CLASS ACTIONS: A NEW BATTLEGROUND FOR INSURERS IN CANADA

Roger J. Horst

Blaney McMurtry LLP
416.593.3938
rhorst@blaney.com

TABLE OF CONTENTS

CLASS ACTIONS: A NEW BATTLEGROUND FOR INSURERS IN CANADA

By: Roger Horst[1]

INTRODUCTION

The introduction of class action legislation in Ontario and British Columbia in the 1990s lead to a proliferation of class action suits by the late-1990s, especially in Ontario. These actions present new challenges to insurers who are faced with both new types of claims and increased exposures on familiar types of claims. A particular type of new claim is the statute-based securities claim under the Ontario ***Securities Act*** which contains statutory "deemed reliance" in certain misrepresentation cases. Companies and their officers and directors are especially vulnerable in circumstances where financial statements contained in a prospectus or circular are re-stated. Old types of claims which come with new force as class actions are product liability and professional services claims.

In the insurance industry, these developments present challenges for both underwriting and claims. Underwriting must now assess risks in the context of potential class actions in an environment where the law is still in flux as to when a claim will be certified as a class action. Given the size of class action claims, any such actions actually commenced frequently present a policy limits problem for claims.

Insurers primarily insure against losses caused by torts. A number of torts are particularly susceptible to class actions with varying degrees of likelihood of being certified as a class proceeding. This paper reviews in particular potential classes of claims for insurers in the areas of professional negligence, products liability, municipal or government, and securities or misrepresentation claims. However, no policy of insurance is immune to a potential class action claim.

---

[1] of Blaney McMurtry LLP. The assistance of Russell Hatch, barrister and solicitor, in the preparation of this paper is gratefully acknowledged.

A class proceeding is a procedural remedy. A representative plaintiff stands in the place of all persons in an identifiable class who have a common cause of action. For the class to be certified, the plaintiff must persuade the judge at the certification hearing that a class action is the preferable procedure for resolution of the common issues raised by the action.

To be certified as a class proceeding, the courts have also said that there must be a nexus between the class identified and the common issues. It is not necessary that each class member be identified at the beginning of the action; it is sufficient if class members are identifiable. The court may require evidence that there is credence to the allegations of an identifiable class[2].

At the certification hearing, the determination is made as to whether or not the proceeding should be certified. The primary test for whether a class proceeding should be certified is whether the resolution of the common issue(s) would materially advance the litigation[3].

Class actions have two effects on claims. Certain claims, especially consumer or shareholder claims, now become viable because they can be brought on a common basis which, if the class is large enough, can turn a modest claim for a few hundred or a few thousand dollars into a claim for millions or billions.

Also, familiar claims can become more dangerous in a class action context because instead of fighting one claim, there are an overwhelming number. For example, medical and health service claims have not been unknown prior to class action legislation. However, no prior claim had anything like the scope of the class certified by the Court of Appeal in ***Anderson v. Wilson***[4], where it is alleged there was a transfer of Hepatitis B through sloppy medical practices at an EEG clinic. There are over a thousand claimants in the class of those who contracted Hepatitis B and 18,000 in the class which received a letter saying that they needed to be tested for Hepatitis B. Both classes have been certified.

---

2 ***Hollick v. City of Toronto*** (1999), 46 O.R. (3d) 257 at 265 (C.A.)

3 ***Carom et al v. Bre-X Minerals Ltd. et al*** (1999), 44 O.R. (3d) 173 at 194 (S.C.J.)

4 ***Anderson v. Wilson*** (1999), 44 O.R. (3d) 673 (C.A.)

The jury is still out on what types of cases will truly find favour as class actions in Canada under the new Acts. Certainly, the Acts will be used.

