How can a defendant to claims brought by multiple claimants manage those proceedings efficiently and effectively? Representative actions; class actions; agreements to be bound; test cases, consolidated actions and other forms of collective action will be reviewed in order to discover what various jurisdictions are doing to allow defendants to handle multiple claimants cost effectively.

Practical Approaches to Managing Class Proceedings in Canada:

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The defence of a class proceeding in Canada brings with it unique concerns, challenges and opportunities. Quite apart from the provincial legislation and common law principles applicable to class proceedings, the practical side of managing a class proceeding – and particularly a multijurisdictional one – requires diligent attention in order to minimize errors, achieve efficiencies and capitalize on the opportunities for early resolution or claim preclusion.

This paper addresses several decision-points faced by class action defendants by providing practical and strategic solutions. First, we discuss the defence of a claim at the pre-certification stage, and the use of alternative compensation programs for putative class members as an effective means of avoiding the certification of a class proceeding. Second, we review the admissibility and use of evidence prior to and during the certification stage of a class proceeding. Finally, we provide practice points in respect of managing an international class proceeding.

Alternative Compensation Programs

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In the early stages of a class proceeding, a conversation between lawyer and client addressing the ultimate end goal for a client is an important step. The discussion should focus initially on legal requirements for the litigation, including the duties of preservation of records in all forms. Thereafter a strategic discussion will address such issues as narrowing the scope of the litigation, timing of the action in relation to parallel proceedings in another jurisdiction and any budgeting of legal time and corporate resources.

The client is frequently the party in the best position to assess whether or not an allegation in the litigation may have any merit or can be appropriately defended. If the client or its expert's view is that there is a possibility that a defect may be found in a product, for example, and the lawyer's opinion is that certification and a finding of liability is a likelihood, it may be prudent to consider the feasibility of designing and implementing an alternative compensation program for putative class members as a means to avoid or diminish the benefits for the pursuit of a class proceeding.

Preferability of an Alternative Procedure

In every Canadian jurisdiction, the availability of a preferable alternative procedure to a class proceeding is a factor to be weighed against certification. There are multiple factors that establish alternative procedures as being preferable to class proceedings, when properly constituted as *bona fide* means of compensating claimants for an alleged wrongdoing:

(a) **Timing**: Class actions can be behemoths of civil procedure. It is not at all unusual for a class action – particularly where there is voluminous disclosure, copious amounts of investigation and multiple areas of expert evidence – to last for many years between pleadings and resolution for class members. An alternative procedure in place before certification will be preferable to an identical procedure established through the more expensive and time-intensive process of engaging in settlement negotiations, particularly in cases where the class is in urgent need of compensation or a client

wishes to seek an early resolution and attempt to put the potential for litigation to an end.

(b) **Legal Fees**: Class counsel are compensated, depending on the costs regime in which the class is certified, typically between 25-35% of class recovery (i.e., the settlement or judgment amount), whether that figure is arrived at by a percentage contingency fee or a multiplier of time dockets (the “lodestar method” of counsel compensation).

A compensation mechanism offering, for example, compensation in excess of 80% recovery for class members may be viewed as a preferable procedure to the cost and risk of pursuing a class proceeding; and the design of any compensation mechanism should take into account in the fact that, due to the contingency arrangements of the class with class counsel, 70-80% recovery is the absolute best-case scenario for any plaintiff class.[2] That being the case, manufacturers are in a particularly good position to offer replacements or repairs in satisfaction of any potential losses, minimizing damages to the class, potentially keeping any remaining costs or losses within that 20-30% margin of legal spend, and ensuring that process will be a mathematically superior procedure to protracted litigation.

(c) **Certainty**: An alternative compensation mechanism carries with it the same certainty of result for the plaintiff class as does a settlement agreement, lacking only the presumption of fairness that arises from a negotiated settlement. The fairness of a *bona fide* compensation mechanism may be easy to establish, however, where the compensation often takes the form of a refund, replacement product or repair, or provides for the substantial recovery for the plaintiff’s losses.

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[2] This consideration prevails most strongly in smaller class proceedings, where legal fees and disbursements will take a more meaningful 'slice' out of class recovery. A possible $500,000 in disbursements and a $1 million legal fee with a 2.5 “lodestar” multiplier would be nearly prohibitive in a $10 million class action, which would make an alternative compensation mechanism offering 70 cents on the dollar a preferable procedure by default. In contrast, that same retainer arrangement in a $100 million class action would likely be preferable to a 0.7:1 alternative compensation mechanism.

