The Canadian Class Action Landscape: Getting Greener?

by

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In their formative years, Canadian class actions produced little news to defendants’ liking, as case after case was certified for class treatment. Over the past three years, the environment has manifested change – but not all in the same direction. Some tribunals have become more circumspect about the wisdom and efficacy of aggregate litigation in the product-liability and toxic-tort contexts. At the same time, however, other elements of the Canadian judiciary have issued groundbreaking precedents that open the door to more class litigation. Despite pockets of positive developments, the overarching trend is an increased volume of class actions being filed in Canadian courts and a broadening of the subject matter of those actions.

Recent cases suggest developments in the following areas:

Class-certification standards: more rigor in some areas, less in others

Historically, the Canadian provincial courts have applied very low thresholds for class certification. Previously, we expressed concern that lax certification standards could foster “generic causation” cases – class proceedings created primarily to determine whether a product could cause certain injuries.1 Several recent decisions, however, suggest that courts are applying more stringent certification standards to product-liability cases, espe-

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1 See John Beisner, Karl Thompson, and Allison Orr Larsen, Is Canadian Class Action Law All It’s Cracked Up to Be? A Closer Look At A Flawed Model for European Class Actions, ENGAGE, Vol. 9, Issue 2 (June 2008).
cially pharmaceutical-tort cases, and toxic-tort cases. At the same time, however, the hurdles in securities-fraud and competition cases are becoming more flexible.

Pharmaceutical Torts

In 2007, an Ontario court handed down *Boulanger v. Johnson & Johnson*,\(^2\) a case addressing safety-related allegations regarding the drug Propulsid. In that case, the court certified a class to determine generic causation, even though proof about individual injuries would still be required. The court viewed generic causation as an appropriate common issue for class certification because it would “significantly move the litigation forward.”\(^3\) Not long thereafter, a Saskatchewan court handed down *Wuttennee v. Merck Frosst Canada Ltd.*\(^4\), in which it certified a class based on supposed common issues, including “whether Vioxx can cause or exacerbate cardiovascular or gastrointestinal conditions.”\(^5\) Merck had argued that generic causation was not a common issue, but the court overruled the objection, relying in part on the *Boulanger* decision.

Critics argued that by accepting as a common issue the question whether Vioxx could cause *either* cardiovascular or gastrointestinal conditions, the *Wuttennee* court had effectively negated any class-certification commonality requirement. In 2009, those critics were heard, and the Saskatchewan Court of Appeal reversed the class certification ruling.\(^6\) According to the appellate court, “[I]t seems clear, at least, that the claim for damages for personal injury in relation to gastrointestinal injuries or conditions is completely unrelated to the claim that Vioxx increased the risk for certain adverse cardiovascular events and, indeed, would have a distinct factual basis.”\(^7\)

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\(^2\) [2007] 40 CPC (6th) 170.

\(^3\) *Id.* ¶ 53.

\(^4\) [2008] SKQB 78 (Sask. Q.B.).

\(^5\) *Id.* ¶ 64.


\(^7\) *Id.* ¶ 129.
The Quebec Superior Court continued this trend in August 2009, rejecting a similar proposed class – a rare occurrence in that court. In the Quebec case, *Goyette v. GlaxoSmithKline Inc.*,\(^8\) the plaintiff brought a class action on behalf of persons who allegedly suffered withdrawal symptoms after discontinuing use of the drug Paxil. The court rejected the class on two primary grounds. *First*, the court held that a class proceeding would not conserve judicial resources because the court would have to separately determine what symptoms each individual experienced and what warnings each individual received. *Second*, the court found that the merits of the plaintiffs’ claims were simply too weak to justify the judicial resources necessary for a class trial. This was so because the warning label on the named plaintiff’s Paxil explicitly warned of the withdrawal symptoms she later suffered. For similar reasons, the court also found that the named plaintiff was not an adequate class representative.