Research, which is now a year old, found that at March 1999 in Ontario, of the 28 contested applications for certification, half were successful. In addition, there were 12 cases where the defendants did not contest certification. At that point, 5 class actions had proceeded to judgment, 2 successfully. In addition, 9 had settled, 7 of those as part of an uncontested certification.[5] In other words, of the 40 cases brought to certification hearings at that point, 65 percent were certified, including those on consent or by settlement.

Those statistics will not scare the burgeoning plaintiffs' class action bar. Successful class actions are here to stay. And they will be expensive.

PROFESSIONAL NEGLIGENCE

On first blush, E & O policies seem unlikely to attract class actions given that professional advice is usually given on a one-to-one basis. However, that is not always the case and there are instances where a professional does a certain act which affects many parties who may or may not be clients, but to whom a duty may be owed. If those duties are insured duties, then E & O policies will be called upon.

In ***Abdool v. Anaheim Management Ltd.***[6], the first case to have a certification hearing in Ontario, certification was refused against all defendants, including two sets of professionals — the lawyers and the accountants. The proposed class action was on behalf of purchasers of condominium units who purchased the units as part of a tax-shelter scheme. It was alleged that the developer's solicitors owed duties of care to the investors. Certification was refused against the lawyers on the basis that liability in each instance would depend on the individual facts as between the investor and the lawyer to determine whether a duty existed. Liability for the accountants was alleged to depend on the representations in a single letter. However, reliance

---

5 Ward Branch, ***Class Actions in Canada***, page 4-55 June 1999

6 (1995), 21 O.R. (3d) 453 (Div. Ct.)

would have been an individual issue in each case thereby undercutting the utility of a class action.

In contrast, last year in ***Delgrosso v. Paul***[7], a class action against lawyers was certified in a similar context with respect to investments in syndicated mortgages. The plaintiffs conceded that they had no contact with the solicitor, thereby avoiding that pitfall which proved problematic in ***Abdool***. Nonetheless, duties were alleged in the circumstances. Leave to appeal the certification was denied.

In short, where a professional acts in such a way that it can be said the professional owes duties to a class of persons, then the courts may well certify a class action against that professional. Professionals involved in tax shelters, syndicated mortgages, advice letters and the like would appear to face the greatest exposure.

PRODUCTS LIABILITY

Products liability suits will continue to be certified as class actions under the CPA. There are several reasons for this. First, the CPA has historically been applied to products liability suits. Second, products liability suits produce large damage awards and this makes them attractive to plaintiff's class action counsel. Third, and relatedly, the potential number of plaintiffs in products liability claims can be very large and a class action can provide a convenient and efficient way to deal with a potentially large number of claims in one action.

In the United States, there has been a reluctance to certify products liability and mass tort claims which involve personal injury on the basis that the individual issues will predominate in each case. Canada does not have the predominance test. However, Canadian courts have considered whether the individual issues will "overwhelm" the class proceeding[8].

---

7 (1999), 45 O.R. (3d) 605

8 ***Carom et al v. Bre-X*** (1999), 44 O.R. (3d) 173 at 200

At present, in Canada, the courts have shown no reluctance to certify personal injury class actions notwithstanding the question of individual injury.

Bendall v. McGhan Medical Corp.,[9] a products liability case, was the first action certified as a class proceeding under the CPA in Ontario. The action was brought by the representative plaintiffs on behalf of "all persons who have had silicone gel breast implants placed in their bodies, whose implants were manufactured, developed, designed, fabricated, sold, distributed or otherwise placed into the stream of commerce by the named defendants".

The defendants in the action contended that the individual differences between the plaintiffs militated against the certification of the action under the CPA. Among other differences, the defendants pointed to the different models of implant, changing technology over the 30-year history of the implants and individual warnings by doctors. On the other hand, the plaintiffs argued that the common issue of the dangerous nature of the silicone implants transcended the individual differences.