Justification of an Alternative Procedure

Early in Canadian jurisprudence, defendants tried with varying degrees of success to promote "preferable procedures" that appeared to provide value to plaintiffs without necessarily costing the defendant an equivalent sum. These "ticket" or "coupon" settlement procedures involved a settlement or a defeat of certification in favour of a mechanism providing product discounts laden with restrictions and conditions. These procedures have become controversial in the United States as well as in Canada for failing to provide consumers valuable consideration for dropping their claims, and for appearing to cost the defendants very little in return.[3]

As courts in Canada have an obligation to protect the interests of absent class members,[4] particularly where their own counsel may have a conflict between the best interests of the class and recommending a lucrative settlement, class actions judges are always vigilant to ensure that the terms of settlement are fair and reasonable. Such concerns are naturally reflected in judicial scepticism of the preferability of procedures established unilaterally by a defendant that could have the result of extinguishing plaintiffs' claims out of court.

Where a *bona fide* compensation mechanism has been put into place by a defendant, however, there is actually an extremely compelling argument that such a procedure advances, rather than undermines, the class proceedings regime. Several such mechanisms have already been recognized by the courts as being preferable to class proceedings.[5]

These mechanisms can be preferable to class proceedings because they actually advance the goals of class proceedings without engaging that procedure. The goals of class action legislation were first articulated by the Supreme Court of Canada in *Dutton v. Western Canadian Shopping Centres,* 2001 SCC 46. In that case, the Supreme Court ruled that class actions are intended to:

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[3] See, *inter alia, Figueroa v. Sharper Image Corp.*, 517 F.Supp.2d 1292 (S.D. Florida 2007); http://www.cbc.ca/news/ford-explorer-settlement-stresses-shortfalls-of-class-actions-1.802995.
[4] *Parsons v. McDonald's Restaurants of Canada Ltd.*, 2005 CarswellOnt 544 (C.A.) at para. 20.
[5] See, *inter alia, Brimner v. Via Rail Canada Inc.* (2000), 47 O.R. (3d) 793 (Div. Ct.); *Hollick, infra* note 13; *Bittner v. Louisiana-Pacific Corp.,* [1997] B.C.J. No. 2281 (S.C.), and *Grace v. Fort Erie (Town),* [2003] O.J. No. 3475.

(a) facilitate access to justice;

(b) Improve judicial economy; and

(c) Promote behaviour modification amongst wrongdoers.

All Canadian judicial decisions concerning class actions procedure, including the preferability of procedure, are made from this interpretive standpoint.

A reasonable alternative compensation mechanism advances all three of these elements. It costs a plaintiff nothing and minimizes delay by eliminating the need for litigation, thus advancing access to justice. The fact that claims need not go to court is a favourable factor in terms of judicial economy. Finally, the fact that the defendant, having identified an issue and provided reasonable compensation, demonstrates an internalization of the behaviour modification encouraged by the court. Such a defendant is acting in the way the courts would wish all businesses to act, and the certification of a class proceeding would arguably run counter to this positive development for consumer protection.

The way these policy requirements are put to work in assessing an alternative procedure was recently refined by the Supreme Court in *AIC Limited v. Fischer.*[6] In that decision, the Supreme Court indicated that it would only consider a class action to serve the goal of access to justice if:

(a) There are access to justice concerns that a class action could address; and

(b) Those concerns remain even when alternative avenues of redress are considered.

In assessing those principles, courts are to consider the following questions:

- What are the barriers to access to justice in this case?
- What is the potential of a class proceeding to address those barriers?

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[6] 2013 SCC 69.

- What is/are the alternative proceeding(s) to a class proceeding?
- To what extent can that alternative proceeding address those barriers?
- How do the proceedings compare?

The burden falls to the representative plaintiff to establish, through that test, that a class proceeding is the preferable procedure in respect of the policy goals set out in *Dutton*. While the *AIC Limited* test cannot be said to do much more than to formalize the fact that one proceeding ought to be compared to another, it does indicate the Supreme Court's willingness to examine the preferability of proceeding as a class action at the certification stage, and to be receptive to reasonable alternatives. The Supreme Court has further suggested that the effect of an alternative procedure on substantive rights will be relevant to that analysis.[7]

All of the above, however, applies only where the defendant makes a *bona fide* offer for real value available to class members. Playing games with quantum of compensation or placing strict requirements on eligibility risks a determination that the alternative compensation mechanism may be viewed as not being a preferable procedure *for the class as a whole*. A defendant may find itself in the worst of all possible worlds, providing valuable compensation to opt-out class members through a side mechanism while simultaneously having to proceed with the defence of a class action that it might well win outright.[8]

Efficacy of Alternative Compensation Mechanisms

The viability of circumventing a class action by going straight to the class members with a fair and reasonable offer has been tested on a number of occasions. In some cases, courts have refused

[7] *Canadian Imperial Bank of Commerce v. Green,* 2015 SCC 60 (partially dissenting judgment of Côté J., McLachlin C.J.C and Rothstein J. concurring). The Court did not provide further guidance on this point.
[8] See the practical result in *Blair v. Toronto Community Housing Corporation,* 2011 ONSC 4395, and consider the disaster if the compensation protocol had been open-ended: class members could have remained in the action until the case trended towards the defendant, at which point they could take a preferable settlement under the compensation mechanism.

to certify on the basis that the alternative compensation mechanism is a preferable procedure.[9] It has been our experience, as well, that an even better result is possible: in light of an obviously fair offer being available to class members – particularly one wiping out class damages by providing a replacement product, reimbursement or repair – class counsel may simply abandon the case.[10] The defendant maintains control over its costs, plaintiffs have the opportunity to receive full satisfaction of their claims, the court is not bogged down with an unnecessary class action, class counsel move on to opposed cases with more significant damages in issue, and at least in theory, everybody wins.