These decisions suggest that the class action landscape in Canada is improving for at least one industry. But numerous other class actions are still pending against pharmaceutical manufacturers in Canada, and whether the current trend holds remains to be seen.

*Toxic Torts*

In March 2010, the Supreme Court of Newfoundland and Labrador Court of Appeal extended the Saskatchewan Court of Appeal’s more stringent class-certification standards set forth in *Wuttennee* to the toxic-tort arena in *Dow Chemical Co. v. Ring*.\(^9\) In *Dow*, the Court of Appeal reversed the trial court’s certification of a class of residents of a military base who claimed that the government’s use of herbicides at the base caused lymphoma or contributed to the risk thereof. The appellate court reversed the class certification on three grounds.

First, the Court of Appeal held that the class was not “identifiable” because the class definition was overbroad. The trial court had defined the class as all residents of the military base “who claim they were exposed to

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\(^8\) [2009] QCCS 3745 (Que. Sup. Ct.).

\(^9\) [2010] NCLA 20 (Nfld.).
dangerous levels of [herbicides] while on the Base.” On this point, the appellate court engaged in a two-step analysis. It first held that defining the class as all residents of the base would be improper because an individual’s mere residency at the base would not have a causal connection with any lymphoma. The appellate court next held that the trial court’s purported limiter – residents “who claim they were exposed to dangerous levels” – actually did not limit the class definition at all because it did “not address the problem of eliminating persons who have no claim.” The Court of Appeal held: “There [were] no objective criteria to enable one to assess whether any one of the approximately 400,000 people [who have resided at the base] is properly part of the class.” For this reason, the class did not satisfy the “identifiable-class” certification requirement.

Second, following Wuttennee, the Court of Appeal held that the class did not present common issues that could be resolved on an aggregate basis and then applied fairly to all the class members. As the Dow appellants noted, the case involved “at least 12 chemicals sprayed and 40 distinct lymphomas, . . . [with] spraying having taken place over a period in excess of 50 years.” Accordingly, the appellate court held that “what is framed as one question seeking one answer for all members of the class is in fact several questions requiring several answers which are dependent upon time of exposure of the individual members of the class.” For example, the trial court’s first common issue had included the question: “Did . . . parts of the Base, after spraying, constitute an unusual danger of causing a malignant lymphoma and, if so, when?” As the appellate court observed, this one common issue was actually four discrete questions: (i) what parts of the base were sprayed, (ii) what herbicides were sprayed, and in which areas, and over what period of time, (iii) can any of those herbicides contribute to

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10 See id. ¶ 72.
11 Id. ¶¶ 60-77.
12 Id. ¶ 73.
13 Id. ¶ 85.
14 Id. ¶ 94.
15 Id. ¶ 79.
causing lymphoma, and (iv) what is the smallest amount of herbicide that can cause lymphoma. Thus, “[u]nless the relationship between various chemicals and all types of lymphomas is the same, the determination will have to be made for each type of lymphoma.”16 For this reason, the class’s common issues were not common at all, and class certification was improper.

Finally, the Court of Appeal held that a class proceeding was not the “preferred procedure” because, as noted above, “the common issues [were] insignificant when compared to the large number of individual inquiries which would be needed to resolve this claim.”17

Like Wuttennee, Dow suggests that at least in toxic-tort cases, Canada’s appellate courts may be taking a more stringent view of the class certification standards than the trial courts.

Securities Fraud

During 2009, the legal community gave considerable attention to Silver v. IMAX Corp., the first case brought under the 2005 Ontario Securities Act’s regime creating liability for continuing disclosure misrepresentations on the secondary securities market. In IMAX, the plaintiff-shareholders asserted two principal claims: (i) common-law misrepresentation; and (ii) statutory misrepresentation under the new Ontario Securities Act. These claims raised two issues, which court-watchers followed closely: First, would the IMAX court certify the class on the common-law claim, as well as the statutory claim? The answer to this question would have far-reaching ramifications, because the Ontario Securities Act caps damages at 5% of the defendant’s market capitalization, but damages for the common-law claim are not capped. Second, would the IMAX court grant the plaintiffs leave to proceed on their statutory claims, as required under the Ontario Securities Act? Because IMAX was the first decision to consider the statute’s leave provisions, the legal community believed the answer to this

16 Id. ¶¶ 83-88.
17 Id. ¶ 107.
question would set important precedent. The Superior Court of Justice issued an opinion on each of these issues.

