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New Frontiers: The Oversight Role of Courts in Common Law Canada

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Courts in common law Canada continue to develop new legal tests and use the procedural tools at their disposal to manage complex class proceedings efficiently and to safeguard both plaintiffs' and defendants' rights. The visible trends in 2016 emphasize the court's role of critical oversight and reflect growing judicial willingness to make difficult decisions in pursuit of fairness and efficiency. Several notable procedural trends emerged in common law Canada in 2016:

- Courts have provided guidance on using summary judgment as a tool to resolve class actions in appropriate cases. Some courts have expressed a willingness to engage in detailed legal and factual analysis on a summary judgment motion, while others have found that non-dispositive motions may not be appropriate for summary judgment. In trying to find the right balance, some courts have focused on the appropriate timing for summary judgment motions in the context of class proceedings. This guidance is helpful to counsel when considering the most efficient way to resolve class proceedings.

- The increasingly common practice of third party funding has led to several motions by class counsel seeking approval of these agreements. The courts have played a key role in scrutinizing these agreements to ensure fairness, but this has led to some debate about the role of defendants. While courts in Ontario have generally held that defendants should be given the opportunity to participate in third party funding approval motions, courts in other provinces have held that these agreements can be approved by the court without notice to the defendants and can remain confidential. Counsel should bear these differing approaches in mind, especially in the context of multijurisdictional class proceedings.

- Again in their oversight role, courts have been critical of fee-sharing arrangements made by class counsel to settle costly carriage motions if they contemplate what is effectively a "ransom fee" being paid at the expense of the class.

- Proposed class action settlements have been subjected to increased judicial scrutiny over the past year. Courts have required parties to provide concrete details and substantive evidence to demonstrate that settlement is in the best interest of the class and, in appropriate circumstances, have appointed independent counsel to assist in reviewing the fairness of settlements. It is no longer sufficient for plaintiffs' counsel to provide "boilerplate" assurances that a settlement is fair, although the Court may give more weight to such assurances as a case gets closer to trial.

- In 2016, a number of decisions dealing with consumer protection were released in British Columbia where courts grappled with threshold standing issues. These decisions address how to deal with proposed class actions when not all the members of the proposed class qualify as "consumers" under the relevant consumer protection legislation. The answer in each case will depend on the specific facts at issue. These cases may provide helpful guidance for proceedings in other provinces with analogous legislation.

- Trial and appeal courts increasingly are being asked to consider the propriety of global class actions, and recent decisions in Ontario suggest a more welcoming approach.

We review these key trends in more detail below.

A. Summary Judgment Motions

In 2016, several decisions have highlighted summary judgment as a potential tool for defendants to resolve class actions in appropriate cases. Courts have demonstrated a willingness to engage in a detailed factual and legal analysis in class action summary judgment motions where the motion provides an efficient resolution of the issues.[1] However, the courts are more reluctant to use this tool where the summary judgment motion would not be dispositive of the action and would act merely as a "dress rehearsal" for the trial.[2]

1. *Sanhar* v. *Bell Mobility Inc.*, 2016 ONCA 242 (*Sanhar*); *Wise* v. *Abbott Laboratories, Limited*, 2016 ONSC 7275 (*Wise*).
2. *Drywall Acoustic Lathing and Insulation, Local 675 Pension Fund (Trustees of)* v. *SNC-Lavalin Group Inc.*, 2016 ONSC 5784 (*Drywall Acoustic*).

Timing is key when bringing a summary judgment motion in the class action context. To that end, in 2016, common law courts provided helpful guidance about whether to bring summary judgment motions before or after certification.[3]

(a) Summary Judgment as a Tool to Resolve Class Actions

In the 2014 decision in *Hryniak* v. *Mauldin*, the Supreme Court of Canada called for a "culture shift" towards a broad interpretation of the summary judgment rules in the interests of fairness, affordability, and the prompt resolution of legal disputes.[4] As anticipated, both counsel and the courts have begun to embrace this shift in the class action context. However, not all class actions are amenable to summary judgment, and the court's willingness to engage with detailed evidence and complexity may turn on the extent to which a summary judgment motion will be dispositive.

The decisions of the Ontario courts in *Wise*[5] and *Sankar*[6] demonstrate that summary judgment can be an effective tool in the resolution of class proceedings in appropriate cases. In considering whether to allow a summary judgment motion to proceed, courts consider factors such as:

(a) the nature and complexity of the issues;

(b) the extent of the anticipated record;

(c) the comparative prospects that the record will be sufficient to satisfy the test for summary judgment with or without examinations for discovery;

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3. *Keatley Surveying* v. *Teranet*, 2016 ONSC 1139 (*Keatley*).
4. *Hryniak* v. *Mauldin*, 2014 SCC 7, para. 2.
5. In *Wise*, a product liability case about the topical ointment known as AndroGel®, the defendant Abbott brought a motion for summary judgment to dismiss the claim before certification. Abbott submitted that the plaintiff's claims should be dismissed on the grounds that they could not prove general causation, which was a constituent element in all of their product liability claims. Conversely, the plaintiffs submitted that if they won, the case would be appropriate for a partial summary judgment in their favour – with the result that three of the five certification criteria would be satisfied.
6. In *Sankar*, the Ontario Court of Appeal granted summary judgment dismissing a certified class action against Bell Mobility Inc. regarding prepaid phone cards. The proposed class action was commenced against Bell for alleged breaches of contract.