Taking into account the arguments of both parties, Justice Montgomery stated:

> "The drafters of the [Class Proceedings] Act were mindful of the problem created by individual issues. Because certification is procedural in nature they vested broad latitude in the court to deal with individual issues in s. 25:
>
> > 25(1) When the court determines common issues in favour of a class and considers that the participation of individual class members is required to determine individual issues, other than those that may be determined under section 24, the court may,
> >
> > (a) determine the issues in further hearings presided over by the judge who determined the common issues or by another judge of the court;
> >
> > (b) appoint one or more persons to conduct a reference under the rules of court and report back to the court; and
> >
> > (c) with the consent of the parties, direct that the issues be determined in any other manner.

---

9 (1993) 14 O.R. (3d) 734 (Gen. Div.)

> (2) The court shall give any necessary directions relating to the procedures to be followed in conducting hearings, inquiries and determinations under subsection (1), including, directions for the purpose of achieving procedural conformity."

Justice Montgomery then went on to make these findings with respect to class certification of the action:

> "In my opinion, the court should err on the side of protecting people who have a right of access to the courts. This is remedial legislation and it should be addressed with a purposive approach. This is not inconsistent with the duty to look carefully at the facts to see if they meet the requirements of s. 5.
>
> Possibly the strongest argument in favour of certification is access to the courts. It is argued that huge numbers of women will not be able to access the system because of the cost of litigation other than by class action. Class actions include court-regulated contingent fees. Regular actions in Ontario are not litigated on contingent fees. The cost of experts alone is prohibitive. Absent class action, who can individually afford this type of lawsuit?"

The defendants in the action, referred to a number of products liability cases from the U.S. courts where class certification was denied on the basis that individual issues outnumbered common issues. Among the cases referred to were the ***Dalkon Shield case***[10] and ***the Re Tetracycline Cases.***[11] Justice Montgomery reviewed the U.S. cases and concluded that:

> "While the American cases are helpful as a reflection of a 30-year history of class actions, one must not lose sight of vital differences. Predominant issue is not a factor in our Act. It is critical under Federal Rule 23. The Ontario legislature had the benefit of a draft bill prepared by the Law Reform Commission after lengthy study and reflection of the American history of class actions. Ontario chose to emphasize the common issues. Again, I come back to the fact that contingent fees make it easier to proceed in the United States absent class action status."

Nantais v. Telectronics Proprietary (Canada) Ltd.[12] was another products liability suit that was certified as a class action. The plaintiffs brought suit against the manufacturers of metal lead wires that were used in pacemakers. Justice Brockenshire also addressed the early American

---

[10] 693 F. 2d 847 (1982)

[11] 107 F.R.D. 719 (1985)

[12] (1995) 25 O.R. (3d) 331 (Gen. Div.)

class action decisions which showed a reluctance to certify products liability suits as class actions:

> "I have considered the series of American decisions given to me by defence counsel on the question of preferability, Re Northern District of California Dalkon Shield etc., 693 F.2d 847 (1982), Re Tetracycline Cases, 107 F.R.D. 719 (1985), Mertens v. Abbott Laboratories, 99 F.R.D. 38 (1983) (D.E.S.), and Caruso v. Celcius Insulation, 101 F.R.D. 530 (1984) (U.F.F.I.), and agree that these cases, and the others cited therein, showed a consistent American reluctance to certify mass tort and products liability cases, on the basis, as put in the Dalkon Shield case, that individual issues would outnumber common issues, that nothing would be gained. However, I have also considered the learned and most helpful comment of Montgomery J. in Sutherland v. Canadian Red Cross, supra, at p. 650 O.R., p. 143 C.P.C., that the previous views of the U.S. courts changed in 1989 with the U.S. Court of Appeals for the Fourth Circuit comment, in Re A.H. Robbins Co., 880 F.2d 709 at p. 740, saying that:
>
> > . . . courts should take full advantage of the provision in [U.S. Federal Rule 23] ss. (c)(4) permitting the class treatment of separate issues in the case . . ."

