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A SMOOTH LANDING — MANAGING MULTI-JURISDICTIONAL CLASS ACTIONS IN THE *SAUER* "MAD COW" LITIGATION

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After six years of floating the very real possibility of multiple trials, the BSE or "mad cow" national class action litigation[1] has finally landed, making its only home in Ontario. Most notably, although the last to arrive, the Québec class members have joined the Ontario action. To be sure, managing identical or overlapping multiple class actions has become a standard challenge for class action counsel, raising continuing discussion, in and out of the courtroom. It is a topic of interest at conferences, in legal publications and at lawyers' preferred coffee and lunch venues.

Not surprisingly, litigators have attempted to tame the beast using a variety of strategies, many of which have been creative and successful. Often, the courts' intervention is sought with approaches such as carriage motions, motions to stay proceedings in one or several provinces, challenges based on *forum non conveniens* arguments and constitutional challenges, to name a few. This has resulted in a growing body of jurisprudence addressing a variety of such legal issues.

The merger of the four BSE class actions[2] into the Ontario *Sauer* action illustrates what is perhaps a new, but likely expanding, approach.

[*Editor's note*: This article is written solely on the author's own behalf and any opinions expressed are those of the author only and do not reflect those of the Department of Justice or the Government of Canada.]

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Through the cooperation of willing counsel who understood both the consequences of having to litigate multiple proceedings as well as those of merging the actions; together with the flexibility and assistance of the courts; and with the openness of all involved to explore new ideas which took them across provincial borders, order has been put into what could have been much more cumbersome and costly litigation. The road was a little long, presented some procedural mind teasers that had to be sorted out, and required choreographed steps. Nonetheless, the litigation of multiple national class actions can be managed. The *Sauer* litigation is an example of how.

In the spring of 2005, four coordinated actions were commenced. The representative plaintiffs for each action were represented by counsel in their respective province. With agreement and coordinated efforts, the plaintiffs' counsel group proceeded with the Ontario and Québec actions, moving the two actions forward more or less simultaneously. From their early days, the Alberta and Saskatchewan actions remained inactive.

Motions to strike in the *Sauer* action were advanced by all the defendants. Related procedural motions were also brought by both the defendants and plaintiff.[3] The motions and appeals resulted in delay of the Ontario certification motion in order to allow the various issues of law to be decided first. Final disposition of these motions occurred in 2007, with the Supreme Court of Canada's denial of leave to appeal the decision of the Ontario Court of Appeal which upheld the denial of the strike motions.[4]

Meanwhile, in Québec, counsel for the plaintiff had consented to a stay of the *Bernèche* action pending final adjudication of the Ontario proceedings at a preliminary hearing in October 2005, presumably signaling a choice to advance the Ontario litigation. However, in June 2006, when the defendants brought a motion for a further stay of the action in response to Bernèche's motion for authorization to institute a class action, the plaintiff opposed the request. Justice Wagner of the Québec Superior Court noted "that because of the additional delay required

to allow the Ontario courts to decide on various issues of law, Bernèche now realizes that his interest no longer lies in Ontario, and that it would be best to pursue the Québec action without delay."[5]

The defendants' motion was unsuccessful under the test that had to be met for a stay under Québec law.[6] Justice Wagner concluded that the law did not permit him to order a stay where there was no *lis pendens*. He found that the class members of the Ontario and Québec actions were not the same, nor were subject matter and the issues to be determined. Accordingly, the Ontario case would not have the effect of *res judicata* and a situation of *lis pendens* was not created.[7] Leave to appeal the decision was denied.[8] The defendants' objective to avoid having to defend two essentially identical class actions could therefore not be achieved. Had the Québec test for a stay mirrored that in Ontario, the result may well have been different. Justice Wagner made it clear, however, that he did not foreclose the possibility of ordering a stay in appropriate circumstances.[9] Those circumstances were to come later.

In the meantime, the actions proceeded towards certification simultaneously in both jurisdictions. The first step in achieving a single national class action came in early 2008 with the suspension of the Alberta and Saskatchewan actions in favour of the Ontario action. In February 2008, prior to the certification hearing in Ontario, the plaintiff amended his Statement of Claim on consent of all parties to include the cattle farmers in those provinces.

Also in February 2008, further streamlining the litigation, the plaintiffs in all four actions and the Ridley defendants negotiated a settlement. The *Bernèche* settlement agreement was approved by Wagner J.C.S. in May 2008. The settlement agreement in *Sauer* was approved by Justice Lax in September 2008. Both actions were subsequently dismissed following the publication of notices.