(d) whether the responding party has production and oral discovery similar to that available in the normal course; and

(e) whether more efficient means could be developed to ensure the just, most expeditious, and least expensive determination of the case on its merits.[7]

The court in *Wise* noted that the use of the summary judgment procedure will promote the interests of justice if it will lead to a fair and just result and will serve the goals of timeliness, affordability, and proportionality in light of the litigation as a whole.[8] The court must be satisfied that it can justly and fairly decide the matter without the advantages of participating in the dynamics of a trial.[9] Additionally, sufficient evidence must be presented on all relevant points to allow the judge to draw the inferences that are necessary to make dispositive findings.[10]

In *Wise*, the parties filed more than 11,000 pages of material for the motion, including 22 expert reports from 9 experts witnesses. There were six days of oral argument. The Court engaged in a detailed analysis of expert evidence, including a detailed inquiry into the impartiality of the experts. The Court ultimately concluded that, although the evidence was voluminous, the matter could be justly and fairly decided without participating in the dynamics of a trial.[11] The Court granted summary judgment in Abbott's favour, dismissing the claim on the basis that there was no genuine issue requiring a trial about general causation.[12]

Summary judgment was also an effective tool in the *Sankar* class action, which the Court described as a "straight-forward contractual and statutory interpretation case". In *Sankar*, the parties brought cross motions for summary judgment on the two core common issues, namely, whether the defendant breached its contract with class members by seizing unused pre-paid credits before it was contractually entitled to do so, and whether the expiry and forfeiture

7. *Wise*, para. 326.
8. *Wise*, para. 317.
9. *Wise*, para. 321.
10. *Wise*, para. 325. The court will assume that the parties have placed before it, in some form, all of the evidence that will be available for trial: *Wise*, para. 319.
11. *Wise*, para. 335.
12. *Wise*, para. 372.

of pre-paid credits in the case of consumer users was contrary to the provincial Gift Card Regulation.

In *Sankar*, summary judgment on this subset of the common issues allowed for a hearing that focused on the most important aspects of the class action in order to achieve a (relatively) quick resolution.[13] The class action was certified in late 2013, the summary judgment motion was heard and decided in early 2015, and the appeal was heard in November 2015. In April 2016, the Court of Appeal released its decision finding that the motion judge was correct to grant summary judgment in favour of the defendant.

Notably, summary judgment motions have also been a useful tool for plaintiffs to significantly advance their case at the time of certification. In *Levac* v. *James*, the Ontario Court certified a class proceeding involving allegations of medical malpractice and granted partial summary judgment against the defendant anaesthesiologist, concluding that the defendant breached his duty of care to class members.[14] Justice Perell concluded that sufficient evidence was before the Court to permit dispositive findings on the duty of care issue.[15] The Court concluded that causation had been established for class members infected with the same bacteria as Dr. James.[16] Those class members only had to quantify their damages. Although the balance of class members had to prove specific causation and quantify their damages,[17] the conclusion on general causation substantially advanced the issues.

In contrast, in *Drywall Acoustic*,[18] the Ontario Court permanently stayed both the plaintiffs' and the defendant's summary judgment motions on the basis that summary judgment was inappropriate. Justice Perell held that there was little utility in the plaintiffs'

13. See also: *Bakshi* v. *Global Credit*, 2016 ONSC 4610.
14. *Levac* v. *James*, 2016 ONSC 7727 (*Levac*).
15. *Levac*, para. 147.
16. *Levac*, para. 164.
17. *Levac*, para. 170.
18. In *Drywall Acoustic*, the plaintiffs brought an action against SNC-Lavalin for misrepresentations and/or omissions in its "core documents" contrary to securities law. SNC-Lavalin and the defendant directors brought a partial motion for summary judgment to determine whether its alleged misrepresentations had been "publicly corrected." In response, the plaintiffs submitted that it is neither possible nor fair to determine the corrective disclosure common issue without deciding the misrepresentation common issues. The plaintiffs therefore brought a motion for summary judgment to decide four common issues.

summary judgment motion. Even if the plaintiffs were successful on the motion, the outcome would not be dispositive and, further, if the action went on to trial, the same evidence would have to be regurgitated. Therefore, the summary judgment motion "would be just a partial dress rehearsal for a full-blown trial."[19]

In addition, Justice Perell found that the defendant's motion was inappropriate in light of the complex issues involved in determining whether corrective disclosure had been made in this securities case. The determination would involve a statistical and semantic analysis that is "far from... what can be proven summarily on the static record of documents and transcripts."[20] Justice Perell found that such issues were too complicated and nuanced to be fairly and justly decided by way of summary judgment and were better suited to be determined at a trial.

The Court's reluctance to hear the summary judgment motions in *Drywall Acoustic* may be, in part, a reaction to the use of *partial* summary judgment. Courts, both in the class action context and beyond it, are generally more reluctant to engage in a detailed factual and legal analysis at a summary judgment stage when the result would not be dispositive of the entire action. The Court in *Wise* similarly noted that the "undesirability of piecemeal litigation" is a factor to consider in determining whether it would be appropriate and just to grant summary judgment.[21] However, as noted above, concerns about partial summary judgment have not been a barrier where partial summary judgment will substantially and efficiently advance the action.

(b) Summary Judgment Motions Can Be Heard Before or At Certification

The timing of summary judgment motions during a class proceeding can determine whether the result of the motion binds either the entire class or only the individual proposed representative plaintiff. In appropriate cases, courts have been willing to hear summary judgment motions prior to certification, particularly where the application concerns the defendant's liability to the class as a whole, even though the decision will not bind other potential class members.

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19. *Drywall Acoustic*, para. 43.
20. *Drywall Acoustic*, para. 159.
21. *Wise*, para. 330.

Indeed, the Court in *Wise* dismissed the class action on a summary judgment motion heard prior to certification on the grounds that the plaintiffs could not prove general causation. The Court reviewed a number of earlier British Columbia decisions wherein summary judgment was granted before certification. Further, the Court noted that Ontario's "enhanced" summary judgment regime in the wake of *Hryniak* v. *Mauldin* (like BC's summary trial regime) is meant to expedite the early resolution of cases.[22]

Recent experience in other jurisdictions confirms the developing trend in common law Canada toward pre-certification summary judgment motions. In Alberta, the Court of Appeal recently upheld a summary judgment decision dismissing a proposed class action on behalf of investors in a failed investment.[23] Before the plaintiff's motion for certification could be heard, the defendants brought a motion for summary dismissal. The chambers judge concluded that there was no substantial evidence on the record to show that the claims of oppression, misrepresentation and bad faith had merit.[24] The Court of Appeal confirmed that the court below was able to reach a fair and just determination of the merits on the motion for summary judgment.[25]

The sequencing of competing motions can similarly be important. In *Keatley,* the defendant filed a motion seeking summary judgment to dismiss the plaintiff's claim for copyright infringement shortly after the plaintiff filed a certification motion. The original case management judge decided that the certification motion should be heard first and adjourned the defendant's motion for summary judgment until after certification.[26] Four years after certification, Justice Belobaba was asked to determine the sequencing of two motions for summary judgment and determine whether the defendant's adjourned pre-certification motion or the plaintiff's post-certification motion would be heard first.

