadian company in connection with a U.S. class action, even though the CEO is under investigation in a parallel criminal proceeding in Canada.

Parsons v. The Canadian Red Cross Society, 2013 ONSC 3053

- A judge of the Ontario Superior Court of Justice may sit outside of Ontario to hear a case involving a pan-Canadian settlement.

Procedural updates (cont.)

- Justice Belobaba released three costs decisions on three successful certification motions. ***Rosen v. BMO Nesbitt Burns Inc***., 2013 ONSC 6356, ***Dugal v. Manulife Financial***, 2013 ONSC 6354 and ***Crisante v. DePuy Orthopaedics***, 2013 ONSC 6351.
- Justice Belobaba noted that class actions are becoming too expensive to promote the goal of achieving access to justice; released cost guidelines and a cost template to make costs awarded on certification motions more uniform.
- Justice Belobaba's cost template provides that:
  - a plaintiff's cost award should range between $169,250.00 and $496,118.00.
  - a defendant's cost award should range between $148,870.00 and $341,000.00.

Procedural updates (cont.)

Cannon v. Funds for Canada Foundation, 2013 ONSC 7686

- Justice Belobaba rejected the common practice by judges of automatically capping legal fees at the 20 to 25 per cent level.
- Rather, contingency fee arrangements that are understood and accepted by representative plaintiffs are presumptively valid, whatever the amounts involved.
- The presumption of validity should only be rebutted in clear cases.

Consumer services cases of note

Sankar v. Bell Mobility, 2013 ONSC 5916

- A certification motion alleging that Bell systemically breaches its contracts with its pre-paid wireless customers by seizing credit balances.
- In particular, the plaintiffs challenge Bell's practice of putting expiry dates on its prepaid cell phone cards and its practice of treating any unused, outstanding balances as forfeited.
- The action is framed in breach of contract, unjust enrichment, and breach of the *Consumer Protection Act.*
- The certification motion was granted; motion for leave to appeal the certification of the class action was denied: 2013 ONSC 7529

Consumer services cases of note (cont.)

Arora v. Whirlpool Canada LP, 2013 ONCA 657

- A certification motion alleging that Whirlpool Canada negligently designed its washing machines and failed to warn of the design defects contrary to s. 52 of the *Competition Act*.
- The action was unsuccessful and certification was denied as there was no tenable cause of action. Plaintiffs failed to provide sufficient evidence to establish a plain and obvious case for either a breach of contract, negligence, waiver of tort or a statutory cause of action under s. 52 of the *Competition Act* against Whirlpool.
- The Court of Appeal dismissed the appeal, noting that the *Sale of Goods Act*, *Consumer Protection Act*, and *Business Practices Act* already provide sufficient remedies against the manufacturer and retailer.

Consumer services cases of note (cont.)

Kang v. Sun Life Assurance Company of Canada, 2013 ONCA 118

- The case involved the sale and administration of universal life insurance policies. Metlife misrepresented the terms for premiums and the terms of the policies which resulted in the plaintiffs being asked to pay additional charges, suffering policy lapses and failing to pursue claims.
- Justice Perell struck out numerous paragraphs of the plaintiffs' Fresh as Amended Statement of Claim under Rule 21.01(1)(b) of the *Rules of Civil Procedure.*
- The Plaintiff's appeal was allowed. Allegations concerning breach of the duty of good faith and fair dealing, breach of contract, deceit and fraud, and the material facts relevant to the pleas were permitted to be part of the claim.
- The test under Rule 21.01(1)(b) is whether it is plain and obvious that the action cannot possibly succeed. A claim should not be dismissed merely because it is novel.

Franchise cases of note

1250264 Ontario Inc. v. Pet Valu Canada Inc., 2013 ONCA 279

- The Superior Court invalidated all opt-out notices filed by class members after a telephone campaign by a franchisee group (CPVF) opposed to the action, which made concerted efforts to dissuade class members from participating in the claim.
- The Court of Appeal set aside the motion judge's order. Justice Winkler held that the motion judge's analysis was based on the mistaken view that the survival of the class action depended on the outcome of the opt-out motion brought by the Plaintiff to invalidate the opt-out notices filed by class members. CPVF's efforts to dissuade class members amount to the type of intra class debate which is acceptable during the opt-out period.

