

BCF Class Action NetLetter

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BCF LLP is a full-service business law firm that represents a wide range of corporate and institutional clients. In order to better serve these clients, BCF has a Class Action Defence Group composed of seasoned practitioners who specialize in complex commercial matters, media relations, and crisis management.

Monthly issues are published on the first day of each month.

HIGHLIGHTS

- * In the April 2022 issue of the *BCF Class Action NetLetter*, you will find the following two articles.
- * The first is a review of practitioner and author Michael Eizenga's latest publication, *The Class Actions Handbook* (Toronto: LexisNexis, 2022). This review addresses the many reasons why the *Handbook* is an essential resource for all jurists. It also provides an overview of the themes and features that the *Handbook* contains.
- * The second article provides a general overview of the enforcement of class actions awards from foreign jurisdictions in Canada. It also analyses the factors involved in determining whether a foreign class actions award should be recognized and enforced.
- * Please note that the views expressed in the *BCF Class Action NetLetter* are those of the authors only and do not constitute advice of any kind.
- * If you have any comments, wish to advise us of a recent class action case or issue, or would like to submit an article for publication, please feel free to contact the *BCF Class Action NetLetter* at one of the e-mail addresses below.
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COMMENTARY

Simplifying Access to Justice: Michael Eizenga publishes *The Class Actions Handbook*, an essential, multi-jurisdictional resource for Canadian jurists, by Shaun E. Finn, BCF LLP

I. Introduction - An Accessible Reference for Jurists from Across the Country

In the very first sentence of his latest work, *The Class Actions Handbook* (the "*Handbook*"), a LexisNexis publication, practitioner and author Michael Eizenga explains that "[a] class action is a procedural tool that allows one or more persons to bring an action on behalf of, or for the benefit of, numerous persons who have suffered a common wrong. It is intended to provide an efficient mechanism to achieve redress for widespread harm or injury."¹ From the uniqueness of this procedural tool flow eight clear, thoughtful, and remarkably crisp chapters of analysis. Neither a legal treatise nor a superficial marketing initiative, the *Handbook*, as its name

suggests, is a useful 169-page primer that manages the feat of concentrating the statutory law of all relevant Canadian jurisdictions and approximately 30 years of case law into a single, accessible volume. In addition to providing useful background information, it introduces the reader to various crucial procedural stages and legal considerations. Although designed to be practical rather than academic in nature and tone, the *Handbook*, like the class action itself, remains focused on one central theme: access to justice. Appropriately, it is this golden thread that weaves its way throughout the book, from start to finish.

II. The Dynamic World of Canadian Class Actions

As the *Handbook* observes, "[c]lass action lawyers know that their practice area is a dynamic one."² This is true from legislative, jurisprudential, and policy standpoints. Beginning with Québec's adoption of a class action regime in 1978, every Canadian province has now enacted a class action statute. Prince Edward Island was the latest and last province to do so when Bill no. 36 received royal assent on November 17, 2021.³ Moreover, legislative reforms continue to be proposed and implemented. In Ontario, the *Class Proceedings Act, 1992* was recently amended pursuant to the *Smarter and Stronger Justice Act, 2020*,⁵ notably with respect to preferability. Québec is also contemplating possible changes to its codified class action regime and launched a public consultation process.⁶

In addition to these important legislative developments is the fact that class actions have adapted themselves to virtually all spheres of economic and social activity. As noted by the Supreme Court of Canada in *Western Canadian Shopping Centres Inc. v. Dutton*, "[t]he class action plays an important role in today's world. The rise of mass production, the diversification of corporate ownership, the advent of the mega-corporation, and the recognition of environmental wrongs have all contributed to its growth."⁷ In effect, "[a] faulty product may be sold to numerous consumers. Corporate mismanagement may bring loss to a large number of shareholders. Discriminatory policies may affect entire categories of employees. Environmental pollution may have consequences for citizens all over the country. Conflicts like these pit a large group of complainants against the alleged wrongdoer."⁸ It is therefore not surprising that the number of class actions litigated in Canada has grown considerably. According to a report published by the Law Commission of Ontario, "there have been approximately 1,500 class actions initiated in Ontario [alone] between 1993 and February 2018."⁹