Both the Québec and the Ontario class actions were certified, *Bernèche* on June 14, 2007 and *Sauer* on September 3, 2008 respectively. The Québec class was defined as:

> *All physical and moral persons residing in Québec and who raise beef or sell cows and calves who have suffered damages as a result of the discovery of bovine spongiform encephalopathy (BSE) of a cow from Alberta confirmed on May 20, 2003 and who as a result, suffered from border closings on the export of Canadian beef and live cattle.*[10]

The court found that the government acted within its policy and administrative sphere which shields it from civil liability and accordingly certified on the common issue of gross negligence or bad faith in the application of the regulations governing production and sale of feed for cattle.[11]

In Ontario, the class was defined as:

> *All persons who as at May 20, 2003 were resident in Canada (except the province of Québec) and farmed cattle including, but not limited to, cow-calf, backgrounder, purebred, veal, feedlot and dairy producers.*
>
> *In this class definition 'person' means any individual, partnership, corporation, cooperative, communal organization, trust, band farm or other association who as at May 20, 2003 was farming cattle within the meaning of the Income Tax Act.*[12]

The claim in Ontario is in simple negligence.[13] The certification order and claim were later amended to include an action for misfeasance in public office. Notices were published in both actions.

Any agreement to coordinate class actions has to be based on a thorough consideration of all legal and procedural issues material to the particular case, and how to protect the interests of the party one represents with respect to each of these issues. In a case involving a Québec action, additional issues arise unique to the substantive and procedural laws of that jurisdiction and their interplay with the common law. Choice of jurisdiction will be a key issue between the parties themselves, and more importantly, with the courts, who may be unwilling or unable in law to accommodate counsels' plan. This was the case in the first stay application in *Bernèche*.

Based on the *Sauer/Bernèche* experience, it is imperative that the judges seized of the actions be involved in the process of coordination. They should be able to discuss and informally approve of the steps proposed by counsel in order to ensure there will be *res judicata* and one case that will finally dispose of the issues between the parties.

Consider the following factors (by no means an exhaustive list) which may bear on both selection of jurisdiction and the terms to be agreed upon for the future conduct of the litigation:

- Comparison/weighing of the advantages/disadvantages of each jurisdiction with respect to practical (for example, location of witnesses, counsel) and procedural considerations (for example, discovery rules and rules of evidence); the availability of trial dates; the costs regime; differences in substantive law; trends in class action jurisprudence;
- Determination of which law would apply to the adjudication of the common issues, particularly in the case of Québec residents and whether and how this will impact one's case; agreement on the law to be applied;
- Differences in the causes of action pleaded;
- Differences in the common issues;
- Differences in the class definition;
- Whether there should be notice of the merger and a further opportunity to opt out;
- Necessity of creating sub-classes;
- Need or desire to change the representative plaintiff;
- Differences in discovery rules; agreement regarding who should be examined for discovery
- Risk of inconsistent witness evidence
- Risk of inconsistent findings in the case of multiple trials
- Inevitable savings of financial and human resources; and
- Meeting the objectives of access to justice, judicial economy and behaviour modification.

All parties in the *Sauer* and *Bernèche* actions wanted the case to proceed in one jurisdiction and agreed it should be Ontario, subject to obtaining an order from Wagner J.C.S. to stay the Québec action. Ontario common law, procedural and substantive, would apply to the determination of the common issues of the Québec resident class members, the Ontario common issues would apply[14] and the decision of the Ontario court would be binding on the Québec resident class members. The main issues of debate raised either by the parties or by the Courts were, in this litigation, the necessity for a Québec sub-class and the issue of notice of the merger to Québec resident class members with a further opportunity to opt-out of the merged national action. These issues were resolved by agreement and, in the case of notice, by the Courts. The path taken to reach the merger waiting at the end of the road, was not without snags, and sometimes appeared circular.

The first step was taken in Québec where Bernèche filed a motion in November 2009 (heard December 22, 2009) seeking to suspend (stay) the Québec action in favour of the Ontario action. The Court was advised an amendment to the class definition would be sought in Ontario to include the Québec class members subject to the stay of the *Bernèche* action. This proposal was introduced to Justice Strathy in Ontario at a case conference in early December 2009. The question of whether a sub-class was required for the Québec class members was discussed but not resolved.

Following the *Sauer* case conference, and as a result of the concerns raised over the sub-class issue, counsel for Sauer advised that he would no longer be moving to amend the Ontario definition to include Québec residents. Québec counsel then amended their stay motion to seek a stay pending resolution of *Sauer* and without proposing a merger

of the actions. Counsel for the Crown did not oppose the motion but brought a motion requesting that notice be given to the Québec class. Justice Wagner reserved his decision.