Franchise cases of note (cont.)

David Zwaniga v. Johnvince Foods Distribution et al, 2012 ONSC 5234

- Johnvince brought a pre-certification summary judgment motion to dismiss the proposed class action against it. Johnvince was neither the partner nor the "franchisor's associate" of the co-defendant, Revolution Technologies Inc.
- The Court granted the motion and held that Johnvince did not meet the definition of the term "franchisor's associate" as interpreted by the courts and as established in the *Arthur Wishart Act.*
- The Court said that Johnvince was not "*involved in reviewing or approving the grant of the franchisee*" and was not a person who "*exercises significant operational control over the franchisee and to whom the franchisee has a continuing financial obligation in respect of the franchisee*."

Labour/Employment cases of note

- The Court of Appeal for Ontario permitted the "off-the-clock" overtime class actions to continue against the defendant banks in ***Fulawka v. Bank of Nova Scotia*** ("***Fulawka***") and ***Fresco v. Canadian Imperial Bank of Commerce*** ("***Fresco***"). Applications for leave to appeal to the Supreme Court were filed in *Fresco* and *Fulawka* but were dismissed.

- The Court of Appeal for Ontario upheld the lower's court decision and declined to certify a class action in ***McCracken v. Canadian National Railway Company***, which involved a claim regarding the misclassification of employees as being exempt from overtime requirements.

Labour/Employment cases of note (cont.)

Brown v. Canadian Imperial Bank of Commerce ("Brown"), 2013 ONSC 1284

- Alleged misclassification of employees to avoid payment of overtime.
- Certification was denied. There was a lack of commonality among the class members as managerial employees were included (appears to have been endorsed in para. 92 of *McCracken*). The decision was upheld by the Divisional Court.

Rosen v. BMO Nesbitt Burns Inc. ("Rosen"), 2013 ONSC 2144

- The proposed class in *Rosen* (much like the proposed class in *Brown*) comprises current and former BMO Investment Advisors, Associate Investment Advisors and Investment Advisor Trainees who claim they were denied overtime pay contrary to the *Employment Standards Act*.
- Certification was granted. Taking a cue from *Brown*, the class definition was revised to exclude Investment Advisors who perform managerial or supervisory work. Also, there was no mention of job "levels" or grades.

Summarizing the key points:

- Class action not certified for managerial employees as their liability can only be determined through an individualized assessment of each employee's duties and responsibilities. (*McCracken* and *Brown*)
- Class action certified for non-managerial employees as standard policies and procedures exist for these employees and the liability of all class members can be determined uniformly. (*Fulawka, Fresco and Rosen*)
- It is important for employers to ensure that their policies and procedures do not run afoul the *ESA* and comply with the minimum statutory requirements.(*Fulawka, Fresco and Rosen*)
- It is important for the plaintiff class to file sufficient evidence to meet the *"some basis in fact"* test at certification and answer questions relating to the "*employee's authority, autonomy, level of responsibility, degree of control over his or her hours of work and where and how that work is done".* (*McCracken* and *Brown* failed to meet the test)

Pensions cases of note

Chapman v. Benefit Plan Administrators et al, 2013 ONSC 3318

- A successful certification motion based on a claim that the Trustees of the Eastern Canada Car Carriers Pension Plan granted early retirement benefits to Plan members at a time when the Plan had ongoing solvency issues.
- The Court allowed the claim to proceed against, among others, Benefits Plan Administrators Limited and its president, in his personal capacity, even though he was acting in the course of his employment. The Court held that "*officers or employees of a corporation can be held personally liable for tortious conduct, even when they are acting in the course of their duty, provided that the tort is properly pleaded against the individual*".

Pensions cases of note (cont.)

O'Neill v. General Motors of Canada, 2013 ONSC 4654

- A partial summary judgment motion and common issues trial arising out of a claim that General Motors of Canada Limited ("**GMC**") unlawfully reduced the post-retirement benefits for executive and salaried employees after their retirement.
- The Court allowed the common issues to proceed in favour of the salaried employees and dismissed the claim by the executive employees as GMC could only reduce benefits of salaried employees while they were actively employed.
- The Court reasoned that whether retirement benefits can be changed after retirement is a matter of contractual interpretation. The contract of the executive employees clearly stated that the post retirement benefits were not guaranteed and may be reduced or eliminated prior to board approval.