On the class-certification issue, the IMAX court departed significantly from existing Canadian law on reliance and loss causation. Until IMAX, Canadian courts tended to view common-law misrepresentation claims as ill-suited to class proceedings, because proof that each class member relied on the alleged misrepresentation is necessarily individualized.\(^{18}\) In *Carom v. Bre-X Minerals Ltd.*,\(^{19}\) for example, a group of shareholders sought to certify a class action against a mining company that had allegedly lied about the discovery of a gold deposit in Borneo. The court certified a class, but held that it would include only shareholders who could demonstrate they had relied on a specific oral or written misrepresentation by the company. Notably, the court declined to adopt a U.S.-style “fraud-on-the-market” theory for secondary-market participants. In other words, shareholders who did not rely on a specific misrepresentation by the company when buying their shares were not included in the class.

In IMAX, the court certified a class asserting common-law misrepresentation claims, even though the plaintiffs only pleaded reliance by the representative plaintiffs themselves.\(^{20}\) At the class-certification stage, the court held, plaintiffs need only show that a corporate document or statement contained a misrepresentation – not that each shareholder member of the class relied upon it. Accordingly, even though the plaintiffs did not plead that each class member relied on a misstatement by the company, the common-law misrepresentation claim could proceed.

In addition, the IMAX court held that the class was proper even though most of the class members would be foreign. The court found a “real and substantial connection” between the plaintiffs’ claims and Ontario – IMAX is an Ontario-based Canadian corporation traded on the Toronto stock exchange, and the alleged misrepresentations occurred in Ontario.

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\(^{19}\) [1999] 46 OR (3d) 315.

as well as in New York. The court also held that a class proceeding was appropriate, even though some plaintiffs would present individual issues that would have to be decided after the court determined the common class issues.

The IMAX court also held that plaintiffs could proceed with their statutory claim. The Ontario Securities Act requires plaintiffs seeking to pursue statutory claims for secondary-market misrepresentation to clear two hurdles – they must demonstrate that: (i) they brought the action in good faith; and (ii) there is a “reasonable possibility” that they will prevail at a trial. The IMAX case presented the first test of these provisions. The court held that under the clear language of the Act, imposing “a ‘high’ or ‘substantial’ onus requirement for good faith in this type of proceeding” would be improper. Further, the court concluded that “reasonable possibility of success at trial” sets a low threshold for a plaintiff seeking leave to proceed with an action. In addition, the court held, the “reasonable possibility” of success at this stage addresses only the merits of the plaintiffs’ affirmative claims; it does not require the plaintiffs to “overcome” any defenses that the defendants could put forward. The court conducted an extensive review of the evidence and found that the plaintiffs satisfied both prongs of the statutory-leave test.

Initially, the two IMAX opinions were expected to have widespread consequences for future shareholder class actions. A March 2010 decision by a different judge of the same Ontario court, however, revealed considerable judicial disagreement regarding the requirements for certifying a com-

21 Id. ¶¶ 35-39.
22 Id. ¶ 33 (quoting Heward v. Eli Lilly & Co. [2007] OJ No. 404 (S.C.), ¶ 69 (“whenever, because of the existence of individual issues, a judgment on the common issues in favour of the plaintiffs will not determine a defendant’s liability, it will always be possible – and invariably likely – that an acceptable class will include persons who will not have valid claims”)).
23 See Ontario Securities Act, § 138.8(2).
25 Id. ¶ 7.
26 Id. ¶ 333.
mon-law misrepresentation class. In *McKenna v. Gammon Gold, Inc.*, plaintiffs sought to certify a class of investors seeking damages for misrepresentation both at common law and under the Ontario Securities Act.²⁷ Plaintiffs claimed that during the proposed class period, Gammon, a mining company, released disclosures that contained misrepresentations, including overstating Gammon’s production rate at certain of its gold and silver mines. The plaintiffs asserted both common-law and statutory misrepresentation claims.²⁸