In January 2009, the Ontario parties agreed to bring a joint motion to Strathy J. in *Sauer* to merge the actions by amending the class definition to include Québec resident class members, but not to include a sub-class. Having been so advised, Québec counsel advised Wagner J.C.S., who convened a case conference. Not having rendered a decision on the stay motion, Wagner J.C.S. asked counsel for Bernèche to file an amended motion returnable in April and to provide the new agreement. The Attorney General's notice of motion would be heard at the same time.

Counsel recognized the somewhat circuitous nature of the situation, with the amendment of the *Sauer* class definition dependent on the Québec stay, itself dependent on the Ontario amendment. The solution was to seek a case conference with Strathy J. to obtain a preliminary view on the plan which could be shared with Wagner J.C.S. to assist him on the stay motion. At the April 2009 case conference, counsel were asked to address three preliminary concerns in their joint motion: (1) that there be no substantive legal disadvantage to the Québec class members if their claims are determined under Ontario law; (2) proof of appropriate mechanisms to ensure proper communication with the Québec residents; and (3) appropriate Notice to Québec class members, including the right to opt-out, be an integral part of the process.

The Courts and the parties in both actions agreed on the order of proceedings through correspondence and ultimately held a joint case management teleconference on May 27, 2010. The process was finalized and the following steps achieved the consolidation of the actions:

- The motion to suspend the *Bernèche* action in Québec did not proceed in April as scheduled to give the Court the benefit of knowing how the actions would be coordinated, prior to deciding on whether a stay should be granted;
- The Attorney General and the plaintiff made a joint motion in August 2010 to amend the class definition in *Sauer* and consolidate the Québec proceeding into the Ontario action. In an endorsement dated August 10, Strathy J. made an order, conditional on the Québec Court suspending or staying the *Bernèche* action, (1)amending the class definition; and (2)directing that notice, as conditionally approved, be given to the Québec class members, and further directing that the Notice specify the manner in which to proceed and the deadline for opt-outs;
- On December 22, 2010, Wagner J.C.S. suspended the Québec class action and approved a form of Notice with opt-out to be published prior to the formal order creating a national class; and
- In its final leg of the journey in Ontario, following the publication of the Notice, Strathy J. made the order finalizing the consolidation of the actions on March 24, 2011.

A happy landing for the parties — one national class action, two parties. Judicial economy and access to justice for all. The parties can now focus their full attention on documentary and oral discovery, moving closer to a final resolution of the mad cow litigation, than might otherwise have been.

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1 The four actions were claims in negligence alleging that the BSE crisis which resulted in the closing of international borders to Canadian cattle and beef in May 2003 was caused or contributed to by the negligence of the federal government and the feed manufacturer. (Ridley, the manufacturer, is no longer a party in the action.)

2 *Murray v. Attorney General of Canada et al*, Saskatoon 0582 of 2005(Sask. residents); *Ewasin et al v. Attorney General of Canada*, Edmonton 05-05326 (Alta. cattle farmers); *Bernèche* c. *Agriculture et Agroalimentaire Canada et al*, Montreal 500-06-000284-055 (Québec cattle farmers); *Sauer v. Attorney General of Canada et al*, Toronto 05-CV-287428 CP (cattle farmers of all other provinces).

3 See for example, *Sauer v. Canada (Attorney General),* [2005] O.J. No. 4237 (S.C.J.).

[4] See *Sauer v. Canada (Attorney General)*, [2006] O.J. No. 26 (S.C.J.), aff'd [2007] O.J. No. 2443 (C.A.); leave to appeal ref'd, [2007] S.C.C.A. No. 454.
[5] *Bernèche c. Canada (Procureur général),* [2006] J.Q. no 5326 at paras. 13 and 14 (S.C.) [*Bernèche*].
[6] Art. 3137, *Code civile du Québec*.
[7] *Bernèche, supra* note 5 at paras. 28 to 35; See also the leave decision of the Québec Court of Appeal on the *lis pendens* issue: [2006] J.Q. no 7893 (C.A.) at paras. 22, 23 and 32.
[8] *Bernèche c. Canada (Procureur general)*, [2006] J.Q. no 7893 (C.A.).
[9] *Bernèche, supra* note 5 at para. 28.
[10] *Bernèche c. Canada (Procureur general)*, [2007] J.Q. no 6368, 2007 QCCS 2945 at para. 165.
[11] *Ibid* at para. 166.
[12] *Sauer v. Canada (Attorney General),* [2008] O.J. No. 3419 (S.C.J.) at para. 72; leave to appeal ref'd [2009] O.J. No. 402 (Div. Ct.).
[13] *Ibid.*
[14] The plaintiff will have to prove simple negligence, the issue certified in Ontario, rather than the more onerous gross negligence or bad faith certified in Québec.

