



2011 TRENDS

Blakes
CANADIAN LAWYERS

LITIGATION

Noteworthy decisions from Canadian courts that may have an impact on litigation in 2011 include:

AGAINST CONFIDENTIALITY ORDERS

Although the test for obtaining a confidentiality order has not changed, the recent case of *Fairview Donut Inc. v. The TDL Group Corp* suggests that confidentiality orders may become harder to obtain in the commercial context. Before this decision, the general practice of the courts was not to scrutinize confidentiality orders too carefully when they were on consent. In *Fairview*, which involved a class action brought by franchisees, the company, Tim Hortons, moved for a confidentiality order to restrict access to certain documents containing competitive information about its costs, sales and margins. The plaintiffs agreed that a confidentiality order was warranted for certain documents.

The court, however, was not satisfied that the interests affected extended beyond the private commercial interests of Tim Hortons and its franchisees. The court also found that the potential advantage to competitors was speculative.

The *Fairview* case signals that even in commercial cases, Ontario courts may be reluctant to grant confidentiality orders. Parties seeking confidentiality orders are advised to lead strong evidence of why specific document(s) should be confidential, and of the broader interest at stake.

A LOWER THRESHOLD FOR SECONDARY MARKET CERTIFICATION LEAVE APPLICATIONS

The December 14, 2009, judgment of the Ontario Superior Court of Justice in *Silver v. IMAX Corp.* was the first decision dealing with s. 138.3 of the *Ontario Securities Act* or any of the analogous provincial regimes creating secondary market liability. The court in *IMAX* held that in deciding the leave requirement under the Act, there is no reason to impose a substantial onus on the first element of "good faith", and that a low threshold would suffice on the second element of a "reasonable possibility of success" at trial. An appeal of the decision was dismissed in May 2010 by the Ontario Court of Appeal. Accordingly, it is fair to expect that a greater number of secondary market actions under the untested provincial regimes are likely imminent. The corollary is greater liability concerns for corporations, as well as their officers and directors.

TOWARDS CERTIFICATION OF INDIRECT PURCHASER ACTIONS

Canadian courts appear to have relaxed a trend of requiring plaintiffs in indirect purchaser cases to put forth a workable methodology to demonstrate class-wide harm. On September 28, 2009, in the case of *Irving Paper Limited v. Atofina Chemicals Inc.*, the Ontario Superior Court of Justice ruled that it is sufficient that a methodology *could* exist. This case was the first where the courts have certified a contested class action involving indirect purchasers. Similarly, less than three months after the *Irving Paper* decision, in *Pro-Sys Consultants Ltd. v. Infineon*, the Court of Appeal for British Columbia held that the appellant was required to show only a "credible or plausible methodology." Finally, on March 5, 2010, in *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, the Supreme Court of British Columbia applied the low bar set in *Infineon*. An appeal from that decision was heard on November 30, 2010, and is currently under reserve. Absent a successful appeal, by ruling in a similar manner in both Ontario and British Columbia, it appears the courts have begun a new trend in the certification of class actions on behalf of indirect purchasers.

WAIVER OF TORT IN CLASS ACTIONS

For several years, waiver of tort has been regularly pled and repeatedly certified in Canadian class action lawsuits. This trend has continued with the recent cases of *Pro-Sys Consultants Ltd. v. Microsoft Corp.* and *Pro-Sys Consultants Ltd. v. Infineon*. While the nature and scope of the waiver of tort doctrine is unclear, it is attractive for plaintiffs, as it arguably does away with the need to prove damages. This argument makes the "common issues" portion of the certification test a low bar, as wrongful conduct and resulting gain by the defendant may alone act as a common issue for class members.

On February 8, 2010, a trial involving waiver of tort allegations against St. Jude Medical Canada and St. Jude Medical Inc. began in Toronto. This is the first trial of a medical device manufacturer facing allegations of waiver of tort. The case, which will conclude in the spring of 2011, has the potential to clarify the nature and scope of the waiver of tort doctrine in Canada, and either affirm or reverse the established trend of the use of the doctrine as a common issue at the certification stage.

