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FIGHT OR FLIGHT: SUMMARY JUDGMENT OR SETTLEMENT IN CLASS ACTIONS

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With a low threshold for certification, a defendant facing a class action has a number of tactical decisions to make from a cost, legal, and reputational perspective. In order to manage the cost and reputational issues, defendants have arguably too often been choosing to settle class actions that could have been successfully defended on the merits. The Supreme Court has recently breathed new life into another tool for defendants in class actions to consider—summary judgment.[1] Rather than focusing one's efforts on defending certification or achieving an early settlement, defendants can consider dealing with the action on its merits in a summary judgment motion.

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Summary Judgment—A Merits-Based Final Adjudication

The Supreme Court's decision in *Hryniak v. Mauldin* [*Hryniak*] has changed the landscape for summary judgment motions in civil actions. In *Hryniak*, the Supreme Court endorsed a cultural shift away from full trials and towards summary hearings where there is no genuine issue for trial.[2] An emphasis on the need for adjudication to be proportionate, timely, and affordable pervades the judgment.

It is axiomatic that one of the purposes of the *Class Proceeding Act, 1992*[3] is to provide access to justice.[4] Ontario judges urge upon the parties in class actions a reasonable and timely resolution of disputes. Justice Belobaba held in a series of costs awards that in the case of certification motions, "excess appears to be the norm in every aspect of the process—in the time spent by legal counsel, the volume of material filed with the court, the number of days scheduled for the oral hearing and the over-litigation of most issues".[5] An early and summary adjudication of all or part of the claim through summary judgment should address these issues of concern to the court by providing for the consideration of the claim on its merits rather than under the auspices of certification.

Parties to class actions can and should consider resort to motions for summary judgment for a timely and cost-effective resolution of the dispute. As described by Justice Perell in *Fehr v. Sun Life Assurance Co. of Canada* [*Fehr*], either party might wish to "spare themselves the expense of the certification motion, lengthy and expensive examinations for discovery, and expensive pre-trial procedures when a procedurally fair merits-based

summary judgment motion can be structured before certification".[6]

Since the release of *Hryniak*, several summary judgment motions have been brought in class action proceedings.[7] In *Fehr*, Perell J. embraced the cultural shift called for by the Supreme Court in *Hryniak*, and based his order dismissing the plaintiff's request for a further affidavit of documents, in part, on that decision. He stated that *Hryniak* "demands a proportionate procedure".[8] Intuitively, cases that are amenable to certification ought to be similarly amenable to a motion for summary judgment (on the part of the plaintiff or defendant), because the certification of common issues would suggest that the dispute could be resolved in a summary manner without significant credibility issues or differing factual records.[9]

In *Magill v. Expedia, Inc.*,[10] the defendant on-line travel company sought summary judgment of the breach of contract class action on the merits. The facts of the case were not in dispute. The defendant's arguments were based on contractual interpretation. The case provides a good example of a successful motion for summary judgment brought post-certification, finally disposing of the claims brought forward by the representative plaintiff. Neither party had argued that it was not an appropriate case for summary judgment. Justice Perell concluded that the evidentiary record before the Superior Court was more than adequate to decide whether there were any genuine issues for a trial.[11] The Superior Court ultimately accepted the defendant's contractual interpretation, and the action was dismissed in its entirety.

Player v. Janssen-Ortho Inc., a recent case from the British Columbia Supreme Court, is an example of a pre-certification summary determination under that province's Summary Trial rule [*Player*].[12] The proposed class alleged that the five corporate defendants manufactured fentanyl patches whose defective design resulted in serious harm to users. Two defendants sought judgment through a summary trial on the basis that their patches were of a different design from those complained of by the plaintiffs.

In its lengthy decision the Supreme Court considered expert evidence, as well as testimony by proposed class members, and determined that it was possible to find the necessary facts to decide the case on summary trial.[13] The Supreme Court found that while pre-certification summary determinations ought to be treated carefully, there was nothing to suggest that they were not appropriate in the right case.[14]

Motions for summary judgment in which a defendant enjoys partial success may also provide a significant advantage to defendants, as these motions may narrow issues for trial and lead class counsel to reconsider what remains of the merits of the case.