The *Gammon* court refused to certify the common-law claims. The court held that reliance is an essential element of a common-law misrepresentation claim, and that “courts have usually concluded that negligent misrepresentation claims give rise to such individual inquiries as to reliance that they are unsuitable for certification.”²⁹ The court concluded: “The need to determine the issue individually would give rise to a multitude of questions in each case concerning the representations communicated to a particular investor, the experience and sophistication of the investor[,] and whether there was a causal connection between the misrepresentation(s) and the acquisition of the security.”³⁰ Accordingly, the court certified the statutory claims only.

It is too early to tell whether the *Gammon* and *IMAX* common-law misrepresentation decisions can be reconciled, an issue that the Ontario Court of Appeal likely will be called upon to resolve.³¹ If, as in *IMAX*, shareholder class actions for common-law misrepresentation are allowed to proceed even if plaintiffs cannot plead reliance, Canadian courts can expect to see many more such cases filed in coming months and years.

In any event, even if an appellate court later rejects *IMAX*’s reasoning on class certification, its statutory-leave opinion can still be expected to

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²⁸ *Id.* ¶¶ 5, 10, 17.
²⁹ *Id.* ¶ 135.
³⁰ *Id.* ¶ 161.
³¹ See Julius Melnitzer, *Reliance Fight Brewing in Securities Cases*, Financial Post (Apr. 21, 2010).
have far-reaching ramifications. By setting a low bar for plaintiffs seeking leave to bring statutory-misrepresentation claims, Canadian courts will be all the more hospitable to securities cases.

**Competition**

In 2008, the British Columbia Supreme Court handed down *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*,\(^{32}\) refusing to certify a class of consumers of a computer-memory chip called DRAM that included indirect purchasers. The court held that because causation could not be established on a class-wide basis, a class proceeding was not the preferable procedure for adjudicating the plaintiffs’ claims. Similarly, the British Columbia Supreme Court refused to certify classes in *Steele v. Toyota Canada Inc.*\(^ {33}\) and *Harmegnies v. Toyota Canada Inc.*,\(^ {34}\) holding that the need for individual proof of loss eliminated any advantages of class adjudication.

If the trial court decision in *Pro-Sys Consultants* suggested that Canadian courts would impose *Wuttennee*- and *Dow*-style standard tightening in competition cases, the British Columbia Court of Appeal\(^ {35}\) delivered a disillusioning message last year.\(^ {36}\) Unanimously reversing the trial court’s decision, the Court of Appeal held that although “[t]he burden is on the plaintiff to show ‘some basis in fact’ for each of the certification requirements, in conformity with the liberal and purposive approach to certification, the evidentiary burden is not an onerous one – it requires only a ‘minimum evidentiary basis,’” and the plaintiffs had “met the low threshold.”\(^ {37}\) In particular, the court said that plaintiffs could use statistical evidence to prove aggregate class-wide damages, including damages suffered by indirect

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\(^{32}\)[2008] BCSC 575 (B.C. Sup. Ct.).

\(^{33}\)[2008] BCSC 1063 (B.C. Sup. Ct.).

\(^{34}\)[2008] QCCA 380 (Que. C.A.).

\(^{35}\) Similar to the court structure in New York state, the British Columbia Supreme Court is the trial-level court, and the Court of Appeal is the province’s highest court.