AGGREGATE DAMAGES VERSUS INDIVIDUAL ASSESSMENT IN CLASS ACTION LITIGATION: IMPORTANT CONSIDERATIONS FROM A LOSS QUANTIFICATION PERSPECTIVE

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The authority of a thousand is not worth the humble reasoning of a single individual.

Galileo Galilei

In Canadian class action litigation, the question of whether damages can be quantified in aggregate (*i.e.*, in total for all members of a plaintiff class), or whether damages require individual assessments (*i.e.*, an analysis of particular facts and circumstances of individual plaintiffs or groups of plaintiffs) is an extremely important one, both at the certification and post-certification stages. While not a strict requirement of the various Canadian provincial class action statutes, pleading or proving whether or not aggregate damages apply may indicate to the court whether a class action may or may not be a preferable procedure to resolve the claims of a putative class and, therefore, whether it should or should not be certified. At the post-certification stage, if a court decides that an aggregate damages rather than individual assessment approach should be undertaken, this could result in significantly less time, effort and expense being required by plaintiffs to quantify their alleged damages.

Most often, at the certification stage, counsel undertakes to provide reasons as to whether aggregate damages or individual assessments should apply for a particular proceeding. However, because of their experience and training, loss quantification experts are increasingly retained by counsel at this stage to provide an independent analysis as to which of the two approaches should apply. The purpose of this article is to analyze, from the perspective of a loss quantification expert, some of the facts and circumstances that should be considered in order to make this determination.

Part I of this article provides a brief overview of relevant class action statutes and case law as they relate to the question of aggregate damages versus individual assessments. Part II discusses some of the facts and circumstances that need to be considered in order to decide between the two approaches.

Part I – The Legal Context

Class Action Statutes

In order for a proceeding to be certified as a class action in Canada, provincial statutes generally require,[1] among other things, that the plaintiffs' claims:

i) Disclose a cause of action;

ii) Identify a class of two or more persons that would be represented by the representative plaintiff;

iii) Raise common issues of the class members;

iv) Set out why a class proceeding would be the preferable procedure for the resolution of the common issues; and,

v) Identify a representative plaintiff who would fairly represent the interests of the class, has produced a workable plan to advance the pro-

ceeding on behalf of the class, and does not have a conflict of interest with other class members.

If a court determines that a proceeding should be certified, the court may then determine whether all or part of the damages in question should be calculated in the aggregate depending on whether:[2]

i) Monetary relief is claimed on behalf of some or all class members;

ii) No questions of fact or law (other than those relating to the quantification of monetary relief) remain to be determined to establish the defendant's monetary liability; and,

iii) The aggregate or part of the defendant's liability to some or all class members can be reasonably determined without proof by individual class members.

To the extent that individual issues exist, the court may set out procedures to be followed (hearings, inquiries and other determinations) in order for individual plaintiffs or groups of plaintiffs to provide their particular facts and circumstances which would then be used in the individual assessments of damages.

Note that there is no explicit requirement for plaintiffs to plead aggregate damages as a common issue at the certification stage. However, plaintiffs often do so if facts exist to suggest that an aggregate damages methodology may be appropriate, in order to demonstrate to the court that: 1) the class action raises common issues, and 2) such common issues extend to the determination of damages in the aggregate. This implies that a class action is an "efficient" and preferable procedure to resolve the plaintiffs' claims. Conversely, defendants may point out other facts that suggest that individual issues exist such that damages cannot be quantified in the aggregate. If individual issues are significant and complex, then this implies that a class action may not be a preferable procedure to resolve plaintiffs' damages claims.

Case Law

The case law on this subject varies case by case, is ever changing, and tends to cover the entire spectrum from requiring aggregate damages to individual assessments.

In *Markson v. MBNA Canada Bank*,[3] a class comprising MBNA credit cardholders brought an action against MBNA alleging that certain transaction fees and interest charged by MBNA on cash advances exceeded the maximum 60% stipulated in s. 347(1)(b) of the *Criminal Code* (the "Alleged Fees"). While the class comprised all MBNA credit cardholders, only a subset had been charged the Alleged Fees. The Ontario Court of Appeal reversed the decisions of the certification court and Divisional Court and certified the proceeding. The Court of Appeal held that, despite the entire Class not having been charged the Alleged Fees, MBNA's practices had the "potential" to charge them. Once "potential" liability had been established, the Court held that aggregate damages could be calculated using statistical methods and such damages could be divided between class members on an average or proportionate basis.