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CHANGING PROVINCIAL APPROACHES TO JURISDICTION

Despite academic criticism, since 2002, the Ontario Court of Appeal decision in *Muscutt v. Courcelles* has been the leading case concerning when the courts will assume jurisdiction over foreign defendants. The test consisted of two subtests: jurisdiction *simpliciter* to decide whether Ontario courts have jurisdiction, and *forum conveniens* to decide whether despite having jurisdiction, the courts should decline it. By and large, the criticisms were based upon overlap in the formulations of the jurisdiction *simpliciter* test and the *forum conveniens* test.

The first significant judicial challenge to the use of the *Muscutt* jurisdiction *simpliciter* test came in the 2006 New Brunswick Court of Appeal decision of *Coutu v. Gauthier (Estate)*. This was followed up with the December 2009 decision of the British Columbia Court of Appeal in *Stanway v. Wyeth Pharmaceuticals Inc.*, where the court rejected the use of the jurisdiction *simpliciter* test. On February 2, 2010, the Ontario Court of Appeal reacted in *Van Breda v. Village Resorts Limited*, simplifying the jurisdiction *simpliciter* test, and attempting to lessen its overlap with the *forum conveniens* test. Leave to appeal *Van Breda* was granted by the Supreme Court of Canada in July 2010. The appeal is to be heard in March.

DUTY OF INSURERS TO DEFEND REVISITED BY SUPREME COURT OF CANADA

On September 23, 2010, the Supreme Court of Canada released its decision in *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada* and provided guidance on the interpretation of liability insurance policies and the duty of insurers to defend.

The court found that the focus of policy interpretation should first and foremost be on the language of the policy and that the general principles of tort law are no substitute for the language of the policy. *Progressive Homes*, therefore, reinforces the primacy of the policy and the language used therein to assess the duty to defend together with a presumption that the facts in the pleadings are true.

In coming to its decision, the court rejected the concept that, generally, faulty design or workmanship does not satisfy the fortuity requirement of an insurance policy or a presumption that a liability policy does not cover damage to property of the insured itself.

While there are, therefore, general interpretative principles that are, and continue to be, used by the courts, this decision demonstrates that the Supreme Court of Canada is not comfortable with presumptions about what is or is not covered if they are not expressly in the language of the policy.

ONTARIO IMPLEMENTS MEDIATION ACT

Ontario recently enacted the *Commercial Mediation Act, 2010* (the Act). The Act was designed to facilitate the use of mediation as a tool to resolve commercial disputes. Ontario is the second Canadian province, following Nova Scotia, to adopt such legislation. Similar to the Nova Scotia legislation, the Act is based on the *UNCITRAL Model Law on International Commercial Conciliation* (2002).

The Act applies to mediation of commercial disputes, whether contractual or not. This includes, among others, such matters as distribution agreements, commercial representation or agency and joint ventures. While much lies within the scope of the Act, it is not intended to apply to mediation relating to a collective agreement, a computerized mediation, actions taken by a judge or arbitrator in the course of judicial or arbitral proceedings to promote settlement, or mediations for which procedures are prescribed in the Ontario *Rules of Civil Procedure*. Further, the Act does not apply where it is in conflict with other legislation. The parties to a mediation may agree to exclude the application of the Act or may agree to apply the Act with agreed upon modifications.

The Act is designed to provide guidance in relation to various components of the mediation process, including appointment of a mediator, the role of the mediator, the structure/procedure for the mediation, when a mediation terminates, confidentiality obligations and enforcement of a settlement. One of the major advantages of the Act is that it makes it easier to enforce a settlement agreement. Under the Act, a party may apply to the Ontario Superior Court of Justice for judgment in accordance with the terms of the agreement or for an order authorizing registration of the agreement with the court.

The implementation of this Act is yet another indication of the growing trend to use mediation and other forms of alternative dispute resolution as a means to resolving disputes.