Seeking the most expeditious and final resolution of the dispute, Justice Belobaba ordered the plaintiff's motion to proceed first, notwithstanding that the defendant's motion had been filed first.

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22. *Wise*, paras. 332-334.
23. *McDonald* v. *Brookfield Asset Management*, 2016 ABCA 375 (*Brookfield*), para. 7.
24. *Brookfield*, para. 7.
25. *Brookfield*, para. 60.
26. It is not clear why the defendant's motion was not heard at the same time as the certification motion.

Critical to his decision was that the defendant's motion would only answer the issues posed by the defendant, not the certified issues, and any order made in the defendant's motion would only bind the plaintiff and not the class as a whole.[27] Because the plaintiff's motion sought judgment on all certified issues, hearing it first was the best way of ensuring the "just and expeditious determination" of the class proceeding.

Keatley demonstrates the strategic importance of seeking summary judgment before or at the time of the certification motion if a defendant wishes to dismiss the claim of a single plaintiff. If the motion cannot be heard until after certification, the defendant's motion may arguably become superfluous, and counsel should consider re-crafting their summary judgment motion with an eye to the certified common issues.

Despite the approach taken to sequencing in this case, Justice Belobaba acknowledged that it is becoming more common for summary judgment motions to be heard before the certification motion.[28] While a pre-certification motion would not bind potential class members, it is not a reason to deny the application for summary judgment where the application concerns the defendant's liability to the class as a whole.[29]

B. Third Party Funding

Third party funding is becoming increasingly common as members of the plaintiffs' bar try to mitigate the risk of potential adverse costs awards and shift the risk of contingency fee agreements onto third parties. In essence, a typical agreement guarantees a share of any award to a third party in return for advancing resources to pay the costs of the litigation. The increased prevalence of third party funding raises questions about the role of defendants in the plaintiff's motion seeking approval of a third party funding arrangement. Con-

27. *Keatley*, para. 9.
28. *Keatley*, para. 7. Notably, even though two of the common issues were decided in the plaintiff's favour on the hearing of the summary judgment motion, one dispositive issue was answered in favour of the defendant such that the class proceeding was dismissed without any need to hear the defendant's summary judgment motion: *Keatley Surveying* v. *Teranet*, 2016 ONSC 1717.
29. *Wise*, para. 331 citing Justice Bracken in *Player Estate* v. *Janssen-Ortho Inc.*, 2014 BCSC 1122.

versely, it also raises the question about whether a plaintiff's litigation funding agreement ("LFA") should remain confidential.

Unquestionably, courts have an important role in overseeing these agreements. However, the issue of defendants' rights to participate in approval motions has been far from unanimous. Courts in the common law provinces are taking different approaches to third party funding motions. On one hand, courts in Saskatchewan, Alberta, and New Brunswick[30] have held that LFAs can be approved without notice to the defendants and can be maintained as confidential. On the other hand, historically, the Ontario courts have generally held that defendants are affected by third party funding motions and should be given the opportunity to participate in such motions. However, in a recent case before the Ontario Superior Court of Justice, the Court modified that approach and excluded the defendants from part or all of the process, given the unique nature and sensitivities of the funding agreement in that case.[31]

As these issues increasingly come before the courts, defendants who face parallel class actions in more than one province may have different rights depending on which province hears the motion. Further, parties should be aware of the potential for disclosure of materials in one province to undermine a confidentiality order made in another. Unless and until the approaches taken in different provinces are harmonized, defendants must be mindful of inconsistent rights of participation in third party funding motions.

(a) Saskatchewan Court Approves Third Party Funding Without Notice to Defendants

In *Schneider* v. *Royal Crown Gold Reserve Inc.*,[32] the plaintiff brought an application requesting approval of an LFA without giving notice to the defendant. To address the risk of costs, the plaintiff had entered into the LFA and then applied for court approval of that agreement. The plaintiff also requested a confidentiality order sealing the documents pertaining to the application. Relying on decisions

30. See *Roth* v. *Alberta (Minister of Human Resources and Employment)*, 2005 ABQB 505 and *Hayes* v. *City of Saint John*, 2016 NBQB 125, where the courts have sealed the file because the disclosure of the agreement would prejudice the plaintiff by disclosing sensitive information to the defendant or would provide the defendant with tactical advantages in the litigation.
31. *Berg* v. *Canadian Hockey League*, 2016 ONSC 4466 (*Berg*).
32. *Schneider* v. *Royal Crown Gold Reserve Inc.*, 2016 SKQB 278 (*Schneider*).

in other provinces approving similar agreements, Chief Justice Popescul of the Saskatchewan Court of Queen's Bench approved the LFA and granted the sealing order requested by the plaintiff.

Chief Justice Popescul concluded that the defendants did not have any legal interest in the motion, and that notice was not required because it did not matter "from whose pocket an adverse cost award is paid."[33] However, he also stated that a copy of the order should be served on the defendants and, because the motion had been made without notice, the defendants could apply to set aside or vary the order in the future. The Saskatchewan Court approved the LFA.

The prevailing view in Ontario to date has been different. As discussed further below, plaintiffs are generally required to provide notice when seeking court approval of such agreements.