Courts have also shown themselves to be agents of change. As the Supreme Court stated in *Western Canadian Shopping Centres*, "[c]learly, it would be advantageous if there existed a legislative framework addressing these issues. The absence of comprehensive legislation means that courts are forced to rely heavily on individual case management to structure class proceedings."¹⁰ Nevertheless, "[a]bsent comprehensive legislation, the courts must fill the void under their inherent power to settle the rules of practice and procedure as to disputes brought before them."¹¹ It is just such a settling of the rules of practice and procedure that was engaged in by the courts of P.E.I. prior to the adoption of comprehensive class action legislation in that province.¹²

III. Making Sense of it All

As the *Handbook* explains, "[i]n the 30 years since the first Canadian common law class action legislation was enacted, thousands of class action decisions and judgments have been rendered."¹³ Even more important, "there is also now a contained set of legal propositions, built out of the courts' progressive interpretations of the class proceedings statutes, that are regularly applied across these substantive areas of litigation [i.e. product liability, environmental accidents, institutional abuse claims, privacy breaches, conspiracy and price fixing claims, consumer and investor protection issues and mass accidents]."¹⁴ The purpose of the *Handbook* is to make sense of it all by pulling together "many (hopefully most) of those basic propositions in a concise and accessible format."¹⁵ In this regard, the book has clearly achieved its objective. Devoid of legalese, it manages to address principle and substance with an enviable economy of language.

But the *Handbook* also avoids falling into the trap of generalization and oversimplification. Although based on a shared heritage, Canadian class action statutes - and the patchwork of case law to which they have given rise - are not identical. As the *Handbook* rightly points out, "[c]lass action lawyers should be particularly familiar with the legislation in the jurisdiction they are dealing with. In addition, the various provinces' rules of court apply to class proceedings and they tend to vary more than the class proceedings statutes themselves."¹⁶ This is particularly true in the case of Québec, Canada's only civilian jurisdiction. Helpfully, "[g]iven the multi-

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jurisdictional nature of many class actions, it is valuable for common law practitioners to understand how the Quebec class proceedings regime works and this Handbook often refers to Quebec law."

More than a hornbook for practitioners, however, the *Handbook's* cross-jurisdictional synthesis will prove an important resource for all jurists, including students, legal scholars, and judges. As noted by Bastarache J. of the Supreme Court of Canada, "[i]f you pick up any major Supreme Court judgment, you will observe that in the course of expressing their reasons, the judges commonly refer to and rely on books and articles written by academics."¹⁷ This is because such work "grounds analytical jurisprudence in terms of abstract, logically coherent, formal conceptual systems. It promotes stability and coherent changeability by affecting the substantive content of rights and by providing a rational basis for judicial decision-making."¹⁸

IV. A Few Words About the Author

Before looking at the *Handbook* more closely, a few words should be devoted to its author. Mr. Eizenga's name has long been associated with class actions in Canada. A plaintiff's counsel who later became a defence counsel, he is an experienced and respected advocate who has appeared before all levels of court - including the Supreme Court of Canada - in such landmark cases as *R. v. Imperial Tobacco Canada Ltd.*,¹⁹ *TELUS Communications Inc. v. Wellman*,²⁰ and *Atlantic Lottery Corp. Inc. v. Babstock*.²¹ Currently, Mr. Eizenga is a partner and co-head (with Ms. Cheryl Woodin) of the class actions practice at Bennett Jones LLP, working out of the firm's Toronto and Vancouver offices.

In addition to his wealth of practical experience, Mr. Eizenga's previous books, notably *Class Actions Law and Practice*,²² have been cited as authority by the Supreme Court in *Western Canadian Shopping Centres, Hollick v. Toronto (City)*,²³ *Pro-Sys Consultants Ltd. v. Microsoft Corporation*,²⁴ *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*,²⁵ and *Pioneer Corp. v. Godfrey*.²⁶

In 2017, Mr. Eizenga was awarded the prestigious Law Society Medal by the Law Society of Upper Canada in recognition of his leadership in the class action Bar and his outstanding commitment to public service. He is, moreover, an adjunct professor at the University of Toronto, Faculty of Law and is Chairman of the Board of Directors at War Child Canada, a non-profit organization that works to protect children and their communities from the brutal impact of war.²⁷

V. Notable Themes and Features of the *Handbook*

It would be impossible to capture the content, richness and range of the *Handbook* in a review such as this. There are, however, some key themes and features that will be touched upon briefly.