\(^{37}\) *Id.* ¶ 23 (internal citations omitted).
A class proceeding, according to the Court of Appeal, was the proper procedure for the case, because the British Columbia Class Proceedings Act should be liberally construed to promote its goals of access to justice, behavior modification and judicial economy. The Supreme Court of Canada denied the defendants’ application for leave to appeal the Court of Appeal’s decision on June 3, 2010, effectively making that opinion, in the words of one observer, “the leading appellate authority on the certification of antitrust class actions in Canada.”

This liberalizing trend continued in Irving Paper v. Atofina Chemicals, Inc., in which the Ontario Superior Court certified a class in a price-fixing case that included both direct and indirect purchasers. The court certified the Irving Paper class even though causation and damages were not common to all class members. With respect to causation, the court held that the certification standards did not require the plaintiffs to show that every possible class member was harmed by the price fixing. With respect to damages, the court held that the indirect purchasers could be included in the plaintiff class because “a methodology may exist for the calculation of [their] damages.”

38 Id. ¶ 17.
39 Id. ¶ 23.
41 Blakes, Cassels, & Graydon, LLP, Class Actions – Direct and Indirect Purchasers Gain Leverage in Certification of Competition Cases, 2010 WLNR 11674532 (June 8, 2010).
On June 8, 2010, the Divisional Court denied the defendants’ request for leave to appeal the *Irving Paper* class certification order.\textsuperscript{44} The judge indicated that she disagreed with the certifying court’s characterization of the governing precedents,\textsuperscript{45} but “concluded there [was] no good reason to doubt the correctness of the certification order and [that] there is no conflicting decision,”\textsuperscript{45} making review inappropriate under the stringent standard for granting leave to appeal.\textsuperscript{46}

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In sum, recent Canadian court pronouncements on class certification standards are somewhat difficult to reconcile, and it remains to be seen whether new authorities will develop along substantive lines (i.e., the type of case) or jurisdictional lines (i.e., the province in which the case is brought). If the lines of authority develop substantively, there is room for cautious optimism in the pharmaceutical-tort context that the *Propulsid* and *Vioxx* cases represented the high-water mark for generic causation-based classes. In the competition context, however, the courts are trending toward an increasingly liberalized view of class-certification standards. The uncertainty caused by *IMAX* in the securities-fraud context is also cause for concern.

If class certification standards develop along jurisdictional lines, that could portend many unfortunate consequences for Canadian business and for the judicial system. Among other things, plaintiffs’ counsel are likely to engage in rampant forum shopping, targeting their filings in those provincial courts that seem more willing to certify cases for class treatment. It is too early at this point to identify which provinces will be viewed as the most hospitable to class proceedings, but we can already predict, for example, that plaintiffs’ counsel will avoid filing mass-tort pharmaceutical cases in Saskatchewan, and, if possible, will steer clear of Newfoundland in filing

\textsuperscript{44} *Irving Paper*, 2010 CarswellOnt 3898, ¶ 3 (Ont. S.C.J.) (WL).

\textsuperscript{45} 2010 CarswellOnt 3898, ¶ 3.

\textsuperscript{46} See Rules of Civil Procedure, R.R.O. 1990, Reg. 194, s. 62.02(4) (Can.).
toxic-tort cases. Meanwhile, securities claimants can be expected to favor Ontario courts, depending on how the IMAX-Gammon split is resolved.

**U.S. Attorneys: Is the Welcome Mat Out?**

For years, some observers have expressed concern that the U.S. plaintiffs’ bar will begin opening offices in Canada to pursue class proceedings in that forum, much as they have done in some European Union member states. The recent case law suggests that while Canadian courts were initially frosty to U.S. attorneys, attitudes are warming.