In *Cassano v. The Toronto-Dominion Bank*,[4] TD Visa cardholders alleged that conversion and issuer fees charged in respect of foreign currency transactions were not disclosed in the cardholder agreements. Certification was refused by the certification court on the grounds that determining damages would involve individual investigations into how particular plaintiffs would have used their Visa cards had they been aware of the fees and this was upheld by the Divisional Court. Similar to *Markson,* the Ontario Court of Appeal reversed the lower courts' decisions and certified the proceeding. The Court of Appeal reasoned, in part, that aggregate damages would be available where liability could be established on a class wide basis, but entitlement to monetary relief may depend on individual assessments.

Meanwhile, in *Healey v. Lakeridge Health Corporation*,[5] two class actions were initiated against Lakeridge Health Corporation and two doctors

("Lakeridge") by patients who had been exposed to (but not infected by) tuberculosis while at the hospital. The plaintiffs alleged that they suffered mental anxiety as a result of being notified of their possible exposure and requiring subsequent testing for TB. The certification court dismissed the claims against Lakeridge and, among other things, found that aggregate damages were not available. The Ontario Court of Appeal dismissed the plaintiffs' appeal, and found that, with respect to aggregate damages, the claims of the plaintiffs were "inherently individual in nature". The Ontario Court of Appeal cited an earlier case, *Bywater v. Toronto Transit Commission*,[6] in which the court found that plaintiffs' claims arising from smoke inhalation would be "idiosyncratic" and would require consideration of a myriad of factors specific to each individual, including age and medical history, in order to establish individual damages.

Markson/Cassano and *Healey/Bywater* are, in many ways, at opposite ends of the aggregate damages versus individual issues spectrum. They are by no means the "only" cases, or even the most "definitive" cases on the subject, and there are many other cases that fall somewhere in between.[7] However, what *Markson/Cassano* and *Healey/Bywater* do indicate is that the application of aggregate versus individual damages is case-specific and depends on the facts and circumstances of the plaintiff group in each proceeding.

Part II — Quantification Considerations with Respect to Aggregate Damages versus Individual Assessments

Overview

In order to understand whether aggregate damages or individual assessments should apply in a particular proceeding, it is helpful to take a step back and understand the overall purpose of damages. The purpose of damages is most often to restore a plaintiff to the financial position he or she would have been in had an alleged wrongful act not occurred or had a contract not been breached. In many commercial litigation matters, this usually entails an analysis of the cash flows that would have been earned by a plaintiff "but for" an alleged wrongful act or breach and comparing these to the "actual" cash flows that were earned by the plaintiff, with the difference representing the quantum of loss.[8]

The "But For" Scenario and "Actual" Scenario

In class action settings, the "but for" scenario represents the financial position that a group of plaintiffs or individual plaintiffs would have occupied "but for" an alleged wrongful act or breach, while the "actual" scenario represents the actual financial position occupied by them as a result of the alleged wrongful act or breach.

For instance, assume a proposed class action where the plaintiffs are businesses whose operations have been allegedly impacted (*i.e.* they have suffered lost revenue and cash flow) as a result of a hazardous chemical spill caused by the alleged negligence of a nearby chemical storage company. In this case, the "but for" scenario would represent the cash flows that the plaintiff businesses would have realized "but for" the alleged negligence, and the "actual" scenario would represent the actual cash flows realized, with the difference being the quantum of financial loss.

As another example, assume a proposed class action in which the plaintiffs invested funds based on the alleged negligent representations of a financial advisor, whereby a significant amount of the invested funds were lost. In this case, the "but for" scenario represents the total amount that the plaintiffs would have been able to retain "in hand" — *i.e.*, the principal amounts invested, plus the investment returns that would have been realized had the plaintiffs not relied on the negligent representations, and invested elsewhere. The "actual" scenario would represent the actual residual amount held by the plaintiffs after their investment losses, and the difference between "but for" and "actual" is the quantum of financial loss.