Most recently, the Ontario Superior Court in *Etienne De Muelenaere v. Great Gulf Homes Limited*[11] *, et al,* also addressed the issue of pre-certification offers of settlement made to putative class members. In ruling against the representative plaintiff who sought to set aside settlement reached with a number of putative class members, the Court also had to grapple with the issue of pre-certification communications with putative class members. In this case settlement offers were made in response to inquiries made by putative class members and the Court found no violation of the provisions of the *Class Proceedings Act, 1992* or the *Rules of Professional Conduct* and therefore the putative class members were found not to be in need of court intervention to protect their interests. While the result of the settlements will ultimately serve to reduce the value of the class action claims, this alternative remedy for putative class members was seen as being proper in the circumstances.

Summary

An alternative compensation mechanism can circumvent a class proceeding by being judicially recognized as a preferable procedure to a class action or by causing plaintiff counsel to settle or even abandon the claim – *if* the procedure is provided legitimately and in good faith. Such a result is in line with the policy goals of class proceedings, and is comparatively easy to facilitate in a product liability class action, where refund, replacement product or repair are available forms of relief for the

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[9] See *supra,* note 5.
[10] See, for example, the claim against Maidenform announced as having been abandoned, online at <http://www.clg.org/Class-Action/List-of-Class-Actions/Maidenform-Flexees-Shapewear-National-Class-Action>.
[11] 2015 ONSC 7442 (CanLii)

defendant to offer unilaterally. As seen above, alternative compensation mechanisms may also serve to render a class action uneconomical for class counsel to pursue.

Evidence Prior to Certification

One of the most frustrating aspects of many proposed class actions in Canada for defendants is the inability to file evidence going to the merits prior to certification. Despite the belief by the defendant that the case would be abandoned or settled if the conclusive evidence already in the defendant's hands were simply to be put to the judge, it is frustrating that thousands of dollars must be spent just to get to the point in the class proceeding where the defendant finally has an opportunity to address the merits of the claim.

There are opportunities for a defendant to do just that in the course of arguing a certification motion, but those opportunities are tightly restricted. The combination of a strict limitation on evidence permitted at that stage in a class proceeding, the general judicial policy in favour of certification, and the low bar that the plaintiff must clear in order for certification to be granted, could suggest that defence counsel ought to file evidence, expert or otherwise, for a certification hearing only when there is an overwhelming case to be made that the plaintiff's claim, or the viability of the class proceeding is without merit. This is typically dealt with by seeking leave to file a motion for summary judgment or a motion to dismiss to be argued at or before the certification motion. If granted, however, the determination is only deemed to be valid as against the class representative and not the putative class.

"Some Basis in Fact": Background

It has long been the law in Canada that a representative plaintiff must demonstrate "some basis in fact" for the claims he or she advances as part of a class proceeding. What precisely that standard requires has long been an open question, and one that has been particularly acute in British Columbia and the Federal Court, which idiosyncratically require the plaintiff (and in British Columbia,

also the defendant) to file affidavits at the certification stage setting out the material facts on which they intend to rely or the purposes of certification.[12]

The seminal case setting out the "some basis in fact" test, *Hollick v. Toronto (City)*,[13] held that the burden on the plaintiff to establish grounds necessary to pursue a class action was low. The Supreme Court pointed to the *CPA's* requirement that it only need be shown that a cause of action has been pleaded, and noted that this bare minimum was all that appeared to be required by the statute in order to satisfy the element of the certification test most closely related to the case's merits.

Accordingly, the Court determined that "the certification stage is decidedly not meant to be a test of the merits of the action… The question at the certification stage is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action."[14] The Chief Justice went on, however, to rule that:

> In my view, the class representative must show some basis in fact for each of the certification requirements set out in s. 5 of the Act, other than the requirement that the pleadings disclose a cause of action. That latter requirement is of course governed by the rule that a pleading should not be struck for failure to disclose a cause of action unless it is "plain and obvious" that no claim exists: see Branch, *supra*, at para. 4.60.[15]

The Court did not further elaborate on the standard for that "basis in fact", finding only that the representative plaintiff had established the same in respect of the common issues, but not in respect of preferable procedure.

The natural evolution of class actions procedure over the intervening 14 years has demonstrated that the distinction between merits and procedural propriety was not the bright line the Supreme Court intended it to be.