Two recent cases illustrate the potential benefits of a motion for summary judgment. In *1250264 Ontario Inc. v. Pet Valu*, the Superior Court allowed the defendant's motion for summary judgment on most of the seven common issues in a certified class action.[15] In supplementary reasons, Belobaba J. answered the two outstanding common issues largely in favour of the plaintiff. However, given the narrow nature of the plaintiff's remaining case, it appears that the damages corresponding to the plaintiff's remaining claim could be determined without the need for extensive submissions,[16] greatly reducing costs to the defendant, as compared to a full-blown trial of the action. Looking at the

complex procedural history of the *Pet Valu* class action, with perfect hindsight, one might reconsider whether a consent certification on agreed-upon common issues and an early motion for summary judgment might have ended up with the same result, at lower cost to the parties.[17] Of course, this works only in hindsight, and counsel for the parties could not have anticipated either the low bar for certification or the Supreme Court's push for summary judgment. For those counsel and clients who follow, however, these cases are a reminder to consider carefully how best to respond in the class action context.

Similarly, the defendant in *Windsor v. Canadian Pacific Railway Ltd.* enjoyed partial success on a motion for summary judgment, significantly narrowing the outstanding issues.[18] In this case, the Alberta Court of Appeal found that the motions judge had erred in dismissing a motion for summary judgment on a nuisance claim for property damage. It held that "the modern test for summary judgment is […] to examine the record to see if a disposition that is fair and just to both parties can be made on the existing record".[19] It further noted that "Since one of the objectives of class proceedings is to provide affordable access to justice, [the] principles relating to summary judgment are applicable to class procedures as well".[20] The Court of Appeal allowed CPR's appeal with respect to the nuisance claim and, in the result, left only one cause of action to proceed to trial. The remaining issue involved far fewer class members, decreasing the cost and complexity of the trial of the action.

Settlements—Not a Risk Free Proposition

In many cases, defendants may consider an early settlement to be the best overall result in terms of cost and reputational issues, even in cases where the merits of the claim are questionable. Most class actions settle,[21] but it is urged upon defendants to consider whether an early settlement is the best result that can be achieved. In considering the best route, defendants should consider that not all settlements will be approved and some settlement approvals may prove to be more costly than any benefit received as a result of the settlement.

Courts have proven themselves careful in approving class action settlements, having regard to the interests of the class members. In reviewing a proposed settlement, courts consider whether the settlement is fair, reasonable, and in the best interests of the class.[22] In order to reach its determination, the court will consider the likelihood of recovery by the class and the terms and conditions of the settlement.[23] A settlement is considered by the court to be a bad settlement if it does not achieve procedural and substantive access to justice.[24]

Settling defendants face at least two concerns in bringing a proposed settlement to the court for consideration and approval. Like class counsel, they face the risk that an agreement they have spent time and money to achieve will be rejected by the court, leaving them to further negotiations or a determination on the merits. Conversely, defendants face the risk that a proposed settlement will be approved too enthusiastically by the court, leaving it to consider whether it should have settled the action at all.

Three recent cases from the Ontario Superior Court illustrate these risks.

In *Hamilton v. Toyota Motor Sales, USA, Inc.* [*Hamilton*],[25] the Superior Court heartily endorsed a proposed settlement for economic loss allegedly suffered by owners of recalled Toyota vehicles. The settlement included a retrofit or small cash

payment to class members, plus an $11.9 million payment, which included $8.4 million to counsel for their legal fees. The case illustrates a significant pitfall for defendants considering settlement—where the court's enthusiastic endorsement of a settlement raises questions about whether they should have settled in the first place.

In *Hamilton*, the Superior Court noted several times the weakness of the plaintiff's case, describing the claims as "very risky products liability cases"[26]:

> I approve the settlement for the main reason that the settlement provides immediate, genuine, and substantive benefits to Class Members for what appears to be a very weak case against Toyota for economic losses. Given the very high litigation risks, the delays of what would be a difficult certification motion, and the difficult litigation that would follow, the settlement is reasonable and in the best interests of the class members.[27]

In light of the commentary from the Superior Court, pursuing a motion for summary judgment in *Hamilton* may have succeeded in ending the litigation without the significant settlement terms that were ultimately approved.

In other cases, settlements are rejected, as not meeting the goals of being a "fair and reasonable" settlement, by the courts in claims that are perceived as offering too great a benefit to the defendant or class counsel (perhaps irrespective of the merits). Indeed, in *Waldman v. Thomson Reuters Canada Ltd.* and *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.*, Perell J. of the considered and rejected settlement proposals.