It may take more practical experience with personal injury product liability class action claims before Canadian courts recognize the problems that American courts have learned they face in mass tort personal injury claims. In my submission, those very real problems will over time swing the pendulum away from easy certification of product liability cases. For now though, Ontario remains the most class action friendly jurisdiction in the world.

MUNICIPAL OR GOVERNMENT CLAIMS

Government bodies are natural targets for class proceedings as either large actors in society or on account of government regulation of other actors. However, in the only municipal case to reach the Court of Appeal in Ontario, ***Hollick v. City of Toronto***[13]**,** certification was denied. The basis of the claim was the alleged nuisance created for neighbours of the Keele Valley Landfill in Toronto. The certification motion failed because the Court of Appeal found that there was no common issue which would meaningfully advance the litigation. The case was distinguished

---

13 46 O.R. (3d) 257 (C.A.)

from other potential mass tort class actions on the basis that the plaintiff could not point to a single event as the basis of liability.

Environmental spills in the context of alleged lax regulation has also lead to certification hearings. At present, no environmental class action against a government has been certified[14]. These mass torts claims raise many of the same concerns which have bothered the American courts in general about mass torts as class actions.

The Advisory Committee, which drafted the modern U.S. class action rules, stated:

> "[A] 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defences to liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits individually tried."[15]

Cases based on a single discrete event may have a greater likelihood of certification. However, as stated earlier, in my submissions it will take the practical experience of dealing with those types of class actions before the Canadian courts will reconsider their approach to these claims.

SECURITIES CLAIMS: THE PROBLEM OF MISREPRESENTATION AND RELIANCE

The CPA has historically found itself suited to product liability and mass tort claims. Motions for the certification of actions involving claims of misrepresentation have generally not been successful[16], and even where successful, have later proven difficult for the courts to manage[17].

---

[14] At the time of writing, reasons for decision following on a December 1999 certification hearing regarding the Plastimet fire in Hamilton had not been released. Both the City and the Province are defendants.

[15] 39 F.R.D. 69 at 103 (1966)

[16] see ***Abdool***, supra; ***Mouhteros v. DeVry Canada Inc.*** (1998), 41 O.R. (3D) 63; ***Rosedale Motors Inc. v. Petro-Canada Inc.*** (1998), 42 O.R. (3d) 776; ***Controltech Engineering Inc. v. Ontario Hydro***, [1998] O.J. 4496

[17] ***Peppiatt* v. *Royal Bank*** (1996), 27 O.R. (3d) 462 (Gen. Div.)

The fundamental stumbling block in Canada for the certification of misrepresentation claims has been the issue of "reliance". In the U.S., the issue of "reliance" is overcome for plaintiff shareholders by the "fraud on the market" theory. The theory is derived from the statutory framework created by Rule 10-b of the **Securities Exchange Act**.

Fraud on the Market

What the "fraud on the market" theory does is shift the burden of proof onto the defendant in a shareholder class action. The theory assumes that the price of a stock is derived from the collective impact of various representations, press releases, and disclosure materials provided to the stock market by the issuer of the stock. The theory further presupposes that if the information provided by the issuer of the stock is somehow inadequate, or misleading, any drop in the value of the stock which results is the fault of the issuer, and shareholders who suffered any loss are therefore entitled to sue the issuer. Further, it is assumed by the court that those shareholders all relied on the misleading information provided by the issuer, unless the issuer can present information to suggest otherwise. In practice, the issuer will not be able to find such evidence, and so the action brought by the shareholders will be certified as a class proceeding. Hence, the popularity and success of shareholder class actions among the U.S. plaintiff's bar.

Rejection of "Fraud on the Market" in Canada

While the "fraud on the market" theory has found great favour in U.S. courts in dealing with shareholder class actions, this theory was flatly rejected by Canadian courts in ***Bre-X***[18], and by the B.C. Court of Appeal in ***Kripps* v. *Touche Ross & Co.***[19] as having no place in Canadian common law.