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[12] *Class Proceedings Act,* R.S.B.C. 1996, c. 50, s. 5(5); *Federal Court Rules,* SOR/98-106, s. 334.15(1) and (5).
[13] [2001] 3 S.C.R. 158 ("*Hollick*").
[14] *Hollick, supra* note 13 at para. 16.
[15] Ibid. at para. 25.

Within two years of the *Hollick* decision, a case was before the Ontario Court of Appeal concerning the amount of evidence that could be relied upon to establish that there was no common issue of fact raised by the pleadings. In *Kumar v. Mutual Life Assurance Company of Canada*,[16] the Court of Appeal upheld lower court decisions refusing certification, effectively, on the basis of evidence led at certification. In that case, where the pleadings alleged a systemic plan of misrepresentations made to policyholders about a particular insurance product, evidence was led by the defendant to show that policyholders received individualized representations, and that there were therefore obvious problems with the class definition and moreover no common issues of fact between class members.

Over the following decade, while deference was generally paid to the *Hollick* pronouncement that the merits are not at issue in certification, more and more of a merits argument was gradually permitted to seep into certification hearings as a watertight division of “merits” and a “basis in fact” supporting each element of the certification test proved unworkable.

This tension reached the extent that in 2012 the Ontario Divisional Court had effectively redefined the *Hollick* “some basis in fact” test as follows:

> It is true that common issues are often expressed as questions. However, in order to justify certification, the plaintiffs must raise a legitimate possibility that the question or questions could be answered in their favour. This does not involve an examination of the merits of the claim (see *Hollick v. Toronto (City of)*, 2001 SCC 68 (CanLII), [2001] 3 S.C.R. 158, at paras. 16, 25). It simply requires that there be some factual basis — in the form of admissible evidence — to support the allegation.[17]

In 2013, the Supreme Court of Canada released a trilogy of cases on this point, seeking to settle the controversy and marking the Court’s first significant foray into class actions procedure in the elapsed decade. These cases, *Pro-Sys Consultants Ltd. v. Microsoft Corp.*,[18] *Sun-Rype Products Ltd.*

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[16] (2003), 226 D.L.R. (4th) 112 (Ont. C.A.).
[17] *Williams v. Canon Canada Inc.*, 2012 ONSC 3692 at para. 23.
[18] [2013] 3 S.C.R. 477 (“*Pro-Sys*”).

v. Archer Daniels Midland Co.[19] and *Infineon Technologies AG v. Option consommateurs*,[20] set out in part to more carefully define the requirements of the "some basis in fact" test.

The 2013 Trilogy

Pro-Sys, Sun-Rype and *Infineon* were competition class actions heard by the Supreme Court, the decisions for which were released together. This trilogy of cases, on appeal from the British Columbia Court of Appeal in the former two cases and the Quebec Court of Appeal in the latter, each alleged price fixing on the part of their respective defendants resulted in a compensable loss to indirect purchasers of that defendant's products.

The British Columbia cases, *Pro-Sys* and *Sun-Rype,* resulted in the Supreme Court reaffirming the *Hollick* test and essentially reversing the 'evidence creep' that had worked its way into the class proceedings jurisprudence. In *Pro-Sys,* Justice Rothstein set out the law as follows:

> The *Hollick* standard of proof asks not whether there is some basis in fact for the claim itself, but rather whether there is some basis in fact which establishes each of the individual certification requirements…[21]

Crucially, Justice Rothstein confirms here that "some basis in fact" is not to be shown in respect of the claim itself, but instead refers to a distinct evidentiary threshold to be met *in respect of the criteria for certification.* Despite the strict language of the *Class Proceedings Act,* the Supreme Court ultimately decided that the civil 'balance of probabilities' standard would *not* apply to the certification criteria. That is, it is apparently no longer necessary even to prove on the balance of probabilities that there is an identifiable class; it is necessary only to show some basis in fact to support the allegation that there is.

Despite moving back to the 'watertight containers' approach endorsed by *Hollick*, and apparently further loosening the evidentiary standards at certification in the common law provinces of

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[19] [2013] 3 S.C.R. 545 ("*Sun-Rype*").
[20] [2013] 3 S.C.R. 600 ("*Infineon*").
[21] *Pro-Sys, supra* note 18 at para. 100.

Canada, Justice Rothstein opted not to attempt to resolve the ambiguity in the "some basis in fact" definition:

> In any event, in my respectful opinion, there is limited utility in attempting to define "some basis in fact" in the abstract. Each case must be decided on its own facts. There must be sufficient facts to satisfy the applications judge that the conditions for certification have been met to a degree that should allow the matter to proceed on a class basis without foundering at the merits stage by reason of the requirements of s. 4(1) of the CPA not having been met.[22]

In the wake of *Pro-Sys,* therefore, the governing principle is that the evidentiary threshold confronted by the plaintiff on certification is the demonstration of "some basis in fact", howsoever that may be defined, to suggest that the certification criteria have been met. It is unnecessary, under the Court's reasoning in *Pro-Sys,* for the plaintiff to show any basis in fact for the validity of the claims made in the proceeding. Accordingly, no evidence can be led at the certification stage contesting the validity of the claims made in the proceeding.