(b) Ontario Court Tailors Defendants' Rights to Participate

Justice Perell's decision in *Berg* v. *Canadian Hockey League*[34] is the most recent development in Ontario in the evolving law surrounding the role of third party funders in class proceedings, and in particular the role of defendants in motions for approval of third party funding arrangements. In his earlier decisions in *Fehr* v. *Sun Life Assurance Company of Canada*[35] and in *Bayens* v. *Kinross Gold Corporation*,[36] Justice Perell determined that defendants are affected by third party funding motions and, as a matter of policy, defendants' participation in the approval process is useful to the court and should be permitted.

However, in *Berg*, the proposed representative plaintiff brought a motion without notice to the defendants for approval of an LFA. The plaintiff also sought an order sealing the court file to prevent the defendants from accessing the LFA. Justice Perell identified "several unique features" of the proposed LFA, including an "extraordinarily complicated" combination of fees, contingency fees, and interest payments which raised a number of concerns for the court. The *Berg* case was further complicated by the fact that there was a parallel class

33. *Schneider*, para. 11.
34. *Berg*, *supra*.
35. *Fehr* v. *Sun Life Assurance Company of Canada*, 2012 ONSC 2715.
36. *Bayens* v. *Kinross Gold Corporation*, 2013 ONSC 4974.

proceeding in Alberta in which Justice Martin had approved the identical LFA on an *ex parte* basis and sealed the order.

Justice Perell's first concern was that Mr. Berg needed to receive independent legal advice regarding the third party funding agreement and its relationship to the contingency fee arrangement with class counsel. In these circumstances, it was not appropriate to rely on the defendants to identify problems with the LFA or to make the case against the probity of such agreements.[37]

Unlike the LFAs in the *Fehr* and *Bayens* cases, there was a real risk that disclosure of the proposed funding arrangement in the *Berg* LFA could provide the defendants with tactical advantages in the litigation.[38] Moreover, if the court ultimately did not approve the arrangement, there was no need to have the LFA and other sensitive materials disclosed to the defendants.[39] Justice Perell was sensitive to the need to rationalize Ontario's approach with the approach in other jurisdictions, especially where courts in parallel proceedings have approved LFAs without any notice to or involvement by the defendant.[40]

As a result of these concerns, Justice Perell modified the approach taken in previous third party funding motions. He adopted a "sequential approach" in this case that did not involve the defendants at the outset. Justice Perell adjourned the motion pending Mr. Berg's receipt of independent legal advice and an independent legal opinion to be provided to the court (at the expense of class counsel) as to the legality of the proposed LFA.[41] Justice Perell concluded that the involvement of the defendants may or may not be required depending on how the request for court approval (and specifically the independent legal advice) progressed. Additionally, the Court sealed the motion materials pending further order of the court.

(c) The Effect of Different Rights in Different Jurisdictions

While the process endorsed in Saskatchewan does not leave defendants without recourse, the ability to seek to set aside or vary an order approving a third party funding agreement puts the onus on

37. *Berg*, paras. 17 and 20.
38. *Berg*, para. 16.
39. *Berg*, para. 21.
40. *Berg*, paras. 9-12.
41. *Berg*, para. 20.

defendants to take steps that historically they would not have had to take in Ontario to ensure their participation. Moreover, the approach raises questions about the potential for any meaningful participation by defendants *ex post facto*, particularly in cases where the agreement and the court record are subject to a sealing order.

Notably, in the past, the Ontario courts invited participation from defendants not only out of concerns for fairness, but also because their participation was viewed as helpful to the courts. The approach taken in Saskatchewan places arguably greater responsibility on the courts to scrutinize LFAs for terms that might cause concern for defendants, including funders' rights to access documents produced in the litigation and their ability to pay costs awards. Safeguards beyond ordinary protections afforded by provincial rules of court may be necessary in some cases, raising potential fairness concerns if defendants are not at the table to identify issues that may not otherwise be obvious to the court based on the plaintiffs' submissions alone.

C. Fee-Sharing Agreements: No "Ransom Fees" Allowed

The proliferation of costly carriage motions has led rival plaintiffs' counsel into some interesting new territory. In one such case, in settlement of a carriage battle, class counsel had agreed to a fee-sharing agreement requiring them to pay a rival law firm up to $800,000 plus disbursements from fees awarded to class counsel in any future settlement. Late in 2015, the Ontario Superior Court of Justice heard a motion to approve a partial settlement of the action, which included a request for approval of fees including the $800,000 carriage fee. Justice Perell refused to endorse the payment to the rival firm on the basis that it was effectively "a ransom fee" to stay rival class actions in other provinces and was being paid at the expense of the class.

On appeal, the Ontario Court of Appeal upheld Justice Perell's decision in *Bancroft-Snell* v. *Visa Canada Corporation*,[42] prohibiting class counsel from making any payments from settlement funds to a rival class action firm. The Court of Appeal confirmed that courts have the authority to review fee sharing agreements under the Ontario *Class Proceedings Act* as part of their broad supervisory role over the conduct of class proceedings, including the approval of settle-

42. *Bancroft-Snell* v. *Visa Canada Corporation*, 2016 ONCA 896 (*Bancroft*).

ments and the approval of fees and disbursements paid to class counsel. The Court held that the fee sharing agreement in question was not in the best interests of class members.

However, in its decision, the Court of Appeal did not find that fee sharing agreements were *per se* unlawful. Rather, the Court of Appeal held that such agreements were not in the best interests of class members and would not be approved to the extent that fees were paid from settlement funds that were held for class members. As a result, the Court of Appeal left open the possibility that class counsel could enter into a fee-sharing agreement with a rival firm using class counsel's own resources that were not drawn from settlement funds.

Going forward, the Court of Appeal's decision may dictate that class counsel will have to choose whether to spend money from their own pocket to stay rival class actions or continue to deal with costly carriage motions. Although this decision focuses on the choices of class counsel, defendants may have their own self-interest in staying rival class actions in other jurisdictions and moving to have settlements approved. As discussed further below, this decision serves as a reminder to both plaintiffs and defendants that settlement approval is not simply a rubber stamp process.