Access to Justice

As the *Handbook* explains, "[t]he most important policy objective driving class actions is to provide access to justice. Many claims are not individually litigated, not because they lack merit, but rather because of economic, social and psychological barriers."²⁸ Invoking *Western Canadian Shopping Centres* and *Hollick*, it adds that "[t]he high cost of litigation means that claims of modest amounts rarely will be economically feasible to pursue on an individual basis. By aggregating the claims of potential individual plaintiffs and effectively spreading legal costs across hundreds or thousands of class members, economies of scale can be generated to reduce the economic barriers to litigation."²⁹ Class action legislation thus has a broader social dimension that transcends traditional civil litigation. It is in part for this reason that the Supreme Court of Canada described the class action as "an ordinary remedy whose purpose is to foster social justice."³⁰

This focus on access to justice is consistent with other developments in the area of civil procedure. For example, Lord Woolf's "Access to Justice - Final Report" noted as a defect of the legal system of England and Wales "a lack of equality between the powerful, wealthy litigant and the under resourced litigant. It is too uncertain: the difficulty of forecasting what litigation will cost and how long it will last induces the fear of the unknown; and it is incomprehensible to many litigants."³¹ Hence the need to render access to British justice easier, more transparent, and less expensive. Access to justice is also at the centre of Québec's new *Code of Civil Procedure*, whose Preliminary Provision stipulates, among other things, that it is "designed to ensure the accessibility, quality and promptness of civil justice, the fair, simple, proportionate and economical application of

procedural rules, the exercise of the parties' rights in a spirit of co-operation and balance, and respect for those involved in the administration of justice."³²

In remarks to the 7th National Pro Bono Conference, Wagner C.J. of the Supreme Court of Canada stated that access to justice is ultimately "about getting good justice for everyone, not perfect justice for a lucky few. It's a democratic issue. It's a human rights issue. It's even an economic issue."³³

Canadian Class Action Legislation

This sense that class actions are procedural - and yet, somehow, beyond the *merely* procedural - is acknowledged by the *Handbook*. On the one hand, it recognizes that "[c]lass action legislation establishes a body of procedural rules to facilitate the effective conduct and resolution of collective claims. Class action legislation creates no new causes of action and is not intended to change substantive law."³⁴ On the other hand, "by allowing claims to be pursued that might otherwise remain dormant, 'a class procedure has the potential to breathe new life into substantive rights.'"³⁵

In addition (as mentioned above), class actions have historically been a provincial phenomenon since "Property and Civil Rights" are attributed by the *Constitution Act, 1867* to the exclusive powers of provincial legislatures:³⁶ "Class proceedings legislation has existed in Quebec since 1978. Ontario was the first common law province to enact class proceedings legislation in 1992; however, all provinces ... have now enacted class proceedings statutes."³⁷ More recently, the Federal Court has also adopted rules of court that allow for class proceedings to be commenced before it in areas of exclusive or concurrent jurisdiction.³⁸ Consequently, Canada's only remaining jurisdictional frontier is to North, as "[t]here is no class proceedings legislation in Northwest Territories, Nunavut or Yukon."³⁹

Summary Judgment

While access to justice is an important advantage of class actions, that does not mean that every class action should be certified (i.e. allowed by the court to proceed to the merits). The good administration of justice also requires a rational and proportionate utilization of judicial resources. One tool for achieving just, cost-effective outcomes is the "summary judgment motion," a motion brought by one party against another to have a case decided summarily, without the need of going to trial.

As outlined in the *Handbook*, in 2014 "the Supreme Court of Canada [in *Hryniak v. Mauldin*]⁴⁰ heralded in a 'culture shift' to promote timely and affordable access to justice. In particular, this shift entails simplifying pre-trial procedures and moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case."⁴¹ More specifically, "[t]he Court stated that a full trial is not required if a summary judgment motion can achieve a fair and just adjudication, and provide a process that allows the judge to make the necessary findings of fact and apply the law to the facts and is a more proportionate, more expeditious, and less expensive means to achieve a just result than going to trial."⁴²

Summary judgment motions can be brought in various procedural contexts, including class actions, whether at the pre-certification or certification stages. One relevant factor to be considered when deciding between these two possibilities "is whether the proposed motion has the potential to dispose of the entire proceeding or substantially narrow the issues."⁴³ If so, it is generally preferable for such a motion to be debated and decided *before* the certification hearing.

As things stand, summary judgment motions are not available in Québec.