The *Infineon* case, being decided under the unique civil-law rules of the Province of Quebec, was decided differently than its companion cases due to the statutory requirement in Quebec that the plaintiff show evidence to the effect that "the facts alleged seem to justify the conclusions sought".[23] Where a representative plaintiff applies for authorization to proceed on behalf of a class in Quebec, he or she is required to lead evidence sufficient to show an arguable case on the merits, though the merits of the claim will not themselves be considered by the applications judge. Provided that the facts as pleaded and supported by affidavit material support an inference of fault on a very low threshold, the authorization will be granted and the class action will proceed.

The New Brunswick Court of Appeal has recently distilled the "some basis in fact" threshold articulated in this trilogy of cases more colloquially: "There will always be an argument against certification. However, no objection can be rooted in the substantive merits of the action, and,

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[22] Ibid. at para. 104.
[23] *Code of Civil Procedure,* CQLR, c. C-25, s. 1003(b).

ultimately, the question to be resolved is whether any arguable procedural objection should overwhelm the case in favour of collective relief."[24]

"Some Basis in Fact" and Methodology

The great majority of cases can be framed to meet such a loose standard as "some basis in fact" in respect of the criteria for certification with relative ease. The reaffirmation of that minimal standard by the Supreme Court suggests that it may be wise to consider spending time and resources more efficiently in preparing for trial or a dispositive motion. There is one aspect of the certification criteria, however, that may still be validly contested with evidence at the certification stage.

In the foreground of the 2013 Trilogy was the matter of the methodology that would be used to establish the harm, if any, suffered by the class as a result of the alleged acts of unfair competition. A legitimate and compelling debate arose as to the way in which harm could be established across the entire class, if indeed it could at all.

Both sides produced experts to opine on the methodology by which the commonality of the class could be established. In *Pro-Sys,* the Supreme Court held that it was not necessary or desirable for the motions judge to engage in an exercise of deciding between experts; rather, it was the task of the motions judge to assess the methodology proposed by the plaintiff, and to determine if it was sufficiently credible and plausible to establish "some basis in fact" for the belief that the members of the class had the pleaded issues in common with one another. The Court referred to this as a methodology for establishing "common impact".[25] It was the responsibility of the plaintiff at certification not to prove the damages to the class, but to prove that its experts had established a legitimate methodology that, by the date of trial, could be used to do so.

While the 2013 Trilogy concerned competition class actions, that decision has an even stronger reverberation in the law of product liability. Consider, for example, *Charlton v. Abbott*

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[24] *Gay v. Regional Health Authority,* 2014 NBCA 10.
[25] *Pro-Sys, supra* note 18 at para. 115.

Laboratories Ltd.,[26] an appeal to the British Columbia Court of Appeal in reliance on the 2013 Trilogy (as well as *AIC Limited v. Fischer,*[27] another case released in association with the results in those cases). *Charlton* concerned an allegation that the defendant's drug, Sibutramine, caused or contributed to adverse cardiac events.

In that case, the defendant pharmaceutical manufacturer pleaded that the plaintiff class had failed to provide any credible methodology by which it could be established that the members of the class suffered harm as a result of the same act or omission of the defendant. That is, the plaintiff had no legitimate methodology he could use to establish general causation across the population of consumers he purported to include in the class. He was unable to establish, on a class-wide basis, the impact (if any) of the drug on the cardiac events suffered by *all* class members.

The experts in *Charlton* went beyond disagreeing as to the degree of risk posed by Sibutramine to the class, and instead could not even agree that such a risk existed. They were unable to establish a methodology whereby the degree of risk posed by the drug to class members could ever be established in such a way as to turn the plaintiff's hypothesis into a proven fact for the purposes of establishing liability. On that basis, among others, the Court of Appeal actually decertified the class, putting an end to the class action altogether. The British Columbia Court of Appeal has since clarified, in respect of the *Charlton* case, that the 'methodology' requirement does not always require expert evidence or a formal scientific methodology; rather, it is only necessary at the certification stage to demonstrate that there is a way to test an alleged common issue at trial. A common issue can be attacked where it can be demonstrated that there is no realistic way to do so.[28]

Similarly, in the recent case of *O'Brien v. Bard Canada Inc*,[29] Justice Perell considered a certification motion brought against the manufacturer of 19 different medical products, each of which

[26] 2015 BCCA 26 ("*Charlton*").
[27] 2013 SCC 69.
[28] *Miller v. Merck Frosst Canada Ltd.,* 2015 BCCA 353.
[29] 2015 ONSC 2470 ("*Bard*").