D. Settlement Approval

Across the common law provinces of Canada, class action legislation contains provisions requiring that settlements of class proceedings be approved by the court as fair and reasonable and in the best interests of the class.

In 2016, courts have demonstrably increased their scrutiny of proposed class action settlements. In a number of recent settlement approval decisions, courts have required that parties provide concrete details and substantive evidence to demonstrate that the settlement falls within the range of reasonableness and is in the best interests of the class. Additionally, courts have indicated a potential willingness to appoint independent counsel in appropriate cases to assist the court by reviewing and opining on the fairness of a settlement agreement, particularly on appeal. Although it remains to be seen whether this remedy will be reserved for exceptional cases or used as a resource for appeal courts, this trend does serve to emphasize the critical supervisory role of the court in approving settlements

only if they are truly fair and reasonable and in the best interests of the class.

(a) Substantive Evidence Required to Establish Reasonableness of Settlement

In a series of decisions in 2016,[43] Justice Belobaba of the Ontario Superior Court of Justice demanded additional evidence in settlement approval motions to demonstrate that the proposed settlement was reasonable. He noted that concrete evidence was required in order to allow class action judges to do their jobs (and be more than rubber stamps) in the settlement approval process. Justice Belobaba was particularly concerned about the possibility of "sweetheart" settlements, in which class members' interests are compromised in favour of the interests of class counsel.[44]

Justice Belobaba noted that the role of the judge in a settlement approval motion is not to second-guess the actual amount of the proposed settlement.[45] However, judges should:

- Make sure that the settlement was negotiated at arm's length by competent counsel;

- Scrutinize the actual agreement and supporting affidavit material for any so-called "structural" indicators that suggest collusion or conflict of interest; and

- Satisfy themselves that the settlement amount falls within a range or zone of reasonableness.

In order to establish that the settlement amount is in the "zone of reasonableness", class counsel is required, at the very least, to provide affidavit evidence with clear reasons as to why the settlement amount is within that range.[46] It is not sufficient to provide "boiler-

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43. *Sheridan Chevrolet* v. *Furakawa Electric et al.*, 2016 ONSC 729 (*Sheridan*); *Leslie* v. *Agnico-Eagle Mines*, 2016 ONSC 532 (*Agnico-Eagle*); *O'Brien* v. *Bard*, 2016 ONSC 3076 (*Bard*); *Middlemiss* v. *Penn West Petroleum*, 2016 ONSC 3537 (*Middlemiss*); *Rosen* v. *BMO Nesbitt Burns Inc.*, 2016 ONSC 4752 (*Rosen*); *Clegg* v. *HMQ Ontario*, 2016 ONSC 2662, para. 26 (*Clegg*).
44. *Agnico-Eagle*, para. 3; *Clegg*, para. 28. He noted that the risk of such settlements may be more pronounced in certain genres of class proceedings, such as securities class actions, which are almost always settled: *Agnico-Eagle*, para. 4.
45. *Agnico-Eagle*, para. 8.
46. *Sheridan*, para. 12; *Agnico-Eagle*, para. 14; *Bard*, para. 7; *Middlemiss*, para. 2.

plate" statements[47] or "an unhelpful catalogue of self-serving (almost generic) reasons why the settlement should be approved: the many litigation risks; the hard-fought negotiation; the arm's-length settlement; and class counsel's impressive credentials and litigation experience."[48]

Justice Belobaba's decisions provide some guidance to counsel as to what kind of evidence will be considered sufficient. For example:

- In *Agnico-Eagle*, counsel were reluctant to disclose copies of the requested confidential mediation briefs. Instead, they filed a supplementary affidavit that described in more detail the litigation risks and the range of possible damage recoveries. This additional information convinced the Court that the settlement was in the best interest of class members.

- In *Bard* and in *Middlemiss*, class counsel were asked to file additional affidavit evidence to specify the number of affected class members, the expected number of claimants in respect of the settlement fund, the likely recovery per claimant had the matter gone to trial, and how the settlement compared to their expected recovery at trial (discounting for litigation risk). On the basis of this evidence, the settlement was ultimately approved.

- In *Rosen* v. *BMO Nesbitt Burns Inc.*, counsel submitted evidence that included data from comparable US settlements (since Canadian data was not available).[49] Justice Belobaba concluded that this hard evidence established that the quantum of the settlement fell squarely within the zone of reasonableness and approved the settlement.

The need to provide concrete evidence appears to be more pronounced when the court is asked to approve "early stage" class action settlements. Justice Belobaba observed that, in cases where documents have not been exchanged or discoveries have not taken place, class counsel has little information or knowledge about the risks and rewards of continuing the litigation. Additionally, class counsel's con-

47. *Sheridan*, para. 10: Justice Belobaba described this boilerplate language as coming down to a statement that: "We're experienced class counsel; we know what we're doing; there were lots of litigation risks; we negotiated the best possible deal for the class members; trust us."
48. *Ibid.*, para. 9.
49. *Rosen*, para. 18.

tingency fee compensation structure "creates a significant conflict of interest for class counsel" since it may motivate them to settle early to ensure a guaranteed contingency payment.[50]

In contrast, Justice Belobaba indicated a greater willingness to rely on class counsel's assessment of the risks of continuing litigation in a "late stage settlement" after counsel has conducted significant investigation into the merits of the case.[51] For instance, in *Clegg*, a settlement was reached just a few days before the start of the common issues trial.[52] At that point, both class and defence counsel had reviewed documents, completed discovery, and fully researched and understood the issues of law that would be litigated in the upcoming trial. Class counsel therefore negotiated the settlement from a significant knowledge base that is generally not available when class actions are settled before or shortly after certification. In these circumstances, Justice Belobaba considered it appropriate to place greater reliance on class counsel's evidence that settlement was in the best interests of class members. He stated that "the closer that class counsel is to trial, the more credible are their assertions about risk and reward."