On the basis of the American caselaw, the plaintiffs in ***Bre-X*** asked Justice Winkler to either apply the "fraud on the market" theory to Canadian common law, or else, read in such a theory within the context of a claim under the ***Competition Act***. Justice Winker rejected the plaintiff's

---

[18] ***Carom v. Bre-X*** (1998), 41 B.L.R. (2d) 246

[19] (1990), 52 B.C.L.R. (2d) 290, aff'd (1992), 69 B.C.L.R. (2d) 62 (B.C.C.A.), leave to appeal dismissed (1993), 78 B.C.L.R. (2d) xxxiv (S.C.C.)

submissions, noting that the "fraud on the market" theory had not been recognized as part of a claim at common law, either in the U.S., or in Canada, and that the Canadian ***Competition Act*** was in no way analogous to the U.S. ***Securities Exchange Act*** in this regard. Justice Winkler wrote:

> "In the United States the fraud on the market theory has one application: it is asserted in a cause of action founded on a breach of a statutory duty. Here, the plaintiff's seek to apply the fraud on the market theory and the resulting presumption to common law causes of action. They also seek to apply the theory in these actions without the limitations which circumscribe its application in the United States. However, the nexus, between the plaintiffs' claims and the theory, is absent without the necessary statutory framework from which it emanated. Moreover, attempts to advance the theory in common law actions in the United States have been almost unanimously rejected, and no appellate court there has approved of the theory in the context of such actions. The theory was developed in support of a legislative objective directed at securities fraud and the cause of action is accordingly circumscribed by two important limitations of the statute, as judicially interpreted, specifically the unavailability of punitive damages and a shortened limitation period. In contrast, punitive damages are available under the common law torts, are claimed in the instant proceedings and the limitations periods here are significantly longer than under the U.S. statute."[20]

The impact of Justice Winkler's decision in ***Bre-X*** is that if fraud on the market theory is to be given any application in Ontario, it must be given such application by means of legislation.

Misrepresentation and Reliance

In the case of a negligent misrepresentation, the law in Canada is well established that the plaintiff must prove that he "reasonably relied on the misrepresentation."[21] Likewise, with a fraudulent misrepresentation, the plaintiff must show that the statement induced him to act to his detriment.[22]

---

[20] ***Carom v. Bre-X*** (1999), 41 B.L.R. (2d) 246 at 261

[21] see ***Queen*** **v.** ***Cognos***, [1993] 1 S.C.R. 87 at 110

[22] see Spencer, Bower and Turner, ***The Law of Actionable Misrepresentation*** (1974) at paras. 97 and 131.

Thus, regardless of the defendant's conduct, in order to establish liability, the plaintiffs must show how the communications emanating from the defendant somehow impacted upon them. To do this necessarily involves an inquiry into which plaintiffs received which information from the defendant, and whether they, or any of them, reacted to it and if so, how. The very purpose of certifying a class proceeding, to avoid an inquiry into the conduct of numerous plaintiffs, is therefore lost.

In ***Controltech, supra***, Justice Sharpe addressed the issue of whether a claim for misrepresentation could ever be certified as a class proceeding. He wrote:

> "In *Abdool* v. *Anaheim Management Ltd*. (1995), 21 O.R. (3d) 453, the Divisional Court considered the question of whether a class proceeding involving a claim for misrepresentation could be certified. All members of the Court were of the view that the need to prove individual reliance did not preclude certification of a class proceeding involving a claim of misrepresentation. While certification was refused in Abdool on other grounds to which I will refer to below, misrepresentation claims were certified in *Peppiatt* v. *Nicol* (1993), 16 O.R. (3d) 133 (Gen. Div.), and in *Maxwell* v. *MLG Ventures Ltd*, [1995] O.J. No. 1136 (Gen. Div.) It cannot, then, be baldly stated that where proof of reliance is a requirement, there can never be a common issue.
>
> ...
>
> There is unquestionably an element of commonality in the allegations of misrepresentation, but do these allegations amount to a common issue for the purposes of a class proceeding? A notable feature of the cases in which claims have been certified is that the claims of all members of the class rested on a single misrepresentation. In *Abdool, supra*, the claims rested on a single letter from an accounting firm commenting on financial forecasts for a condominium project. O'Brien J. found (at 466):
>
> > In this case, there are common issues involving the question of whether the single letter was a misrepresentation. If so, there was a common issue as to whether it was negligently made and, finally, a common issue as to the effect of a disclaimer contained in that letter.
>
> In *Peppiatt, supra*, the claims of all class members rested on misrepresentations contained in an information package developed to promote the sale of equity shares in a golf club. Similarly, in *Maxwell, supra*, the claims of the class members rested on alleged misrepresentations contained in a securities offering circular.

> It is possible to imagine claims resting on various misrepresentations being certified. For example, it may be that a common issue would be found where a defendant developed and deployed a standard deceptive sales pitch for a consumer product, repeated time and time again in nearly identical circumstances to various consumers by various sales people: see, eg. *Dabbs* v. *Sun Life*, [1998] O.J. 2811 (Gen. Div.), appeal quashed [1998] O.J. No. 3622 (C.A.), leave dismissed [1998] S.C.C. No. 372."

It is possible then for a class action to be brought against a company, or its officers and directors, on the basis of a misrepresentation. The key, however, is that the circumstances of the misrepresentation must fit within a rather narrow fact matrix. The class plaintiffs must be able to establish that they all received a single, common representation from the proposed defendant.

ONTARIO SECURITIES ACT AND DEEMED RELIANCE

While the Canadian courts have rejected the "fraud on the market" theory and require plaintiffs to prove reliance upon misrepresentations, there are sections of the Ontario ***Securities Act*** (**"OSA"**) which will deem reliance in certain circumstances.

Prospectus

Except for a few narrow exceptions, under the OSA, any company that wishes to distribute securities must comply with prospectus requirements. A prospectus is a document which must be given to persons to whom securities are to be distributed. It is the document which is intended to provide information relevant to valuing the securities.[23] The requirements of prospectuses are contained in Part XV of the OSA. Section 56 of the OSA states:

> "(1) *Prospectus.* — A prospectus shall provide full, true, and plain disclosure of all material facts relating to the securities issued or proposed to be distributed and shall comply with the requirements of Ontario securities law.
>
> (2) *Supplemental material.* — The prospectus shall contain or be accompanied by such financial statements, reports, or other documents as are required by this Act or the regulations."

---

[23] M.R. Gillen, ***Securities Regulation In Canada***, 2nd ed. (Carswell: Toronto, 1998), at pp. 101-02

Continuous Disclosure

After the initial prospectus requirements are fulfilled, the OSA, in Part XVIII, requires companies to provide continuous disclosure to its shareholders and the Ontario Securities Commission (**"OSC"**) on items such as reports of material changes[24], financial statements[25], proxy information circulars[26], take-over bid and issuer-bid circulars[27].

Proxy

A proxy is a document which gives the person named in the proxy the power to exercise the vote of the person who signs the proxy. It is common practice in large corporations for management to solicit proxies from shareholders. This allows directors and officers to ensure that sufficient shares will be represented at the shareholders' meetings to satisfy quorum requirements.[28] The OSA lists, in Part XIX, the requirements of proxies and proxy solicitation. Where the management of a corporation solicits proxies from its shareholders, it is required to include an information circular with the proxy. The information circular is required to provide details on the matters to be voted on in sufficient detail to permit the shareholders to form a reasoned opinion concerning the matter.[29]

Issuer Bids and Take-Over Bids

Part XX of the OSA deals with the requirements of take-over bids and issuer bids. An issuer bid is an offer made by the issuer of a security to acquire or buy back their securities from any of the shareholders. A take-over bid is a general offer made to the shareholders of a target corporation,

---

[24] OSA, section 75

[25] OSA, sections 77-79

[26] OSA, section 81

[27] OSA, section 98

[28] see note 23, above, at page 180

[29] see note 23, above, at page 183

the result of which will be that the offeror obtains a total of 20% or more of those shares of the target corporation.