used one or another form of surgical mesh in its construction. The expert retained by the plaintiff for the purpose of the certification motion testified broadly about the surgical mesh product industry. The Court found that the expert's evidence was of limited utility "even with the submissive and easy-going scrutiny of the some-basis-in-fact standard" as his opinions about surgical mesh generally were insufficiently specific to the claims against Bard and insufficiently nuanced to account for the fact that all 19 products were designed differently:

> The commonality of surgical mesh in the 19 products conveys only a false impression of commonality, because the evidence on the certification motion shows that the 19 medical devices for the treatment of two very different medical ailments are different in materials; shape; size; weight; density; weave; porosity; flexibility; configuration; fixation methodology; design purposes; and, product warnings.[30]

The Court, finding that the representative plaintiff had not established the necessary commonality even on the "some basis in fact" standard, refused to certify the class proceeding. Costs were awarded to the defendant.

These debates about methodology – and particularly about establishing commonality and causation – have been a very active battleground in product liability class proceedings since the 2013 Trilogy was released, and can be expected to continue to be for some time.[31] Any defendant that has a serious concern about the coherence or 'provability' of an identifiable class should consider arguments to that effect at the certification stage, before incurring the costs and procedural challenges in attempting to raise it at a later time.

Summary

The Supreme Court, in the 2013 Trilogy, reaffirmed the *Hollick* test proscribing the introduction of evidence on the merits at the certification stage. The Court only somewhat clarified *Hollick's*

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[30] Ibid. at para. 126.
[31] In the Quebec context, see *Lebrasseur v. Hoffman-LaRoche Limited,* unreported, Quebec Superior Court, File No. 500-06-000512-109, June 27, 2013, in which authorization was denied for a plaintiff claiming that his Accutane prescription caused or contributed to his development of Crohn's Disease. The Court determined that there was an inadequate factual foundation for establishing that the drug could have such an effect, and as a result there was no available methodology for establishing general causation on a class-wide basis. The same debate about methodology in satisfying certification criteria is carrying on in the securities jurisprudence as well: see *Andriuk v. Merrill Lynch Canada Inc.* 2014 ABCA 177.

controversial “some basis in fact” standard by ruling that a plaintiff must only show “some basis in fact” to suggest that the criteria for certification could be met, and that a plaintiff is not required to show “some basis in fact” for belief in the merits of the claim. What constitutes “some basis in fact” remains to be decided on a case-by-case basis.

Despite that general bar against the introduction of evidence at certification, and the increasing practice of negotiating or arguing the terms of a consent certification order, there has been a recent slate of rejected certification motions and class decertifications resulting from disputes over the methodology used by the plaintiff to establish commonality and/or causation. Although parties should not lead evidence as to the merits on certification, it is incumbent on the plaintiff to demonstrate some basis in fact for belief that the proposed action truly has legal issues common to the entire class; presents an identifiable class; and is a preferable procedure to any other procedure available. The plaintiff is not required at certification to establish causation or commonality, but he or she *is* required to demonstrate a legitimate methodology that, when applied to the facts that will come out in the litigation, *will* establish those facts.

Where the plaintiff’s proposed methodology for any of the foregoing cannot withstand the mild scrutiny of the “some basis in fact” standard, it may be a successful strategy for defendants to challenge that methodology in an effort to terminate the class proceeding.

Managing Multiple Proceedings

One of the most challenging aspects of defending class actions is that it is rarely the case that the claim will be restricted to a single jurisdiction. In order to achieve economies of scale, plaintiffs tend to define classes as broadly as possible as a matter of course. In so doing, they invariably name multiple associated and subsidiary corporations internationally and bring the claim in various different jurisdictions with different statute books, thus putting all parties to the effort of retaining and coordinating counsel in a number of different jurisdictions.

This section will briefly canvass a few of the best practices that have been adopted as multijurisdictional class proceedings have become the norm rather than the exception in Canada.

National Class Proceedings: Administration

While the constitutionality of the national class proceeding is still uncertain,[32] it is often the case that class proceedings are brought on a national basis, to be certified in an 'opt-out' jurisdiction (i.e., a jurisdiction wherein all members of a class are presumed to be participating in the action unless they 'opt out', as opposed to an 'opt-in' jurisdiction such as British Columbia, wherein extraprovincial class members must actively attorn to the court's jurisdiction in order to participate in the action).[33]

As the enforcement of a settlement or judgment on behalf of the plaintiff class will require an approach to different provincial courts, the involvement of local counsel may be preferable though not necessary given Canada's mobility rules. The benefits of collaboration amongst experienced counsel retained in three or four jurisdictions, with one counsel as lead for co-ordination purposes, can avoid procedural embarrassment and ensure efficiency in procedure.