In *Rosen*, Justice Belobaba similarly indicated that he was more inclined to rely on class counsel's assessment of the risks of a class action in a "late stage settlement" after class counsel has conducted significant investigation and discovery of the merits of the case. However, class counsel still must present hard evidence showing why the settlement amount falls within a range or zone of reasonableness.

(b) Ontario Courts Appoint Amicus Curiæ to Assist the Court

In *Agnico-Eagle*, Justice Belobaba suggested that one possible means of ensuring that a settlement is in the best interests of the class would be to appoint independent counsel (with his or her legal

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50. *Clegg*, para. 26.
51. *Rosen*, paras. 15-17.
52. Note: In *Clegg*, the settlement to be approved was the fourth in a series of class actions dealing with abuses in provincial "Schedule 1" facilities. The original settlement was first approved in *Slark* v. *HMQ Ontario*, 2013 ONSC 6686 (*Slark*). Therefore, Justice Belobaba reviewed the settlement in *Slark*, which was achieved a few days before the common issues trial, to determine whether it was fair and reasonable and in the best interests of the class in order to approve the settlement in this case (which mirrored the settlement in *Slark*).

fees paid by the parties), who could review and opine on the fairness of the agreement. He noted that this approach would "add a much needed adversarial dimension to the settlement approval hearing."[53]

In a recent decision of the Ontario Divisional Court in *Waldman* v. *Thomson Reuters Canada Ltd.*,[54] the court did precisely that by appointing *amicus curiæ* ("friends of the court") to assist the court by "providing a more balanced perspective on the issues."[55] In this case, both the plaintiff and defendant appealed the order of the class action judge, who had dismissed the settlement on the basis that it was not in class members' best interests. As both the plaintiff and defendant sought approval of the settlement on appeal, the court concluded that they were "allied" in interest and therefore appointed *amicus curiæ*. The fees for the *amicus curiæ* were ordered to be paid on a full-indemnity basis out of class counsel's fees.

Similarly, in the *Bancroft-Snell* v. *Visa* decision discussed above,[56] the Ontario Court of Appeal appointed *amicus curiæ* to advance the perspective of the unrepresented class members with respect to the review of the fee-sharing agreement between a consortium of class counsel and the Merchant Law Group. As discussed above, when class counsel sought approval of their fees in conjunction with a subsequent motion to approve the partial settlement of the actions in all jurisdictions, Justice Perell took a negative view of the fee-sharing agreement and reduced class counsel's fees accordingly.

On the appeal before the Court of Appeal, Merchant Law Group was granted intervenor status, and the Court appointed *amicus curiæ* to advance the perspective of the unrepresented class members. The Court of Appeal noted: "The submissions of *amicus* were very helpful to us (as, indeed, were the submissions of all counsel) because they enabled us to approach our decision with a more balanced perspective on the issues than would otherwise have been the case."[57] The *amicus* was awarded its costs of the appeal on a full indemnity basis to be paid by class counsel and the Merchant Law Group.

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53. *Leslie*, para. 18.
54. *Waldman* v. *Thomson Reuters Canada Limited*, 2016 ONSC 2622.
55. *Ibid.*, para. 2.
56. *Bancroft*; see Section C above.
57. *Bancroft*, para. 114.

While appointing *amicus* may assist the court in certain cases, it does increase overall costs for the parties and raises important questions as to the extent to which courts should engage this mechanism. In particular, the rationale for introducing *amicus* at the trial level raises concerns about a potential floodgate of additional costs and delay. In most cases, once the parties have agreed to a hard-fought settlement, counsel will generally be attending the approval motion aligned on the appropriateness of the settlement. While counsel for the parties are arguably "allied" for this purpose in almost every case, not every case will call for an independent perspective. Ideally, however, courts will not perceive a need to use this as a default precautionary mechanism if counsel come to court with a meaningful evidentiary record in support of the settlement agreement.

E. Consumer Protection Class Actions

While this paper annually focuses on procedural developments in the class action arena, a threshold substantive issue can have procedural implications worthy of comment.

For example, standing-type issues have been prevalent in a number of cases in 2016 dealing with consumer protection class actions, particularly in British Columbia. One of the main debates in these decisions is how to deal with a class action when not all members of the class qualify as "consumers" under the relevant consumer protection legislation. Certain cases have held that a broad class definition is not fatal to certification. Other cases have held that it is appropriate to create a subclass that is limited to individuals acting for personal, family or household purposes for the consumer protection claim. Still other cases declined to certify a class action due to the difficulties of distinguishing persons who purchased a good or service for a consumer purpose as opposed to a business purpose.

A "consumer transaction" under the BC *Business Practices and Consumer Protection Act* ("BPCPA") is defined as "a supply of goods or services or real property by a supplier *to a consumer* for purposes that are primarily personal, family or household" (emphasis added). Similar definitions are found in other provinces.[58] In several recent cases,

58. For example, the Ontario *Consumer Protection Act, 2002*, SO 2002, c. 30 ("CPA"), defines "consumer" as "an individual acting for personal, family or household purposes and does not include a person who is acting for business purposes"; see also Alberta *Fair Trading Act*, RSA 2000, c. F-2., ss. 1(1)(e) "goods" and 1(1)(k) "services"; Saskatchewan *The Consumer Protection Act*, SS 1996, c. C-30.1, ss. 3(d)

the defendants argued that many customers who purchased the goods or services at issue would not be considered "consumers" because they used those goods or services predominantly for business purposes. Although the cases have played out in the context of the BC BPCPA, the underlying principles may be applicable to other provincial consumer protection statutes where "consumers" are defined by reference to the purpose of the transaction.