In *Waldman*, the representative plaintiff was a respected lawyer, Lorne Waldman, who realized that a factum he had filed for a case before the Court of Appeal had been made available to subscribers of Carswell's "Litigator" service. Mr. Waldman brought the action on behalf of himself and other lawyers whose work was available through Litigator.[28]

However, between the commencement of the action and a planned motion for summary judgment to determine whether Litigator's use of the work was "fair dealing", the Supreme Court released five decisions clarifying the scope of the "fair dealing" defence to copyright infringement.[29] Class counsel believed that these cases were damaging to the claim, and the parties entered settlement discussions. The Superior Court noted that these discussions were "adversarial, arm's length, and intensive".[30] The proposed settlement agreed to by the parties involved, amongst other terms, the creation of a substantial cy-près trust fund to support public interest litigation, an agreement by class members to grant Thomson a non-exclusive licence in respect of their court documents on Litigator and $825,000 in fees to class counsel.[31] While the cy-près aspect of the proposed settlement attracted widespread support, including from the Canadian Bar Association and the Canadian Civil Liberties Association, seven class members objected to the settlement. In rejecting the proposed settlement, Perell J. stated that "the court will not rubber stamp settlements where the lawsuit is genuine but class counsel are content to take a low-ball offer because it suits their entrepreneurial business model".[32]

The same high level of scrutiny is apparent in *Quizno's,* a franchise class action.[33] In that case, class counsel found itself in a position similar to that of class counsel in *Waldman*: decisions weakening its case were released in advance of a summary judgment motion, and class counsel opted to enter settlement discussions with the defendant.[34]

The proposed settlement involved a payment in the amount of $275,000 to class counsel for its disbursements and a full and final release from and for class members. No monetary compensation was proposed to be paid to class members. The settlement was described by the Superior Court as more of a discontinuance than a settlement.[35] Only one class member objected to the proposed settlement. This class member voiced concern over the broad wording of the class members' release. Citing *Waldman*, Perell J. concluded that "it is one thing for Class Members to not have gained anything by a class action, it is another thing to give up rights as the price for settling the Class Action, and such settlement would not be in the Class Members' best interests"[36] and refused to approve the settlement because the scope of the release was too broad.[37] Nonetheless, in considering the fairness and reasonableness of the settlement, the Superior Court considered the claims made by the plaintiff and concluded that it was "doubtful" that the plaintiffs would have achieved a better result had the matter proceeded to trial.[38]

Both *Waldman* and *Quizno's* are cases in which defence counsel had already brought motions for summary judgment but ultimately attempted to resolve the case by way of settlement. In each case, as part of the settlement, the defendant sought to achieve a result that could not be achieved if the case was adjudicated on its merits. In *Waldman*, the defendant was to obtain a licence to the works; in *Quizno's,* a very broad release was sought. If the settlements had been approved, the litigation in each case would have been concluded on very positive terms for the defendant and for class counsel, but the benefit to the class was not as clear. This ended up being of concern to the courts, and no approval was initially given. As such, the defendants may have been better off proceeding with a motion for summary judgment on the merits, with a view to having a judicial determination of the issues; if they were successful, the result would be binding on class members—like a release.

Conclusion

While each case must be considered on its own merits, *Hyrniak* gives both class counsel and defence counsel an improved tool in their toolbox to achieve an earlier, lower-cost result for their client on the merits. Although settlements are encouraged by the courts, determinations of class actions on the merits will advance jurisprudence in various areas of the law, which will ultimately guide counsel and their clients in the future. Settlements of class actions are not approved in every case. In unmeritorious class actions, for the defendant at least, a settlement may not be the most just and least costly result. In order to achieve these early and cost-effective determinations on the merits, counsel and their clients will have to be willing to take the risk of a negative result, and the courts will have to be willing to embrace the cultural shift message sent by the Supreme Court in *Hyrniak*.