When deciding upon local counsel for retention purposes, it is advisable to take a careful view of all counsel's qualifications *as a national team*. Assess, for example the benefits and efficiencies to be found in retaining local counsel that are also subject matter experts.

It may not be necessary to retain local counsel in all jurisdictions across Canada in order to defend a national class proceeding. Three recent developments have suggested that the need to do so is becoming less pressing as time goes on.

First, courts have begun to criticize the practice of plaintiffs filing placeholder claims in every superior court in Canada with statements of claim brought on behalf of the same class as an abuse of process. In *BCE Inc. v. Gillis*, the Nova Scotia Court of Appeal held that because all of Nova Scotia's

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[32] *Lépine v. Canada Post,* 2009 SCC 16 at paras. 56 and 57, which constituted a point of dispute in, *inter alia, Meeking v. Cash Store Inc.,* 2012 MBQB 58 and *Silver v. IMAX Corp.,* 2012 ONSC 1047.
[33] *Class Proceedings Act,* R.S.B.C. 1996, c. 50, s. 16(2).

class members were covered by a certified class in Saskatchewan, it was improper to have an identical outstanding claim in Nova Scotia.[34]

The Quebec Superior Court followed that line of criticism against a particular plaintiffs' firm that adopted the multiple-filings strategy as a matter of course, holding that "nothing explains why this law firm commenced two identical claims other than to block other law firms and members who could be interested in the same subject-matter. The jurisprudence unanimously condemns this approach".[35]

The Alberta Court of Appeal held a similar view, ruling that the practice of filing claims in multiple jurisdictions was not acceptable because, among other things, it provided the plaintiffs with an avenue for collateral attacks on adverse decisions, or to advance a particular claim that had been defeated on a purportedly national basis in another jurisdiction.[36]

While these cases have largely concerned the condemnation of a particular litigation strategy that amounted to an abuse of process, the trend appears to be gradually moving towards courts recognizing and enforcing purportedly national 'opt-out' class proceedings brought in other jurisdictions within Canada, subject to local approval of settlement or recognitions of judgment. Among the Alberta Court of Appeal's reasons for finding the multijurisdictional filings to be an abuse of process was the conclusion that decisions made in other jurisdictions had been made by competent courts, even though they purported to resolve issues in respect of a multijurisdictional class.

Second, the rise of 'plaintiff consortia' has been a recent development of the class action Bar. Like defence teams comprised of lawyers with different expertise and in different jurisdictions, plaintiff firms are banding together to take carriage of the more complex class proceedings in Canada.[37] The

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[34] BCE Inc. v. Gillis, 2015 NSCA 32.
[35] *Cohen c. LG Chem Ltd.,* 2015 QCCS 6463.
[36] *Turner v. Bell Mobility,* 2016 ABCA 21,
[37] See, for example, the carriage motion in *Mancinelli v. Barrick Gold,* 2014 ONSC 6516 and the multijurisdictional consortium representing the class in *Condon v. The Queen,* 2014 FC 250.

result is that defence counsel are now able to deal with matters touching on various jurisdictions or distinct legal issues more efficiently, through a single point of contact.

Related to the rise of 'plaintiff consortia' is the development of the Canadian Bar Association National Task Force on Class Actions' recommendation that settlement conferences be heard jointly by various benches, and the judiciary's apparent willingness to accommodate that procedural efficiency. The Task Force recommended that motions for multijurisdictional class settlement approval be recognized by the courts,[38] and that the same may be heard by judges of multiple jurisdictions simultaneously by video conference. The Bench has been generally supportive of this policy of streamlining. British Columbia has been an outlier in requiring that the teleconference still be a physical occurrence in a British Columbia courtroom, with parties and witnesses having the right to be present, and no obligation to be compelled to appear elsewhere.[39]

This latter development also means the 'travelling roadshow' of settlement conferences, which often engaged local counsel to a considerable degree, may now be avoided by the hearing of a single, multijurisdictional hearing by virtual means.

Parallel Regulatory and Civil Actions

Perhaps the most common trigger for the commencement of a product liability class proceeding is the recall. Manufacturers are aware by now of the strong correlation between recalling a product and the commencement of a class proceeding. There is also a strong correlation between a regulatory proceeding and a recall. Very commonly, therefore, class action defence counsel will find

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[38] Canadian Bar Association, online: <http://www.cba.org/CBA/ClassActionsTaskForce/PDF/Protocol_eng.pdf>