Issuer bids are often motivated by an information advantage or a conflict of interest regarding the control of the company. Take-over bids often seek to take advantage of a short bid period to cut out competing bids and prevent the management of the target company from taking defensive action. Thus, there is a concern that confidence in the market will be weakened if such transactions proceed without adequate disclosure and time to assess the information. To address these concerns, part XX of the OSA, subject to a few exceptions, mandates that certain reporting and disclosure information must be given to "all holders of securities of the class that is subject to the bid". This information is contained in an issuer bid circular or a take-over bid circular as the case may be.

Enforcement and Deemed Reliance under the OSA

Section 122 of the OSA makes it an offence at law to make any misrepresentations in any of the disclosure material or information submitted to the OSC, and specifically makes directors and officers of a corporation liable for such misrepresentations:

> "(1) *Offences, general.* — Every person or company that,
>
> (a) makes a statement in any material, evidence or information submitted to the Commission, A Director, any person acting under the authority of the Commission or the Executive Director or any person appointed to make an investigation or examination under this Act that, in a material respect and at the time and in the light of the circumstances under which it is made, is misleading or untrue or does not state a fact that is required to be stated or that is necessary to make the statement not misleading;
>
> (b) makes a statement in any application, release, preliminary prospectus, prospectus, return, financial statement, information circular, take-over bid circular, issuer bid circular or other document required to be filed or furnished under Ontario securities law that, in a material respect and at the time and in the light of the circumstances under which it is made, is misleading or untrue or does not state a fact that is required to be stated or that is necessary to make the statement not misleading; or
>
> (c) contravenes Ontario securities law,

> is guilty of an offence and on conviction is liable to a fine or not more than $1,000,000 or to imprisonment for a term of not more than two years, or to both.
>
> …
>
> (3) *Directors and officers.* — Every director or officer of a company or of a person other than an individual who authorizes, permits or acquiesces in the commission of an offence under subsection (1) by the company or person, whether or not a charge has been laid or a finding of guilt has been made against the company or person in respect of the offence under subsection (1), is guilty of an offence and is liable on conviction to a fine of not more than $1,000,000 or to imprisonment for a term of not more than two years, or to both."

Also, sections 130 and 131 of the OSA create deemed reliance with respect to misrepresentations made in prospectus, take-over bid and issuer-bid circulars:

> "130.(1) *Liability for misrepresentation in prospectus.* — Where a prospectus together with any amendment to the prospectus contains a misrepresentation, a purchaser who purchases a security offered thereby during the period of distribution or distribution to the public *shall be deemed to have relied* on such misrepresentation if it was a misrepresentation at the time of the purchase and has a right of action for damages against,
>
> (a) the issuer or a selling security holder on whose behalf the distribution is made;
>
> (b) each underwriter of the securities who is required to sign the certificate required by section 59;
>
> (c) every director of the issuer at the time the prospectus or the amendment to the prospectus was filed;
>
> (d) every person or company whose consent has been filed pursuant to a requirement of the regulations but only with respect to reports, opinions or statements that have been made by them; and
>
> (e) every person or company who signed the prospectus or the amendment to the prospectus other than the persons or companies included in clauses (a) to (d),
>
> or, where the purchaser purchased the security from a person or company referred to in clause (a) or (b) or from another underwriter of the securities, the purchaser may elect to exercise a right of rescission against such person, company or underwriter, in which case the purchaser shall have no right of action for damages against such person, company or underwriter.