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1 *Hryniak v. Mauldin*, [2014] S.C.J. No. 7, 2014 SCC 7.
2 *Ibid*., para. 28.
3 S.O. 1992, c. 6.
4 *Pearson v. Inco Ltd.*, [2006] O.J. No. 991, 79 O.R. (3d) 427, para. 13 (Ont. C.A.).
5 *Sankar v. Bell Mobility Inc.*, [2013] O.J. No. 5124, 2013 ONSC 6886, para. 1.
6 *Fehr*, [2014] O.J. No. 1703, 2014 ONSC 2183, para. 68.
7 See, *e.g.*, *Magill v. Expedia, Inc.*, [2014] O.J. No. 1553, 2014 ONSC 2073 [*Magill*]; *1250264 Ontario Inc. v. Pet Valu Canada*, [2014] O.J. No. 5152, 2014 ONSC 6056 [*Pet Valu* (2014)], leave to appeal to C.A. ref'd, 2015 ONCA 5.
8 *Fehr*, *supra* note 6, para. 47.
9 If class members have differing factual records that must be addressed at trial, then, arguably, the class action ought

not to have been certified, and a decertification motion may need to be considered at an appropriate stage.

10 *Magill*, *supra* note 7.

11 *Ibid.*, paras. 63–64.

12 *Player*, [2014] B.C.J. No. 2123, 2014 BCSC 1122.

13 *Ibid*., para. 205.

14 *Ibid*., paras. 168–185.

15 *Pet Valu* (2014), *supra* note 7; related reasons, [2015] O.J. No. 23, 2015 ONSC 29, para. 2 [*Pet Valu* (2015)].

16 *Pet Valu* (2015), *ibid*., para. 65.

17 The certification decision was heard in October 2010 and decided in January 2011 ([2011] O.J. No. 1618, 2011 ONSC 287). Costs were awarded to the plaintiff in the amount of $125,000, $75,000 payable forthwith ([2011] O.J. No. 2623, 2011 ONSC 3475).

18 [2014] A.J. No. 256, 2014 ABCA 108.

19 *Ibid.*, para. 13.

20 *Ibid*., para. 14.

21 See, *e.g.*, *Waldman v. Thompson Reuters Canada Ltd.*, [2014] O.J. No. 1049, 2014 ONSC 1288, para. 80 [*Waldman*].

22 *Parsons v. The Canadian Red Cross Society*, [1999] O.J. No. 3572, 103 O.T.C. 161, paras. 68–73 (Ont. Sup. Ct.).

23 *Carom v. Bre-X Minerals Ltd.*, [2001] O.J. No. 4177, 15 C.P.C. (5th) 33, para. 8 (Ont. Sup. Ct).

24 *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.*, [2014] O.J. No. 4717, 2014 ONSC 5812, para. 36 [*Quizno's*].

25 *Hamilton Toyota Motor Sales, USA, Inc*., [2014] O.J. No. 581, 2014 ONSC 785.

26 *Ibid*., para. 51.

27 *Ibid*., para. 49.

28 *Waldman*, *supra* note 21, para. 40.

29 *Ibid*., para. 45.

30 *Ibid*., para. 48.

31 *Ibid.*, para. 58.

32 *Ibid.*, para. 89.

33 *Quizno's*, *supra* note 24.

34 *Ibid.*, paras. 13–19.

35 *Ibid*., para. 43.

36 *Ibid*., para. 61.

37 Justice Perell subsequently approved the settlement with changes to the release language to make it clear that the future conduct being released is a continuation of the conduct at issue in the action.

38 *Ibid.*, paras. 39–42. Note, however, that Perell J. stated at para. 47, "I wish to make it clear that nothing that I have said above should be taken as an assessment of the actual merits of the Plaintiffs' claims against the Defendants in the case at bar[….] Each case depends upon its own particular facts".

THIRD-PARTY CLAIMS AND CLASS ACTIONS: ALBERTA'S RECENT EXPERIENCE

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The number of class actions filed in Alberta significantly decreased in 2014, reversing an upward trend of the past few years that followed the 2010 amendments to the *Class Proceedings Act* (Alberta) [*CPA*],[1] which made Alberta an "opt-out" jurisdiction and eased the burden on plaintiffs to commence or certify class actions. There were also relatively few decisions issued of any precedential value in this past year.

However, one decision in particular is notable and offers the possibility of having a long-term impact on class action litigation in the province if not beyond. That decision, *Harrison v. XL Foods Inc.* [*XL Foods Inc.*],[2] addressed the tension between class actions and third-party claims. We consider the implications of that decision in this article in the context of the overall class action landscape in Alberta over the past year.