Certification

A crucial moment in the life of most class actions is certification (or authorization, in Québec), the preliminary filtering mechanism that decides whether the proceeding will be litigated on the merits. As the *Handbook* makes clear, however, this is a distinct procedural stage which invites a different standard of proof. Simply put, "[t]he purpose of a certification motion is not to address the merits of the plaintiff's claim, but to determine if the claim can appropriately be prosecuted as a class action. The certification motion ensures that only claims that will materially benefit from common adjudication of issues will proceed as a class action."⁴⁴ None the less, "[w]hile the certification motion is not a merits-based analysis of the action, it is a meaningful screening device of the existence of issues which could be tried in common."⁴⁵ This is particularly true given recent amendments to the

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Ontario *CPA* that arguably make it more onerous to certify class actions in that province. As noted by Professor Jasminka Kalajdzic, these "amendments radically change the test for certification in two ways: by creating a more demanding 'superiority' test and by introducing the 'predominance' requirement in certification."⁴⁶

Although the certification/authorization requirements vary from jurisdiction to jurisdiction, the common law provinces include as criteria: i) a viable cause of action; ii) an identifiable class; iii) common issues; iv) preferability; and v) an adequate representative plaintiff.

- Cause of Action. As the *Handbook* explains, the standard applicable to the cause of action differs from that applicable to the other certification requirements. More specifically, "[i]n determining whether the pleading discloses a cause of action, no evidence is admissible. The pleaded facts form the basis upon which the prospect of success of the claim will be assessed."⁴⁷ As a result, "[t]he material facts pleaded must be accepted as true, unless patently ridiculous or incapable of proof. For example, bare allegations and conclusory legal statements based on assumption or speculation are not material facts. They are incapable of proof and will not be taken as true."⁴⁸

- Identifiable Class. Although it may appear elementary to say so, a class action can only be feasible if there exists an actual and identifiable class of persons who stand to benefit from its resolution. The *Handbook* notes that "[t]he definition of an 'identifiable class' serves three purposes: (i) it identifies the persons who have a potential claim against the defendant; (ii) it defines the parameters of the lawsuit so as to identify those persons bound by the result of the action; and (iii) it describes who is entitled to notice."⁴⁹ Precision, proportionality and reasonableness are relevant considerations since "[t]he class must be defined with reference to objective criteria that do not depend on the merits of the claim. The class should not be unnecessarily broad, nor should it arbitrarily exclude potential class members. In addition, the class definition must bear a rational relationship to the common issues."⁵⁰

- Common Issues. For a class action to exist, it must be bound together by common facts and questions. Otherwise, a class would be nothing more than an arbitrary assemblage of persons with no legally meaningful connection with one another. In short, "[t]he commonality requirement reflects the central notion of a class proceeding. It is based on the view that individuals who have common litigation concerns should be able to efficiently resolve them in one central proceeding rather than through a multitude of repetitive proceedings."⁵¹ Although a key element, however, "[a] common issue need not dispose of the litigation or determine liability. An issue can still be a common issue even if it makes up a very limited aspect of the liability question, and even though many individual issues remain to be decided after its resolution."⁵² As the Supreme Court of Canada has stated on more than one occasion, "[i]t is sufficient if it is an issue of fact or law common to all claims and its resolution will advance the litigation for (or against) the class."⁵³ By way of a concrete example, the *Handbook* points to cases involving medical devices. In such instances, "in order to establish some basis in fact for a claim of general adverse health effects causation: (i) the symptoms described cannot be so vague and generic that they lack a plausible common cause; and (ii) the methodology proposed must relate to the symptoms pleaded in evidence."⁵⁴

- Preferable Procedure. While Québec's class action regime differs in this respect, "[m]ost of the class proceedings statutes provide that a class proceeding will be certified if 'a class proceeding would be the preferable procedure for the resolution of the common issues.'"⁵⁵ As mentioned above, "[t]he 2020 amendments to the Ontario statute have introduced 'minimum requirements' to satisfy the preferable procedure requirement."⁵⁶ New Sub-section 5(1.1) of the Ontario *CPA* reads:

(1.1) In the case of a motion under section 2, a class proceeding is the preferable procedure for the resolution of common issues under clause (1) (d) only if, at a minimum,

(a) it is superior to all reasonably available means of determining the entitlement of the class members to relief or addressing the impugned conduct of the defendant, including, as applicable, a quasi-judicial or administrative proceeding, the case management of individual claims in a civil proceeding, or any remedial scheme or program outside of a proceeding; and

(b) the questions of fact or law common to the class members predominate over any questions affecting only individual class members.