In 2008, the British Columbia Supreme Court handed down *Chartrand v. General Motors Corp.*, a decision refusing to certify a class of pick-up truck owners who alleged that their trucks’ parking brakes were defective and sought repair costs. In rejecting certification, the court voiced concern that the proposed representative plaintiff had been recruited by class counsel and was not an active, decision-making participant in the litigation. The court was particularly distressed by the presence of U.S. attorneys on the plaintiff’s side:

> Concerns also arise when American counsel are involved in proposed Canadian class proceedings. The nature of the involvement is relevant. Lawyers from other jurisdiction[s] may be able to act as consultants. It is a different matter if they are in some way underwriting the litigation and obtaining a potential benefit from it. A representative plaintiff must have competent counsel in order to fairly and adequately represent the interests of the class. The court, as part of its role in a class proceeding, supervises class counsel to ensure that counsel is acting in the interests of the class. The court is not in a position to su-

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47 [2008] BCSC 1781 (B.C. Sup. Ct.).
pervise the actions of or participation of counsel from another jurisdiction.48

However, times may be changing – and changing quickly. In October 2009, the Ontario Superior Court gave a warmer welcome to U.S. attorneys when it granted “carriage”49 of a class action against Timminco Ltd., a Canadian metals producer, to Canadian firm Kim Orr Barristers, which had partnered with Milberg LLP, the famous U.S. plaintiffs’ firm.50 In selecting Kim Orr for the lead role, the Court clarified its understanding that Milberg would serve in a limited capacity, providing Kim Orr strategic advice and investigation and document-management services.51

The court also clarified its understanding that Kim Orr would pay for Milberg’s services directly, and that Milberg would not have a direct claim on any damages award.52 The same court previously had rejected the involvement of a U.S. firm in a Canadian class proceeding when the U.S. firm intended to fund the litigation and share in any fees that ultimately were awarded.53 The limited nature of Milberg’s role may have played an

49 “Carriage” means that the court selects a particular law firm to be lead class counsel.
51 That Kim Orr wanted the benefit of Milberg’s experience in discovery-intensive U.S. cases says much about Canadian plaintiffs’ firms desire to use discovery as a litigation tool, as their U.S. counterparts do. This is notable in light of a 2009 amendment to Ontario’s rules of civil procedure that sought to restrict the scope of permissible discovery. Amended rule 30.02 now permits parties to discover documents “relevant to any matter in issue,” instead of the older “relating to any matter in issue.” The drafters’ intent in making this subtle change was to narrow the scope of discovery to core relevant documents. See Ontario R. Civ. P. 30.02, R.R.O. 1990, Reg. 194.
52 Sharma v. Timminco Ltd., [2009] 99 OR 3d 260, ¶ 78 (Ont. S.C.J.). But see Canadian Underwriter.ca, Daily News (Sept. 30, 2010) (quoting a source claiming that Kim Orr was actually being “funded monetarily” by Milberg, rather than the inter-firm billing arrangement that the Timminco court had envisioned).
important part in the court’s decision and created a model for the involvement of U.S. counsel in future cases.\textsuperscript{54}

\textit{Timminco} did not go unnoticed on either side of the 48th Parallel. According to published reports, several U.S. plaintiffs’ firms reportedly met with their Canadian counterparts in 2009, and Canadian firms have been recruiting U.S. class action colleagues to assist them with bringing cases in Canada.\textsuperscript{55}

Who’s Paying for It?

Recent decisions about who should pay for class litigation have been a mixed bag: Canadian courts have recently affirmed the loser-pays principle, but they seem open to third-party funding arrangements.

In 2007, the Supreme Court of Canada handed down \textit{Kerr v. Danier-Leather},\textsuperscript{56} in which it held that the traditional “loser-pays” rule applies to class proceedings under the Ontario Class Proceedings Act 1992.\textsuperscript{57} \textit{Kerr} is significant because the court held that Ontario law permitted a court to require unsuccessful named plaintiffs to pay certain of the defendants’ costs, even though those plaintiffs’ claims were at least colorable and the ruling dismissing them made new law.\textsuperscript{58} In this respect, \textit{Kerr} rejected the Alberta and New Brunswick provincial policies of not imposing costs when the representative plaintiffs’ claims are premised on novel theories. \textit{Kerr} similarly rejected the practices in British Columbia, Manitoba, Newfoundland, and Saskatchewan of imposing costs against representative plaintiffs only where there has been abusive, vexatious, or frivolous conduct. In the \textit{Kerr} opinion, the Supreme Court recognized that class proceedings could lead to

\textsuperscript{54} Stitt, \textit{Court Rules Direct Involvement Of U.S. Firm In Canadian Class Action Acceptable.}

\textsuperscript{55} Julie Triedman, \textit{New Players at the Table}, The American Lawyer, 40, 44 (Aug. 2009).