Class Actions That Were Filed in Alberta in 2014

Only 4 class actions were filed in 2014, compared to 11 in 2013, and 12 in 2012. Of the class actions that were filed in 2014, 3 included product liability claims, all in the medical space.

In *Elizabeth Todd v. Bayer Inc., et al.*, the plaintiff alleged that the contraceptive device marketed as

Mirena caused adverse health issues and that the defendants were, among other things, negligent in the testing, warning, monitoring, manufacturing, and packaging of the device.

In *Joel Avery Macdonald v. Janssen Inc., et al.*, the plaintiff alleged that the drug Risperdal causes gynecomastia, which is a condition whereby the breasts of males become abnormally enlarged, and that the defendants failed to, among other things, adequately warn the plaintiffs of the risk.

Similarly, in *Dimitre Stoianov Karpuzov v. Boehringer Ingelheim (Canada) Ltd., et al.*, the plaintiff alleged that the defendants failed to warn patients that the drug Dabigatran, marketed in Canada as Pradaxa, causes gastro-intestinal bleeding.

The remaining class action that was filed in Alberta in 2014 was *Paul Carter v. Asia Packaging Group Inc., et al.* In that case, the claim was brought on behalf of the current and former shareholders of Asia Packing Group Inc. ("APX"), a Canadian public company now subject to cease trade orders in Alberta and British Columbia. The plaintiff alleged that APX lost control of all of its material assets, eventually becoming unable to meet its various Canadian corporate obligations. It is alleged that this led to APX being ordered to cease trading, with the result that potential class members lost the value of their investment.

XL Foods

The most significant decision regarding class actions in Alberta in 2014 was *XL Foods*. In that case, the representative plaintiff sued XL Foods Inc. and Nilsson Bros. Inc. for injuries suffered as a result of the plaintiff and class members consuming meat products contaminated by E. coli.

The defendants, in turn, filed a third-party claim against the Canada Food Inspection Agency ("CFIA"), arguing that if they were liable, then this liability was shared, in whole or in part, by the CFIA, because the CFIA and its food inspection processes were tightly associated and integrated with the defendants' operations.

The CFIA applied to have the third-party claim struck pursuant to rule 3.68 of the Alberta Rules of Court, which allows the court to strike a pleading if it discloses no reasonable claim. When considering such an application, the court assumes that the facts pleaded are true, and no evidence may be submitted.

The defendants alleged that the CFIA owed a duty of care to the defendants' customers and that this duty was breached causing harm to the class members through the CFIA's negligence with respect to three grounds:

(a) The CFIA failed to establish adequate operating standards.

(b) The CFIA failed to properly inspect or test beef products.

(c) The CFIA failed to hold or recall beef products.

Associate Chief Justice Rooke of the Alberta Court of Queen's Bench heard the application. Justice Rooke has presided over several class action cases in Alberta since 2010. He found that it was not "plain and obvious" that the defendants' third-party claim could not succeed and summarily dismissed the CFIA's application. In other words, it was not plain and obvious that the CFIA owed no private law duty to the class members.

In reaching his conclusion, Rooke A.C.J. first considered whether an analogous duty of care had

been confirmed or rejected in other case law. For example, in *Los Angeles Salad Co. v Canadian Food Inspection Agency* [*LA Salad*],[3] the CFIA was alleged to have negligently inspected carrots imported into Canada when it falsely determined they were contaminated with disease-causing *Shigella* bacteria. The carrots were recalled and destroyed, allegedly causing the carrot producers to incur damages.

However, in *LA Salad*, the British Columbia Court of Appeal concluded that the CFIA owed no duty of care to the carrot producers. The defendants sought to distinguish *LA Salad* on the basis that *upstream* producers were distinct from *downstream* consumers such that the Court of Appeal could not extrapolate that no duty of care was owed by the CFIA to consumers in *XL Foods*. Justice Rooke agreed.

The CFIA also argued that a duty of care respecting the prevention of economic loss by *middlemen* in the food industry had previously been held not to exist. The CFIA seems to have inferred this from *Adams v. Borrel* [*Adams*].[4] However, Rooke A.C.J. rejected the CFIA's argument on the grounds that economic loss was a complex and underdeveloped issue and that it should be fully tested and argued at trial.