Considerations in the "But For" Scenario

The extent to which aggregate damages can be quantified for a class of plaintiffs depends on the

degree of similarity or homogeneity in individual plaintiffs' "but for" scenarios. In other words, an aggregate damages approach is more likely to apply if the financial positions that individual plaintiffs would have occupied "but for" an alleged wrongful act or breach are reasonably similar. "Reasonably similar" in this context implies that individual "but for" scenarios could be captured in a financial model using few variables for each individual. Similarity in the "but for" scenario depends on, among other things: 1) the degree to which there would have been alternative courses of action available to plaintiffs in the "but for" scenario; and, 2) the degree to which the decisions that individual plaintiffs would have made in a "but for" scenario are similar.

To demonstrate, take the example of the proposed class action above where plaintiffs invested funds based on the alleged negligent representations of a financial advisor and lost most of their investment. As indicated above, damages in this case might be quantified as the difference between the cumulative investment funds that the plaintiffs would have retained had they invested elsewhere, and the actual residual investment funds held by the plaintiffs after the investment losses. If the facts of the case indicate that all or a substantial number of plaintiffs would have invested in similar alternative investments (perhaps in stocks, or bonds, or mutual funds etc.), then a loss quantification expert could make an assumption as to the alternate rate of return that would have been realized in the "but for" scenario. An "aggregate" financial model could then be created that takes into account individual investment principal amounts (the only "variable" in this example), applies the assumed alternate rate of return, and thereby calculates the financial position that the plaintiffs would have occupied in the "but for" scenario.

However, now assume that the facts of the case indicate, among other things, that, but for the alleged negligent misrepresentations:

1) Some plaintiffs would not have made any investment whatsoever;
2) Some plaintiffs would have made alternate investments in stocks; others in bonds; others in mutual funds etc.;
3) Some plaintiffs would have used their investment funds to pay down debts instead; and,
4) Some plaintiffs would have made RRSP contributions with their investment funds.

The facts indicate that individual plaintiffs would have made different investment decisions in the "but for" scenario, and had alternate courses of actions to choose from. With this many variables in play, preparing an "aggregate" loss quantification model would probably not be feasible; individual assessments of loss based on what alternate investment option each plaintiff (or group of plaintiffs) would have undertaken in the "but for" scenario would probably be required.

The exercise of analyzing plaintiffs' potential decisions and the availability of alternatives in the "but for" scenario may be more relevant for proceedings where a relatively larger dollar amount per plaintiff or per transaction is involved. Generally speaking, the larger the dollar amount involved, the more likely for plaintiffs to make conscious decisions as to alternate courses of action to pursue in a "but for" scenario. For instance, in the above investment funds example, plaintiffs would most likely have invested principal funds in the hundreds or thousands of dollars, as opposed to tens of dollars, or pennies. Therefore, "but for" the alleged negligent representations, the plaintiffs would have been more likely to evaluate alternate investment options than if they had invested tens of dollars or less.

Ultimately the analysis of the "but for" scenario is case-specific, and depends on the facts and circumstances of the plaintiffs that comprise a particular class proceeding.

Considerations in the "Actual" Scenario

The extent to which aggregate damages can be quantified for a class of plaintiffs also depends on the degree of similarity or homogeneity in individual plaintiffs' "actual" scenarios. In some cases, the

"actual" scenario may be relatively straightforward. For instance, in the investment funds example above, the "actual" scenario may be represented by the residual investment funds of plaintiffs after investment losses. In other cases, the "actual" scenario may not be as intuitive.

Take the example of the proposed class action mentioned above where the plaintiffs are businesses whose operations have been allegedly impacted as a result of a hazardous chemical spill caused by the alleged negligence of an nearby chemical storage company. The "but for" scenario would represent the cash flows that the plaintiff businesses would have realized "but for" the alleged negligence, and the "actual" scenario would represent the actual cash flows realized. The actual cash flows of each plaintiff business can be obtained from their respective financial statements. However, it is possible that individual businesses undertook different courses of action in the "actual" scenario in order to mitigate their losses. For instance, facing a decline in revenue caused by the chemical spill, one business may have cut staff and reduced fixed costs in order to reduce/mitigate its losses, another business may have continued to maintain unrealistically high staff and fixed cost levels, resulting in a higher financial loss, while another may have decided to shut down entirely resulting in "lost business value" and additional closure costs.

In approaching the "actual" scenario in this situation, a loss quantification expert may need to analyze each plaintiff's actual cash flows independently, and adjust cash flows for those losses that could "reasonably" have been avoided via mitigation, or which were exacerbated as a result of the actions of other plaintiffs. In this fact situation, a case-by-case analysis of individual plaintiffs' actual financial results will likely be needed; an aggregate damages methodology would not likely be applicable.