Securities class actions statistics

Trends in Canadian Securities Class Actions: 2013 Update (NERA Economic Consulting)

- 10 new Canadian securities class action filed in 2013:
  - 9 out of 10 claims were Bill 198 cases.
  - 8 out of 10 new cases were filed in Ontario (of these, 2 were also filed in other provinces); out of the remaining 2 cases, 1 was filed in Alberta and 1 in Quebec
- As of December 31, 2013, there are 54 active securities class actions ~ $19 billion in outstanding claims (including claims for punitive damages).
- From 1997-2013, Canadian-domiciled companies were named as defendants in 93 filings in the U.S.; 32 also had parallel class actions commenced against them in Canada.

Cited with Permission from NERA.

Securities cases of note

Silver v. IMAX, 2013 ONSC 6751

- IMAX, a Canadian public company dual-listed on the TSX and the NASDAQ, is a defendant in overlapping class proceedings in Ontario and the United States.
- The Court granted the defendants' motion to exclude from the certified class all NASDAQ purchasers who did not deliver an opt-out notice in the U.S. Action.
- The Plaintiff sought leave to appeal the decision. Leave was denied. Justice Tzimas stated: "*The existence of an approved settlement in the U.S. Proceedings was clearly relevant to the question of whether or not the Ontario Action would remain the preferable procedure to resolve the claims of the overlapping class members".*

Securities cases of note (cont.)

Tucci v. Smart Technologies Inc., 2013 ONSC 802

- Smart Technologies issued shares in the secondary market following an Initial Public Offering in 2010. The plaintiffs bought shares and brought an action alleging that the offering materials were materially deficient.
- The Court upheld the conventional application of s.130(1) of the *Ontario Securities Act* ("***OSA***") to purchasers in the primary market and refused to extend the application of s.130(1) to purchasers in the secondary market.
- Settlement of $15M and class counsel fees approved: 2013 ONSC 5786

Securities cases of note (cont.)

Dugal v. Manulife Financial, 2013 ONSC 4083

- Plaintiffs sought leave to bring a secondary market liability action under s. 138.3 of the *OSA*.
- The Court considered the two interpretations of the "reasonable possibility of success" threshold which have emerged from the case law.
- The Court granted leave under s. 138.3 and adopted the more rigorous interpretation of the section. The Court held that "*establishing a reasonable possibility of success at trial involves more than merely raising a triable issue or articulating a cause of action […] the test [under s. 138.8] is intended to do more than screen out clearly frivolous, scandalous or vexatious actions.*"

Securities cases of note (cont.)

Bayens v. Kinross Gold Corp., 2013 ONSC 6864

- Trustees of the Musicians' Pension Fund of Canada commenced a secondary market misrepresentation claim against Kinross.
- Justice Perell denied the plaintiffs leave to advance a statutory claim for securities market misrepresentation under Part XXIII.1 of the *Securities Act.*
- Although the leave test imposes a low evidentiary threshold on the party seeking leave, it is still a genuine screening mechanism that requires the court to assess and weigh evidence.
- In denying leave, Justice Perell also dismissed the plaintiff's motion to certify the statutory claim along with a common law claim for negligent misrepresentation.

Securities cases of note (cont.)

AIC Limited v. Fischer, 2013 SCC 69

- The defendant mutual fund managers settled the market timing allegations by the **Ontario Securities Commission** *("**OSC**")* against them and agreed to pay $205.6 million to investors. The proposed plaintiff claimed that the amount paid, pursuant to the OSC settlements, did not fully compensate the class and claimed damages over and above the amount of the settlement.
- The plaintiffs' motion for certification failed at first instance on the basis that a class proceeding was not the preferable procedure for the resolution of the claims asserted on behalf of the class.
- That decision was overturned by the Divisional Court, the decision was upheld by the Court of Appeal for Ontario. The Supreme Court of Canada dismissed the appeal, upholding the decision to grant certification.

Securities cases of note (cont.)