Justice Rooke's analysis then turned to whether the alleged duty of care owed by the CFIA to consumers was novel. The CFIA admitted that it was reasonably foreseeable that its negligence could lead to the class members being injured; however, the CFIA argued that it owed no duty to the defendants' customers, because it had no proximate relationship with them, and, further, that reasons of public policy should preclude such a duty of care being imposed.

Justice Rooke found that if all the facts pled by the defendants were true, including the integral participation of the CFIA in the defendants' operations and the implications of deficient inspections by the CFIA, then the proximity of the CFIA to the customers would not be a remote possibility. Additionally, there were no policy considerations arising from the relationship between the class members and the CFIA that militated against finding that a duty of care existed.

Justice Rooke also examined the residual policy arguments raised by the CFIA. The CFIA made the usual argument that the alleged duty would create a "spectre of unlimited liability" as well as cause conflict between the CFIA's statutory duties respecting public health versus the duty to prevent economic loss. First, Rooke A.C.J. noted that although the class members could be large, they were finite; therefore, no spectre of unlimited liability existed. Second, Rooke A.C.J. decided that the CFIA's statutory duties coincided with the alleged duty respecting economic loss. Accordingly, the CFIA's residual policy arguments were rejected, and, in any event, all of the residual policy issues were disputed and could not be dealt with summarily by the Court of Queen's Bench. The appropriate venue to determine those issues would be at trial.

The third-party claim was therefore allowed to proceed to trial. Justice Rooke cautioned that he had not determined whether a duty of care owed by the CFIA to the plaintiff class members existed—only that it was not plain and obvious such a duty could not be found.

The plaintiff class members also concurrently applied for a stay of the defendants' third-party claim (assuming it would not be dismissed). The class members argued that they consciously chose not to

name the CFIA as a defendant in order to reduce the complexity and possible delay in the action and that their interests should be considered. The class members further argued that the defendants could claim contribution from the CFIA if, in fact, they were found liable.

The defendants, on the other hand, pointed to s. 13 of the *CPA*, which provides that the court may make any order it considers appropriate with respect to the conduct of a class proceeding in order to ensure its fair and expeditious determination. The defendants argued that s. 13 therefore gives the court procedural discretion and authority to allow third-party claims to proceed even before certification and to determine what roles third parties should play at each stage of the class proceeding.

Justice Rooke agreed with the defendants, dismissing the application for a stay. In his view, hearing the matters together would promote judicial efficiency and offer protection against inconsistent decisions. Further, he concluded that any delays or inefficiencies suffered by the class members could be remedied with costs.

Analysis of *XL Foods* and Its Possible Implications

The *XL Foods* decision highlights the clear tension between the *Class Proceedings Act* (Alberta) and third-party claims. The purpose of the former is, generally, to allow, in certain circumstances, multiple plaintiffs to join their actions in the interests of efficiency. Third-party claims are also meant to increase judicial efficiency; however, they may actually decrease efficiency from the perspective of the class members in the context of a class proceeding.

Generally, third-party claims play a fundamental procedural role in improving the court's efficiency and avoiding multiple proceedings. Absent a third-party claim process, a defendant must wait to see whether they are found liable to a plaintiff before bringing an entirely separate action for contribution or indemnity from a third party. This process is more cumbersome and may require the defendant to pay the plaintiff's claim before obtaining recourse through its suit against the third party. Further, as identified by Rooke A.C.J. in *XL Foods*, without third-party claims, there is a risk that the multiple proceedings may come to inconsistent conclusions.

Prior to 2010, a defendant could bring a third-party claim only in limited circumstances. The Alberta Rules of Court permitted defendants to file a third-party claim where the third party was or might have been liable to the defendant for all or part of the plaintiff's claim, but only where the third party owed a common law or statutory duty to the defendant.

Amendments to the Alberta Rules of Court in 2010, however, expanded the scope of third-party claims under newly drafted rule 3.44. Specifically, defendants may now file a third-party claim for an "independent claim" arising out of a transaction or occurrence involved in, or connected to, the action against the defendant.

An "independent claim" arises if the third party causes damage to the defendant, and that damage is related to the losses suffered by the plaintiff. In other words, the third-party claim does not have to be for the same wrong against the plaintiff and needs to be only sufficiently related to the plaintiff's loss. Additionally, defendants may also file third-party claims where the third party should be bound by a decision about an issue between the plaintiff and defendant.