In *Seidel* v. *Telus Communications Inc.*,[59] the BC Supreme Court was asked to certify the few claims that survived an enforceable mandatory arbitration clause.[60] The plaintiff alleged breaches of the BPCPA based on the historic billing practices relating to incoming calls.[61] The proposed class was defined as:

> All individual customers of the Defendant who were resident in British Columbia and who contracted for cellular telephone services through the Defendant from January 21, 1999 (excluding the Defendants' employees and agents) to the date on which the Defendant changed the language in its contracts.[62]

The Court concluded that the breadth of the proposed class was not fatal to certification because the class definition allowed the objective identification of a "consumer" as required by the BPCPA.[63]

"goods" and 3(f) "services"; Manitoba *The Business Practices Act*, CCSM 1990, c. B120, s. 1 "consumer transaction"; Quebec *Consumer Protection Act*, CQLR, c. P-40.1, s. 1(e) "consumer"; Newfoundland & Labrador *Consumer Protection and Business Practices Act*, SNL 2009, c. C-31.1, s. 2(a) "consumer"; New Brunswick *Consumer Product Warranty and Liability Act*, SNB 1978, c. C-18.1, s. 1 "consumer product"; Nova Scotia *Consumer Protection Act*, RSNS 1989, c. 92, ss. 21V(e) "services."

59. *Seidel* v. *Telus Communications Inc.*, 2016 BCSC 114 (*Seidel*).
60. The Supreme Court of Canada decided in *Seidel* v. *Telus Communications Inc.*, 2011 SCC 15, that an arbitration clause in Telus' consumer contract could not prevent a party from bringing an action that seeks remedies under s. 172 of the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2.
61. The plaintiff sought both a declaration that the defendant engaged in deceptive acts and practices and/or unconscionable acts and practices pursuant to sections 5 and 9 of the BPCPA as well as an order returning the monies acquired because of these contraventions of the BPCPA pursuant to section 172 of the BPCPA.
62. *Seidel*, para. 128.
63. *Seidel*, para. 146: "In my view it is possible to objectively determine whether a customer's phone was used primarily for personal, family or household purposes. For example, a customer's phone records, whether the customer claimed some or all of his phone expenses as business expenses for income tax purposes, and whether the customer listed his cell phone as a business number are all factors that can be used to objectively assess whether the customer used his phone primarily for personal, family or household purposes. For many customers this determination

Further, any individual inquiry required would not make the class definition unworkable for the purpose of the BC *Class Proceedings Act*. In addition, the Court found that Ms. Seidel was an appropriate representative plaintiff even though she was not a "consumer" within the meaning of the BPCPA for some or most of the class period. The defendant has filed a Notice of Appeal in *Seidel*.

In *Finkel* v. *Coast Capital Savings Credit Union*,[64] the BC Supreme Court considered an application for certification of a claim against the defendant for undisclosed surcharges to its members who made foreign currency withdrawals from their personal accounts outside of Canada. The Court accepted that there could be some "non-consumer" personal account holders, though they are likely a very small minority, given that the agreement at issue contained a term that a personal account cannot be used for business purposes and also set out sanctions for breach of this term. In addition, while these non-consumers did not have a BPCPA claim, they did have a breach of contract claim. Therefore, the Court proposed that a subclass should be created for the BPCPA claim, which would be limited to individuals acting for purposes that are primarily personal, family or household purposes. The Court held that the question of whether an account holder is acting for these purposes can be determined objectively, and that the question is best handled at an individual issues trial or at the claims administration process.

In contrast, in *Jiang* v. *Peoples Trust Company*,[65] the BC Supreme Court found that a proposed class consisting of consumer residents in BC who purchased, received or acquired one or more Prepaid Cards issued or sold by any of the defendants was not certifiable because, unlike *Seidel*, on an objective basis, it was not possible to determine whether a proposed class member was a "consumer" under the BPCPA. As such, a multitude of individual inquiries would be required.

The most recent British Columbia decision denying certification of consumer protection claims is *Webster* v. *Robbins Parking*,[66] a proposed class action challenging a private parking lot operator's prac-

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will be straightforward, while for some it may be more complicated. The fact that there can be difficulties in objectively determining whether a customer was a "consumer" does not mean it is impossible.

64. *Finkel* v. *Coast Capital Savings Credit Union*, 2016 BCSC 561 (*Finkel*).
65. *Jiang* v. *Peoples Trust Company*, 2016 BCSC 368 (*Jiang*).
66. *Webster* v. *Robbins Parking*, 2016 BCSC 1863 (*Webster*).

tices of issuing "violation notices" demanding payment where motorists parked in the operator's lots without displaying a valid pre-paid parking ticket. Among other claims, the plaintiffs alleged that the "violation notices" were deceptive acts or practices contrary to the BPCPA. The BC Supreme Court denied certification on various grounds, including that the claim of deceptive acts or practices under the BPCPA did not disclose a cause of action. Nonetheless, the Court proceeded to consider whether or not the plaintiffs had proposed an identifiable class.

The Court in *Webster* concluded that the members of the proposed class were not capable of being identified because there were no objective criteria to determine whether the registered owner (as opposed to someone else) parked the vehicle or whether the individual who parked the vehicle did so for a "consumer purpose" or otherwise. In reaching this conclusion, the court followed previous decisions such as *Jiang* where proposed class definitions had been rejected because of the difficulties in distinguishing persons who purchased a good or service for a consumer purpose rather than a business purpose. In so doing, the Court also distinguished cases such as *Seidel* and *Finkel* where a proposed class of persons potentially having BPCPA claims were accepted, either because the customer's purpose could be discerned from the defendant's records or the contract at issue specifically prohibited customers from using the service for business purposes.

Unlike the BC courts, the Ontario courts have been relatively unconcerned with the difficulties of distinguishing consumers from non-consumers in consumer protection class actions to date. In the few cases that have briefly touched on the issue, the Ontario courts have suggested that the defendant's records could identify whether services were purchased for business or personal use and that, in any event, the issue could be addressed during the claims administration phase.[67]

Nevertheless, the argument made and accepted in *Webster* could be made in provinces where similar legislative regimes have been adopted. Where class action claims are advanced under consumer protection legislation in respect of goods and services supplied to a mix of businesses and consumers, *Webster* and related BC decisions weigh against certification based on the difficulties of distin-

67. See, for example, *Wellman and Corless* v. *TELUS and Bell*, 2014 ONSC 3318.

guishing "consumers" (as defined in the governing legislation) from non-consumers. This argument appears most likely to succeed where the defendant's records do not provide a reasonable basis for determining whether or not the customer is a consumer, and where the contract does not specifically contemplate that the good or service is only for personal or consumer use.