…

> 131.(1) *Liability for misrepresentation in circular*. — Where a take-over bid circular sent to the security holders of an offeree issuer as required by Part XX or any notice of change or variation in respect thereof contains a misrepresentation, every such security holder *shall be deemed to have relied on* the misrepresentation and may elect to exercise a right of action for rescission or damages against the offeror or a right of action for damages against,
>
> (a) every person who at the time the circular or notice, as the case may be, was signed was a director of the offeror;
>
> (b) every person or company whose consent in respect of the circular or notice, as the case may be, has been filed pursuant to a requirement of the regulations but only with respect to reports, opinions or statements that have been made by the person or company; and
>
> (c) each person who signed a certificate in the circular or notice, as the case may be, other than the persons included in clause (a)."

The effect of sections 130 and 131 of the OSA is to shift the evidentiary burden onto the defendants. That is, that reliance upon the misrepresentation by the plaintiff is presumed and it is open to the defendant to rebut the presumption by showing that the plaintiff did not rely on the misrepresentation. This is essentially the same advantage created for plaintiffs by the "fraud on the market" theory in the U.S. in circumstances where there are misrepresentation in prospectuses or circulars.

These deemed reliance provisions will make it easier for Canadian shareholders who find themselves within the scope of sections 130 and 131 to certify a class action against a company and its officers and directors. Firstly, the plaintiffs need only prove that the there was a misrepresentation in the prospectus or circular and, secondly, that they purchased or sold securities during the period of the offer in the prospectus or circular.

The persons potentially liable for damages for misrepresentation in a prospectus are the issuer, the underwriters, the directors and any expert who consented to the use of their opinion in the prospectus. The persons potentially liable for damages for misrepresentation in a circular are the directors, any person who consented to the use of their opinion in the circular and each person who signed a certificate within the circular.

The only class action certified under the deemed reliance provisions of the OSA thus far is ***Maxwell v. MLG Ventures Limited***[30]. In that case, the defendant corporation made an offer in an issuer bid to purchase all outstanding shares of Maple Leaf Gardens Ltd. (**"MLGL"**). As required under the OSA, MLGL included an information circular with the distribution of its issuer bid. The class action was commenced on the basis of misrepresentations in the information circular. With the assistance of the deemed reliance provision of OSA section 131, the plaintiffs easily overcame the common issues hurdle to class action certification and the action was certified as a class action.

Further, class actions have been commenced, though not yet certified, in Ontario against officers and directors of YBM and Philips. In short, it is entirely possible that the substantive legal position of those making claims against officers and directors will improve over time given the current concerns about the nature of Canadian capital markets and their regulation, or alleged lack thereof.

CERTIFICATION HEARINGS AND MANAGING A CLASS ACTION

A class action law suit is a complex piece of litigation and must be treated as such. It is not easy to manage and requires careful strategy. As class actions frequently involve numerous parties, it is not reasonable to think that one party will be able to dictate to the other parties how the proceeding will run. Further, in Ontario, class actions are heavily case managed by a designated group of strong-minded judges.

The first question to consider when facing a class action law suit is whether to resist the motion for certification as a class action. If the goal is to achieve a speedy resolution with the plaintiffs, then a certification order is a mandatory part of settlement[31].

Even if a certification order of some sort is likely to issue, it may still be prudent to resist the motion for certification in order to obtain the best possible terms of certification. How notice is

---

30 (1995) O.J. No. 1136 (Gen. Div.)

31 section 29(2) of the ***Class Proceedings Act*** S.O. 1992 c. 6

given, the size of the class, the nature of the common issues are all important questions that determine how much will be in issue in the claim.

A claim may be challenged at a preliminary stage as disclosing no cause of action. Similarly, motions for summary judgment may also be brought at this stage to defeat the meritless claim.

The most important aspect of managing a class action law suit is to have a plan. The plan must take into account the nature of the claim, the parties and counsel involved, the degree of exposure and a calculated assessment as to whether it would be better to fight or settle at the beginning.