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This sub-section arose from the consultation process surrounding the LCO Report. According to one of the co-authors of that report, "[t]he new superiority and predominance tests [included in Section 5 of the Ontario *CPA*] are conservative American principles that make many types of mass wrong impossible to litigate as class actions."⁵⁷ It remains to be seen just how the superiority and predominance tests will be construed and applied by Ontario courts.

In addition to Sub-section 5(1.1), the Ontario *CPA* has been amended to add Section 5.1, which "include[s] comparable provisions to those already existing in other provinces to deal with multijurisdictional issues."⁵⁸ According to the *Handbook*, "[t]he amendments now require that the court determine whether it would be preferable for some or all of the claims or common issues to be resolved in an existing or proposed class proceeding, including multi-jurisdictional proceedings, commenced in a Canadian jurisdiction other than Ontario involving the same or similar subject-matter and some or all of the same class members."⁵⁹

This provision is quite interesting as it seems to jar with the approach adopted by the Québec legislator. Article 577 of the Québec *Code of Civil Procedure* states, among other things, that "[t]he court cannot refuse to authorize a class action on the sole ground that the class members are part of a multi-jurisdictional class action already under way outside Québec."⁶⁰ Furthermore, as the *Handbook* points out, "[a]pplications to stay Québec proceedings have been dismissed when the court found that the interests of Quebec class members were better protected by allowing the Quebec action to proceed, for example, because they would have their claims adjudicated more rapidly than in the parallel Ontario proceeding."⁶¹

- Representative Plaintiff. Finally, the person who wishes to represent the class (and his or her counsel) must be able to do so. Practically speaking, this means that "[t]here must be a representative plaintiff who: (i) would fairly and adequately represent the interests of the class; (ii) has produced a workable litigation plan for the proceeding, including notification of class members; and (iii) does not have any conflict of interest with the class members on the common issues."⁶² This requirement is not a particularly onerous one, however, since, as observed by the Supreme Court of Canada in *Western Canadian Shopping Centres*, the proposed class representative "need not be 'typical' of the class, nor the 'best' possible representative," but simply in a position "to vigorously and capably prosecute the interests of the class."⁶³

Carriage and Multi-Jurisdictional Issues

According to the *Handbook*, "[t]he avoidance of a multiplicity of proceedings is a foundational principle of civil procedure. Multiple proceedings about the same wrong may lead to inefficiency, the duplication of fact-finding, legal analysis and appeals, wasted forensic and judicial resources, and inconsistent outcomes."⁶⁴ In other words, "[a]s a general proposition, there should not be two or more class actions advancing the same cause of action on behalf of the same putative class. That said, it is not unusual for overlapping class proceedings to co-exist in different jurisdictions."⁶⁵

One way of addressing the problem of possibly overlapping class actions is to stay superfluous parallel proceedings, thereby reducing costs for the court system and defendants, avoiding contradictory judgments, and dispelling any confusions amongst the putative class members. The mechanism used for this purpose in common law jurisdictions is a carriage motion whose function "is to stay all other present or future class proceedings relating to the same subject-matter" in a particular province.⁶⁶ Interestingly, in an effort to avoid unnecessary delay, carriage motion decision are no longer appealable in Ontario.

But carriage motions are not used throughout Canada. In Québec, "courts apply a 'first to file' rule which awards carriage to the action filed first. This rule is not absolute, however, and the court will not follow it if a party shows that it would not be in the best interests of the class."⁶⁷

Because Canada does not have an equivalent to the United States' Judicial Panel on Multidistrict Litigation⁶⁸ - which is able to consolidate federal class actions and assign them to a specific district court for adjudication - Canadian litigants, counsel, and courts have struggled with efficient management of parallel class actions across jurisdictions (i.e. substantially similar proceedings commenced before the superior courts of more than one Canadian jurisdiction) and/or "national" class actions (i.e. those which include as putative members persons residing in several, or indeed all, Canadian jurisdictions). Even the Supreme Court of Canada has weighed in on the issue, observing in *Canada Post Corp. v. Lépine* that "the creation of national classes ...