By way of another example, take a class action in which plaintiffs are individuals claiming damages against a construction company for deficient electrical work done on their homes which did not meet safety standards. As a result, the plaintiffs had to incur additional costs to remedy the deficient work, and were also assessed statutory penalties from the relevant municipalities as a result of the deficient work and for not complying with municipal by-laws. Assume that, in a "but for" scenario, plaintiffs would have retained a competent firm (or firms) to carry out the required work at a higher price. In the "actual" scenario, plaintiffs paid money to the defendant construction company, incurred costs to remedy the work, and incurred penalties. Assume that some of the plaintiffs have paid their penalties, others have not. Moreover, some have appealed to waive/refund their penalties; some of the appeals have been granted, others rejected, other appeals have yet to be heard by municipalities. Also, each plaintiff incurred different costs to remedy the deficient work. In this fact situation, again, a case-by-case analysis of individual plaintiffs' actual costs incurred as a result of the deficient work and an individual assessment of the status of penalties paid and appeals with respect to such penalties would be needed. An aggregate damages methodology would not likely be applicable.

Conclusion

The analysis above indicates that deciding whether aggregate damages versus individual assessments apply to a particular class proceeding is highly dependent on the facts and circumstances of each case. The analysis involves examining the degree to which plaintiffs in a class would have made similar alternate decisions "but for" an alleged harmful act or breach, and examining the degree to which plaintiffs' "actual" financial position and courses of action are similar. The greater the number of variables that have to be incorporated in a "but for" versus "actual" financial model to quantify damages, the more likely it is that individual assessments would be more appropriate than aggregate damages (or *vice versa*).

The case law on the subject certainly covers a wide spectrum. Given this, an independent and objective analysis of the considerations of aggregate damages versus independent assessments by a loss quantification expert may be useful at the certification

stage to all stakeholders — plaintiffs, defendants, intervenors and the court — in order to assist with the determination of whether a class action is a preferable procedure to resolve plaintiffs' damages claims or not.

Galileo once said that the "authority of a thousand is not worth the humble reasoning of a single individual". A proposed class is, in some ways, analogous to the "thousand" that Galileo speaks about. However, at the end of the day, what is important in deciding between aggregate damages and individual assessments, is the decisions ("reasonings") of individual plaintiffs, the alternatives available to them, and the degree to which these are similar.

[*Editor's note*: The author would like to acknowledge the assistance of Molly Yuan of Cohen Hamilton Steger & Co. Inc. for her help in researching this article.]

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1 Not all provinces have enacted statutes governing class action proceedings. The statutes of those that have are generally similar in their provisions. Refer to para. 5(1) of the *Class Proceedings Act, 1992* (Ontario), S.O. 1992, c. 6, and paras. 4(1) and (2) of the *Class Proceedings Act*, (British Columbia), RSBC 1996, CHAPTER 50, for example.

2 Refer to para. 24(1) of the *Class Proceedings Act, 1992* (Ontario), and paras. 29(1) and (2) of the *Class Proceeding Act* (British Columbia), for example.

3 *Markson v. MBNA Canada Bank,* [2007] O.J. No. 1684, 2007 ONCA 334.

4 *Cassano v. The Toronto-Dominion Bank,* [2007] O.J. No. 4406, [2007] ONCA 781.

5 *Healey v. Lakeridge Health Corporation,* [2011] O.J. No. 231, 2011 ONCA 55.

6 *Bywater v. Toronto Transit Commission,* [1998] O.J. No. 4913, 27 C.P.C. (4th) 172 (Gen. Div.).

7 It is interesting to note, for example, that in *Fresco v. Canadian Imperial Bank of Commerce*, [2010] O.J. No. 3762, 2010 ONSC 4724, a case involving compensation for alleged unpaid overtime work, the Divisional Court did not certify the proceeding. The Divisional Court concluded, among other things, that damages *could not* be calculated in the aggregate in this case. Meanwhile, in another overtime class action, *Fulawka v. Bank of Nova Scotia*, [2010] O.J. No. 716, 2010 ONSC 1148, the certification court did certify the proceeding, concluding, among other things, that damages *could* be calculated in the aggregate in this case.