AIC Limited v. Fischer, 2013 SCC 69

- At the Supreme Court, the issue was whether the proposed class, as compared to the non-litigation OSC proceedings, was preferable from an access to justice point of view.
- The preferability inquiry must address judicial economy, behaviour modification, and *access to justice.*
- To determine if the class action will promote access to justice, ask:
  - (1) What are the barriers to access to justice?
  - (2) What is the potential of the class proceedings to address those barriers?
  - (3) What are the alternatives to class proceedings?
  - (4) To what extent do the alternatives address the relevant barriers?
  - (5) How do the proceedings compare?

Sharma v. Timminco Limited, 2012 ONCA 107 ("*Timminco*")

- In 2009, the plaintiffs commenced a proposed class action alleging misrepresentations by the defendants that adversely affected the value of shares of Timminco Limited in the secondary market for 8 months in 2008.
- The defendants appealed to the Court of Appeal on the issue of whether pleading the intention to seek leave under Part XXIII.1 of the OSA was sufficient to suspend the limitation period. The Court of Appeal overturned the initial decision concluding that without leave having been obtained, no cause of action under s. 138.3 was being "asserted" so as to engage s. 28(1) of the *CPA*.
- As such, the cause of action for secondary market misrepresentation was not a legal right and could not be enforced. The Supreme Court of Canada declined to review the decision.

Timminco Applied

Green v. Canadian Imperial Bank of Commerce (“***Green***”), 2012 ONSC 3637

- Two shareholders of CIBC sought leave, under s.138.3 of the *OSA,* to pursue an action against CIBC and four senior officers for alleged misrepresentations in the secondary securities market concerning CIBC’s exposure to the U.S. residential mortgage market.
- Following *Timminco*, the plaintiffs’ right to pursue a cause of action under s.138.3 of the *OSA* was time-barred, as leave was not obtained prior to the expiry of the three year limitation period.
- At the request of the plaintiffs in *Green*, the Court of Appeal appointed a special five-judge panel to hear the appeal and reconsider the issues raised by *Timminco*.

Timminco Overruled

Green v. Canadian Imperial Bank of Commerce ("***Green***"), 2014 ONCA 90

- The 5-member panel of the Court of Appeal overruled *Timminco* and held that when a representative plaintiff in a class action commenced within the 3-year limitation period under s. 138.14 of the *Securities Act* pleads:
  - (a) the statutory claim for misrepresentation in the secondary market based on section 138.3;
  - (b) the facts supporting that claim; and
  - (c) the intent to seek leave to commence an action based on the *Securities Act*,

  then the limitation period is suspended for all class members.
- Thus, a plaintiff has 3 years from the date an alleged misrepresentation is made to commence a secondary market misrepresentation claim as opposed to 3 years to *both* commence a claim *and* obtain leave to pursue it.

The trilogy of competition class action decisions by the SCC

- The Supreme Court heard the trilogy of competition law cases; ***Pro-Sys Consultants Ltd. v. Microsoft Corp.***, 2011 BCCA 186, ***Sun-Rype Products Ltd. v. Archer Daniels Midland Co.***, 2011 BCCA 187 and ***Option Consommateurs v. Infineon Technologies***, 2011 QCCA 2116 and rendered its decision on October 31, 2013.
- The core issue before the Supreme Court was whether indirect purchasers (consumers who bought the products after the initial purchase by direct purchasers, from those involved in the anti-competitive conduct) have a remedy under s. 36 of the *Competition Act*, which allows for a private right of action to any person who has suffered loss as a result of criminal misconduct under the legislation.
- The Supreme Court not only allowed indirect purchasers to sue for damages for violations of the *Competition Act*, but also reinforced the low evidentiary burden at the certification stage of class proceedings.

The trilogy of competition class action decisions by the SCC (cont.)

- Indirect Purchasers have the right to sue
  - The Court was of the view that indirect purchaser actions are consistent with the objectives of restitution law since these purchasers may have actually borne the overcharge.
  - Though the indirect purchasers have a right to sue, the Court also noted that the indirect purchasers may still face challenges in proving their loss at the merits stage. In particular, consumers must be able to “self-identify” as having purchased a product that was the subject of price-fixing.

- Standard of proof at certification
  - The Court also reinforced the low evidentiary burden at the certification stage, holding that the plaintiffs are not required to adduce evidence that the acts alleged actually occurred. The evidence required to establish "some basis in fact" goes only to establishing that the issues are common among class members and that the certification criteria have been satisfied.

Thank you

If you have any questions, please contact:

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