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raises the issue of relations between equal but different superior courts in a federal system in which civil procedure and the administration of justice are under provincial jurisdiction. [T]he decisions made may sometimes cause friction between courts in different provinces."⁶⁹ According to the Supreme Court, "the provincial legislatures should pay more attention to the framework for national class actions and the problems they present. More effective methods for managing jurisdictional disputes should be established in the spirit of mutual comity that is required between the courts of different provinces in the Canadian legal space."⁷⁰

Although a pan-Canadian solution has yet to be adopted and implemented, some helpful steps have been taken. As the *Handbook* explains, "[t]he Uniform Law Conference of Canada has recommended that courts should consider the issue of parallel multi-jurisdictional class proceedings at the certification stage, under a more refined preferable procedure criterion."⁷¹ Although several provinces "have adopted the recommendation and amended their class proceeding statutes accordingly," "the courts have held that even without [a] statutory amendment, the broad statutory discretion granted a case management judge provides them with jurisdiction to consider which of two actions is preferable at the certification motion with the benefit of a full record."⁷²

Limitation Periods

Time waits for no one - and no lawsuit. In all Canadian jurisdictions, litigants must contend with limitation periods, which "represent unique and complex issues in the class action context. In class actions, as in individual actions, the governing limitation periods are those that apply to the causes of action asserted in the statement of claim."⁷³ It follows that "[a] representative plaintiff who has waited too long to bring a claim risks applicable limitation periods barring the claim, sometimes at an early stage (via motion to strike, certification or summary judgment) or eventually at the merits (at the common issues trial or at individual trials)."⁷⁴

To avoid such a prejudicial outcome, the parties can enter into tolling agreements pursuant to the applicable statutes. As the *Handbook* specifies, "[t]olling provisions suspend the running of limitation periods during the course of a class proceeding. They are intended to further the policy objectives of access to justice and judicial economy."⁷⁵ Put simply, "[t]heir purpose is to protect potential class members from the expiry of limitation periods until the feasibility of the class action is determined, which removes the need for each class member to commence an individual action in order to preserve his or her rights."⁷⁶

Yet, as with class actions, tolling provisions vary from jurisdiction to jurisdiction. Summarizing the tolling landscape in Canada, the *Handbook* explains that "[t]he class proceedings statutes of the common law provinces all contain provisions tolling limitation periods for potential class members. In Quebec, the tolling provisions are found in the *Civil Code of Quebec*. There is no comparable provision suspending limitation periods in the federal class action regime."⁷⁷

Notice

For class actions to provide members with a meaningful choice about whether to remain in a class or exclude themselves, object to a settlement, voice their opinion or obtain benefits under a judgment or a settlement, notice is key. Indeed, "[i]n a class action, one or more named representative plaintiffs participate in the proceeding on behalf of the class, with the individual class members remaining entirely or largely absent from the litigation."⁷⁸ As a result, "[s]ince all class members, present or absent, may be bound by the outcome of the class action, it is crucial that efforts are made to keep the class apprised of critical information at varying stages of the proceeding. To maximally protect the litigation autonomy of each class member, legislation and courts have prescribed and enforced notice requirements for the timely communication of relevant information to class members."⁷⁹

The requirement of providing class members with clear, concise, and effective notice of their rights is not a mere formality or a secondary consideration. As the Supreme Court of Canada stated in *Lépine*, "[t]he notice procedure is indispensable in that it informs members about how the judgment authorizing the class action or certifying the class proceeding affects them, about the rights - in particular the possibility of opting out of the class action - they have under the judgment, and sometimes, as here, about a settlement in the case."⁸⁰

Settlement

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While many class actions make it to the certification stage and a growing number proceed to the common issues trial, it remains the case that many are settled. Settlements can occur at virtually any procedural stage: before certification; following certification; before the common issues trial; after the common issues trial; and even when a judgment is under appeal. Unlike an ordinary settlement involving individual parties, "[i]n all jurisdictions, class action settlements must be approved by the court. A settlement of a class proceeding that is approved by the court binds all class members."⁸¹

As the *Handbook* explains, when assessing a class action settlement "[t]he case law establishes that [it] must fall within a zone of reasonableness. Reasonableness is an objective standard that allows for variation depending upon the subject-matter of the litigation and the nature of the damages for which the settlement is to provide compensation."⁸² Thus, although "[a] settlement need not be perfect," it must none the less "treat all class members equally."⁸³