[39] See *Honhon c. Canada (Procureur general),* 2013 QCCS 2782; *Parsons v. The Canadian Red Cross Society,* 2013 ONSC 3053; *Endean v. British Columbia,* 2014 BCCA 61 at paras. 65, 69 ("… counsel for Canada in his factum acknowledges that permitting judges of one jurisdiction to hold hearings in another could be problematical… [and] also endangers the open court principle… If for reasons of convenience or otherwise, a judge determines that a matter is to be heard by telephone, video conference or other communication medium, there is I suggest no reason why the judge, counsel or witnesses necessarily need to be physically present in the province as long as the hearing itself takes place in a courtroom in British Columbia. Witnesses and counsel, of course, will have the right to be present in the courtroom and cannot be compelled to attend to a location other than a courtroom in British Columbia." The BC Court of Appeal also quite properly noted that the judges in attendance on such a video conference would not and could not be a 'panel'. They would apply different law, come to different decisions in respect of objections or motions, treat evidence differently and come to different but binding conclusions (as opposed to dissenting judgments). Note that the *Parsons* case has been granted leave to appeal to the Supreme Court, and may provide some definitive guidance as to the multijurisdictional restrictions on class proceedings in the near future.

themselves dealing with the defence of a product liability class proceeding while simultaneously juggling a regulatory proceeding of equal or greater severity.

The best practice in mediating between these two very different regimes is to generally take steps to ensure the regulatory proceeding has sufficient resources devoted to it at the start than the civil action. Class actions, by and large, represent liabilities related to alleged wrongs in the past that may represent future costs. Regulatory concerns, however, can impact the immediate business operations of a manufacturer and must generally be addressed immediately. In most cases, a regulatory proceeding should be a manufacturer's priority, both in terms of its potential impact on the company's operations and in terms of the efficiencies to be found in managing the two proceedings: regulatory conclusions can inform civil liability, but the reverse is not often true.

The investigations of a regulator and the evidence that regulator requires are also typically crucial evidence in the civil proceeding. If a product liability class action sounds in negligence, it is difficult to overstate the importance of evidence showing a 'passing grade' after a regulatory investigation.

Where possible, consider bringing a motion to stay the class proceeding pending the outcome of a regulatory investigation. Such a request may be met with favour by plaintiffs' counsel, as the evidence produced by that proceeding will be pivotal to the claim and any potential resolution, and will not be generated at the expense of the plaintiff class or through the use of court resources. Plaintiffs may oppose it if they have concerns that the defendant will do well in the regulatory proceeding, if they fear the information put to the regulator will be insufficiently vetted or tested, or if the need of the class for resolution is urgent.

Parallel American and International Actions: Administration

One of the most reliable predictors of a class proceeding in Canada is a class proceeding in the United States. 'Copycat' claims are a windfall for class counsel, who will have ready access to

crucial information and preformatted legal arguments as the action proceeds south of the border. These claims are therefore very common in Canada, and where a manufacturer is in the position of defending related claims in the United States and abroad, centralized administration of the claims and control over the release of evidence are crucial.

The risk of defending similar claims in a number of different jurisdictions, apart from the strict legal pitfalls associated with a multilateral defence, is that certain jurisdictions will reach various stages of litigation faster than the 'main' American action. It is important, therefore, to have a centralized team in-house on the defendant's side responsible for overseeing *all* such actions and keeping timelines organized.

That centralized team will be responsible for controlling the narrative in each jurisdiction to keep defences parallel and evidence properly presented.

If evidence and expert opinion is collected centrally in the United States, that benefit enjoyed by foreign plaintiff counsel is, in effect, enjoyed by foreign defence counsel as well.

Parallel American and International Actions: Settlement

The apparent chaos of multiple related class proceedings in multiple jurisdictions are surprisingly amenable to global settlement. Particularly if the plaintiffs' access to evidence is uniform across all jurisdictions, it is likely that all plaintiff counsel will have a vaguely similar perspective on the strengths and weaknesses of their case.

At an opportune time, however, it may be beneficial to consider a global settlement conference to resolve, if not the cases as a whole, then at least several of the challenging issues. If a defendant is willing to concede a certain point, or has conclusive evidence that another particular form of claim has no merit, the cost of a two-day conference for international parties may be dwarfed by the overall costs of litigation.

Summary

When a defendant is facing multiple proceedings, centralized administration is crucial. The best counsel should be appointed as a leader and co-ordinator of experienced defence teams across Canada, working in collaboration with in-house counsel and managing the case.

Particularly where local counsel have unique expertise not only in their own court systems, but in applicable areas of law or evidence, lead counsel's role as a co-ordinator or chairperson will consist largely of providing the diverse perspectives of the team to the client, along with his or her own best advice, and assuming the responsibility of ensuring that actions taken in one jurisdiction do not negatively impact any current or future step in any other.

The largest and most important proceedings from a business perspective should be addressed first wherever possible, with less critical disputes stayed or postponed pending their outcome. The evidentiary and precedential fruits of the more time- or operations-sensitive proceedings may be used to save costs on those equally significant but less critical disputes.

This approach also should address centralized control over the company's media responses to avoid the risks of adverse media and legal exposure. If this approach is followed, and plaintiff counsel everywhere are on the same page, a global settlement conference may be worth considering to minimize exposure and shorten the duration of the dispute and the negative publicity associated therewith