As a result of the loosening of the rules regarding third-party claims, the claims have become a more useful tool for defendants in the context of class actions, because the efficiency gains realized by groups of plaintiffs filing their claims as a class may be reduced, as was evident in *XL Foods*. In other words, when a defendant to a class action brings a claim against a third party, the time and cost of the proceeding will likely increase for all parties already involved, including the class members. This could act as a deterrent to plaintiffs.

Whether the possibility of a multitude of third-party claims will act as a disincentive for representative plaintiffs when filing class actions is difficult to tell. However, given Rooke A.C.J.'s note in *XL Foods* that "the Representative Plaintiff's position was that he, with the advice of his Counsel, had made a very conscious decision not to assume the risk of adding CFIA as a defendant, and instead wanted to proceed against XL without the delay",[5] the availability of third-party claims may well act as such a disincentive.

Other Alberta Decisions Regarding Class Actions in 2014

Most of the other decisions regarding class actions in Alberta in 2014 concerned certification applications. For example, in *Vander Griendt v. Canvest Capital Management Corp.* [*Vander Griendt*],[6] an application for the certification of a class proceeding was allowed.

In that case, the plaintiff claimed that the defendant—a vehicle for investors to pool capital for the acquisition and ownership of interests in a portfolio of Canadian commercial real estate properties—misallocated funds from certain dispositions without returning the original capital investments to the investors and that the defendant's reporting documents were inadequate and lacked transparency.

The Court of Queen's Bench in *Vander Griendt* certified the class proceeding after finding, in accordance with s. 5(1) of the *CPA*, that (1) the pleadings disclosed a cause of action, (2) an identifiable class of two or more persons was present, (3) common issues among the potential members of the class were raised, (4) a class proceeding was the preferable procedure, and (5) the plaintiff was an adequate representative plaintiff.

Another example in which a certification application was considered is *Sullivan v. Golden Intercapital (GIC) Investments Corp.* [*Sullivan*].[7] In that case, one of the defendants, Golden Capital Investments Corp ("GIC"), advertised services that purported to assist individuals facing foreclosure on their homes. It was alleged that GIC created a scheme whereby individuals who faced foreclosure received personalized promotional materials from GIC, which offered an arrangement in which GIC took title to the residential property and placed a second mortgage on that property. GIC then used the proceeds of the second mortgage to obtain advantageous financial arrangements, such as reduced high-interest debt and a lower overall mortgage rate. It was alleged that, among other things, GIC engaged in unfair trading practices, acted as a mortgage broker without the proper authorization, and collected various fees constituting interest that exceeded the statutory maximum amount.

The Court of Queen's Bench, however, denied the certification application. It held that the representative plaintiffs were not suitable as required by s. 5(1) of the *CPA*. The proposed representative plaintiffs lacked basic knowledge about their role in the action and, in the court's opinion, would not be

able to represent the interests of the class vigorously and capably.

While the Court of Queen's Bench recognized that a class does not necessarily have to have a sophisticated representative plaintiff with relevant skills, training, or education, the representative plaintiff "must have at least a basic knowledge of his/her role in a class action litigation, otherwise that person cannot be anything more than an empty vessel controlled by the litigation lawyer".[8]

In *Sullivan*, the Court of Queen's Bench found that neither of the proposed representative plaintiffs were able to explain in any manner their role in the proposed litigation. Moreover, neither of them were aware of the cost implications of that role, nor was their ability to pay costs explored.

Conclusion

Despite the downward trend in 2014 and the risk that third-party claims may pose to the efficiency gains realized by filing as a class, we expect class actions to increase in the coming years, driven primarily by the easing of the burden on class action plaintiffs in commencing and certifying class actions as a result of the amendments to the *CPA* passed in 2010.

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1 SA 2003, c. C-16.5.
2 *XL Foods*, [2014] A.J. No. 745, 2014 ABQB 431.
3 *LA Salad*, [2013] B.C.J. No. 122, 2013 BCCA 34.
4 *Adams*, [2008] N.B.J. No. 327, 2008 NBCA 62.
5 *Supra* note 2, para. 124.
6 *Vander Griendt*, 2014] A.J. No. 954, 2014 ABQB 542.
7 *Sullivan*, [2014] A.J. No. 387, 2014 ABQB 212.
8 *Ibid*., para. 55.