8 The terms "loss" and "damages" will be used interchangeably.

RECENT DECISIONS

LEAVE TO APPEAL DECLINED IN *IMAX*: DIVISIONAL COURT FINDS NO REASON TO DOUBT CORRECTNESS OF DECISION

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The first decision to grant leave under the Ontario *Securities Act*'s (R.S.O. 1990, c. S.5 [the *Securities Act*]) statutory secondary market misrepresentation regime — *Silver v. IMAX Corporation,* [2009] O.J. No. 5573 (S.C.J.) and [2009] O.J. No. 5585 (S.C.J.) — was rendered by Justice van Rensburg on December 14, 2009. On February 14, 2011, Justice Corbett released the Ontario Divisional Court's decision ([2011] O.J. No. 656 (Div. Ct.)) declining to grant leave to appeal the motion judge's decision on either the statutory or common law claims asserted in the action. He declined to disturb the relatively low threshold test that van Rensburg J. had applied to the statutory leave requirement, and found no reason to doubt the correctness of her decision permitting the certification of the common law negligent misrepresentation claims.

While arguably the unique facts of the *IMAX* decision drove its result, in making this decision, Corbett J. has reinforced a compensatory, rather than deterrent approach to the *Securities Act* continuous disclosure regime. Through declining to grant leave on the issue of the common law misrepresentation claims, this decision has heightened the risk that the new *Securities Act* regime could be rendered superfluous on its first real judicial examination. Appellate consideration of the statutory regime, and how it should interact with common law negligent misrepresentation claims, is required to clarify how courts should approach these issues.

The IMAX Case and the Motion Judge's Decision

The plaintiffs allege that IMAX Corporation made misrepresentations in press releases and year-end financial statements about its earnings and compliance with accounting requirements, particularly as

they related to its installation of theatre systems in Q4 2005, and how that revenue was being recognized. IMAX was required to re-state its 2005 financials, and its clear audit opinion for the year 2005 was withdrawn by its auditor.

The plaintiffs sued IMAX and a number of its directors and officers in a proposed class action, alleging common law negligent misrepresentation, and seeking leave to make statutory misrepresentation claims under the *Securities Act*. The leave and certification motions were argued together, and van Rensburg J. granted leave to the plaintiffs to make their statutory claims, and certified a class action in respect of certain of the common law claims, including negligent misrepresentation.

The Leave to Appeal Decision

Leave to appeal was sought with respect to both of these decisions. In considering the leave motion, and perhaps recognizing the unique facts giving rise to the claims in *IMAX*, Corbett J. noted that the focus of a leave motion is on the decision, not the lower court's reasons: "[i]nteresting legal questions raised by reasons, but not by decisions, can await other cases."

In respect of the statutory leave test, Corbett J. found that the defendants could not satisfy the first branch of the leave to appeal test, namely that they could not establish good reason to doubt the correctness of van Rensburg J.'s decision. The heart of his decision on this point was his assessment that, on the facts as found by her Honour, "this was not a close call that turned on the precise test used to grant leave." Under the particular circumstances of the *IMAX* case, leave would arguably have been granted even applying a higher threshold.

With respect to the common law misrepresentation claims, the plaintiffs had successfully argued before the motion judge that class reliance could be proved as a matter of fact, using the "efficient market theory". Justice Corbett relied on the existence of coordinate authority for the motion judge's approach, and the lack of appellate authority taking the contrary position.

The defendants argued that the decision in *McKenna v. Gammon Gold,* [2010] O.J. No. 1057 (S.C.J.), ought to guide the Divisional Court to grant leave to appeal on the common law misrepresentation claims. In that case, Justice Strathy had refused to certify an action alleging common law misrepresentation, due to the inability to establish reliance as a common issue. Leave had also been sought to appeal this decision ([2010] O.J. No. 3183 (Div. Ct)) and Justice Sachs had seen no reason to conclude that Justice Strathy had erred in his decision not to certify the common law misrepresentation claim. However, in the *IMAX* case, Corbett J. concluded that the decision in *Gammon Gold* was distinguishable due to the number and varied nature of the misrepresentations at issue in that case. In his view, there was thus no reason to doubt the correctness of the motion judge's decision, which did no more than allow the plaintiffs to advance the claim at trial.

The motion judge's decision in *IMAX*, now as affirmed by the Divisional Court, has set a low bar for *Securities Act* statutory misrepresentation claims to proceed and has carved out the possibility that common law misrepresentation claims can proceed alongside claims under the statutory regime, the very framework designed to address the inability of plaintiffs to certify such claims in class proceedings. Subsequent decisions have followed the motion judge's reasoning, and *IMAX* is now not the only class proceeding in which statutory and common law claims have been certified as was the case in *Dobbie v. Arctic Glacier Income Fund et al.*, [2011] O.J. No. 932 (S.C.J.). Appellate review of both the statutory leave test, and the ability of plaintiffs to establish class reliance using an "efficient market theory", is required to ensure that the *Securities Act* regime remains relevant and fills the specific void intended for it by the legislature.