F. Global Class Actions

The final topic of consideration regarding procedural developments in 2016 is the continued emergence of global class actions. These cases consider the circumstances in which a provincial court should, or could, take jurisdiction over claims that have significant foreign elements to them. These decisions demonstrate that, where claims have a connection to the Canadian jurisdiction, the courts may be prepared to take jurisdiction even if many class members and many of the key facts are elsewhere.

The Ontario courts were faced with this issue in *Excalibur Special Opportunities* v. *Levitsky Feldman*,[68] when a Canadian investment fund sought certification of an action alleging negligence and negligent misrepresentation against a Canadian accounting firm on behalf of all global investors after a high-risk investment in a Chinese hog company had collapsed. In addition to the Canadian plaintiff, the putative class members included investors from the United States, Cayman Islands, Samoa, Malaysia, and United Kingdom. The vast majority (98 percent) of the proposed class members were not resident in Ontario.

At first instance, Justice Perell dismissed the motion seeking certification on two bases: first, the proposed class action lacked a real and substantial connection to Ontario as the vast majority of the investors were in the US; and second, the proposed class action was not the preferable procedure. Justice Perell dismissed the plaintiff's class certification motion on the grounds that the connection to Ontario was "modest" or "trivial."

However, in late 2016, following an unsuccessful appeal to the Ontario Divisional Court, the Court of Appeal for Ontario certified

68. *Excalibur Special Opportunities* v. *Levitsky Feldman*, 2016 ONCA 916 (*Excalibur*).

the action. After applying the real and substantial connection test outlined by the Supreme Court of Canada in *Club Resorts Ltd.* v. *Van Breda*,[69] the Court of Appeal found that the Ontario courts did in fact have jurisdiction *simpliciter* in this case. On the pleadings, the substance of the action had a real and substantial connection to Ontario. The claim was against an accounting firm that resided in Ontario, actively carried on business in Ontario, and prepared the audit report in Toronto. Notably, the Court of Appeal held that the reasonable expectations of foreign class members are not an independent consideration in determining whether to take jurisdiction of a global class action.

The Court of Appeal found that the proposed class action was in fact the preferable procedure. Relying on the dissenting decision of Justice Sachs of the Divisional Court, the Court of Appeal noted that the proposed class action was the preferable procedure for several reasons, including on the basis of access to justice and the fact that class actions have a greater effect in enhancing regulatory oversight.

In another global class action, *Kaynes* v. *BP P.L.C.*,[70] actions were commenced in both the US and Canada seeking damages for alleged misrepresentations by BP to its shareholders before and after the 2010 Deepwater Horizon oil spill. The plaintiff in the Ontario class action purchased BP securities on the New York Stock Exchange and sought damages for a proposed class of Canadian purchasers of BP securities over the TSX, NYSE and various European exchanges. Initially, the Canadian action was stayed on the basis that Ontario was *forum non conveniens*. The plaintiff then attempted to commence a competing class proceeding in the US advancing claims under the Ontario *Securities Act* (the "OSA"). The US District Court for the Southern District of Texas dismissed the plaintiff's claim because, among other things, it had already appointed lead plaintiffs in the existing class action in Texas, and those lead plaintiffs had determined not to pursue claims under the OSA.

Following dismissal of the plaintiff's US proceeding, the Court of Appeal for Ontario revisited the *forum non conveniens* issue and lifted the stay. The Court of Appeal referenced the dismissal of the US claim along with the defendant's purported acceptance of Ontario law

69. *Club Resorts Ltd.* v. *Van Breda*, 2012 SCC 17.
70. *Kaynes* v. *BP P.L.C.*, 2016 ONCA 601 (*Kaynes*).

as sufficient grounds to lift the stay and proceed with the proposed class action in Ontario on behalf of a class of Canadian purchasers. Leave to appeal to the Supreme Court has been sought in the *Kaynes* case.

In addition, an appeal was recently argued before the Ontario Court of Appeal in the case of *Airia Brands Inc.* v. *Air Canada*.[71] In rejecting a global class, the Ontario Superior Court in *Airia Brands* held that comity, fairness and constitutional limits required that the court only take jurisdiction over foreign class members whose transactions with foreign defendants took place outside Ontario if they were present in Ontario or consented to the Ontario court's jurisdiction. The result of this appeal will be instructive regarding and the application of the real and substantial connection test in the context of a proposed global class action commenced in Ontario.

Given the approach taken by appellate courts in 2016, and subject to any guidance from the Supreme Court of Canada, the lower courts will almost certainly be asked to grapple with further requests to certify global class actions in Canadian common law jurisdictions.

Conclusion

As stated at the outset of this paper, the courts in the common law provinces in Canada continue to test the boundaries of class action procedure and emphasize the critical oversight role of the courts at all stages of class proceedings. In 2016, the courts have set several trends utilizing new procedural tools (i.e. global class actions) and continuing to fine tune trusted procedural tools (i.e. summary judgment). At the end of 2016, it became clear that the following procedural trends will become integral to class actions practice in 2017:

- The use of summary judgment on both a pre-certification and post-certification basis assuming that the court can reach a dispositive finding on the motion;

- The use of third party funding agreements and the increased role of the court in carefully scrutinizing these agreements;

71. *Airia Brands Inc.* v. *Air Canada*, 2015 ONSC 5332 (*Airia Brands*).

- The increased judicial scrutiny of settlement agreements and the requirement for substantive evidence to support settlements; and

- The availability of global class actions where the subject matter of the litigation has a real and substantial connection to the Canadian courts.

In addition to these procedural trends, the BC courts have opened an interesting dialogue regarding threshold standing issues with respect to consumer protection claims. The application of this discussion in other provinces will continue to be an interesting topic in 2017.