\textsuperscript{56} [2007] SCC 44.

\textsuperscript{57} \textit{Id.} ¶ 65 (citing Class Proceedings Act, S.O., ch. 6 (1992) (Can.), § 31(1)).

\textsuperscript{58} The Ontario law provided that when determining whether to award costs against a representative plaintiff, “the court may consider whether the class proceeding was a test case, raised a novel point of law or involved a matter of public interest.” Class Proceedings Act, S.O., ch. 6 (1992) (Can.), § 31(1).
abusive litigation, noting that “protracted litigation has become the sport of kings in the sense that only kings or equivalent can afford it.” The Court therefore concluded that “regard must also be had to the situation of the respondents/defendants who have incurred the costs.”

Without question, the loser-pays rule, as articulated in Kerr, is an effective safeguard against abusive litigation. Kerr’s salutary effects may be diluted, however, by what appears to be Canada’s growing acceptance of third-party litigation funding. In Meltzer Investment GmbH v. Gildan Activewear Inc., the Ontario Superior Court rejected a proposed third-party funding agreement, but held that such agreements were not per se champertous or otherwise against public policy. The court held that the arrangement in the Meltzer case was unlawful because the funder’s recovery would have been a fixed percentage of any damages award, regardless of the amount of money advanced to plaintiffs, the risk to the funder, or the amount of time the lawsuit was pending. The court suggested, however, that a litigation-funding arrangement that calculated recovery based on these elements would be permissible.

In 2009, the Court of Queen’s Bench in Alberta had the dubious distinction of becoming the first Canadian court to approve a private third-party funding agreement. In Hobsbawn v. Atco, the court approved an agreement to fund a representative plaintiff’s legal fees in a class proceeding. In light of the court’s decision, BridgePoint Financial Services Inc., the funding company in Hobsbawn, is reportedly exploring numerous other funding opportunities in Canada. The judicial reactions to these early third-party funding cases could greatly influence the frequency with which class actions are filed in Canadian courts.

60 Id. ¶ 64.
63 Id.
Conclusion

2009 saw unprecedented levels of class-action activity in Canada. Over the last two years, the Chief Justice of Canada, the Chief Justice of Ontario, and Ontario’s leading class action judge all issued opinions calling for expanded use of class proceedings to promote access to justice. And they are likely to get their wish. Although the “certify-all-classes” tendency of Canadian courts was tempered recently by significant rulings in the product-liability and toxic-tort arenas, the other recent developments discussed in this article (including liberalized certification standards in securities-fraud and competition cases, cross-border alliances among law firms, and the acceptance of third-party funding in class proceedings) suggest that the volume of class actions filed in Canadian courts may grow exponentially.

There may, however, be a bright spot on the horizon in Ontario. In January 2010, an amended Rule 20 of Ontario’s Rules of Civil Procedure, which governs summary-judgment motions, came into effect. Under the amended rule, Ontario judges are permitted to weigh evidence submitted by defendants who have sought summary judgment. A number of observers in Canada believe this will empower courts to dismiss purported class proceedings on questionable claims before the class-certification stage. Given Ontario’s generally permissive class-certification requirements, observers expect defense attorneys to use the new summary-judgment rule frequently to attempt to shut down class proceedings before they are certified. It remains to be seen, however, how Ontario judges apply the revised rule.

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64 Triedman, New Players at the Table, at 40-41.
66 See Daryl-Lyn Carlson, New Class Action Rules Get Mixed Reviews From Law Firms, Financial Post (February 24, 2010).