Fees

Just as class actions require unique procedural machinery because they are designed to advance the claims of "numerous persons who have suffered a common wrong,"⁸⁴ they involve equally unique financial incentives and dynamics. As the *Handbook* points out, "[c]lass proceedings legislation was designed to provide access to justice for groups of plaintiffs with meritorious cases who might otherwise not sue as a result of the economics of traditional litigation. One of the ways that the legislation lowers the economic barriers to litigation is by allowing class counsel to assume a substantial portion of the risk and potential reward."⁸⁵ Accordingly, "[t]he courts have noted that appropriate class actions can be encouraged by rewarding class counsel with premium fees for the risk they have undertaken and the results obtained for the class."⁸⁶

As with settlements, courts must approve class counsel fees in order to protect class members and ensure the good administration of justice. In so doing, the overriding principle "is that any fee payable must be 'fair and reasonable' in the circumstances. This is regardless of the method of calculating fees (e.g., as a percentage of class recovery or by applying a multiplier to class counsel's recorded time) or the source of the payment (e.g., from the recovery for the class or payable separately by the defendants)."⁸⁷

In the context of a fee-approval hearing, "[c]lass counsel bears the onus of establishing that its proposed fee is justified and should be approved by the court as fair and reasonable."⁸⁸

Costs

An important practical consideration for parties and their counsel is the question of costs. This is particularly true when it comes to class actions. In effect, as outlined in the *Handbook*, "[p]rior to the enactment of class proceedings legislation in the common law provinces, the [Ontario Law Reform Commission] delivered a comprehensive report recommending the introduction of a class proceedings regime. Partly in response to concerns that costs consequences could lead to prohibitive access to justice issues, the report provided a number of recommendations regarding costs."⁸⁹ Among these recommendations were "the establishment of limits and tariffs, or even the abrogation of the ordinary costs rule (*i.e.*, the 'loser pays' rule) in favour of a general rule that partial indemnity costs should not be awarded at the certification and common issues stages of the class proceedings."⁹⁰ Despite these recommendations, they "were not universally adopted by the provinces, creating so-called 'costs' and 'no-costs' jurisdictions."⁹¹

More specifically, "[c]osts rules in class proceedings vary by jurisdiction. British Columbia, Manitoba, Newfoundland and Labrador and the Federal Court, are 'no-costs' jurisdictions. In these jurisdictions, no costs may be awarded against any party to a motion for certification of a class proceeding, or to an appeal from a class proceeding ..."⁹² Yet "[i]n Alberta, New Brunswick, Nova Scotia, Ontario, Quebec and Saskatchewan, the costs rules that apply to civil proceedings also apply to class actions."⁹³ In Québec, however, there are virtually no costs at the authorization stage of the proceeding.

To quote Sir Winston Churchill, the rich tapestry of Canadian class actions, with their tailored rules, exceptions, and complexities, sometimes seem "like a riddle, wrapped in a mystery, inside an enigma." Hence the need for a non-nonsense handbook to cast light on a nebulous - but increasingly important - area of the law.

VI. Conclusion - Why the *Handbook* Belongs on Your Bookshelf

The bookshelves of a Canadian class action practitioner will likely include annotated statutes, loose-leaf binders, textbooks, case books and law reviews. They should now certainly include *The Class Actions Handbook* as well. Not only is it a recent publication that captures the most relevant class action authority, but it is an authentically multi-jurisdictional work that does not give short shrift to any Canadian jurisdiction, including (most notably) the civilian province of Québec. Equally important, the *Handbook* is written in clear, concise prose that is accessible to the busy lawyer in need of assistance. It also includes useful appendices containing sample class definitions and common issues and the 2020 amendments to the Ontario *CPA*. More than a tool for practitioners, the *Handbook* is an essential resource for all jurists, whether they be law students, legal scholars or judges. Those with an interest in class actions have a good reason to add this useful and engaging book to their collection. Like the class action itself, the *Handbook* will, in its own way, help to ensure access to justice.

CAMERON'S CORNER: Enforcement of Foreign Class Actions Awards in Canada, by Cameron Fiske, Milosevic Fiske LLP⁹⁴

I. Introduction

The purpose of this article is to provide a general overview of the enforcement of class actions awards from foreign jurisdictions in Canada. Given the proximity of Canada to the United States, cross-border businesses and disputes are commonplace. A class action launched in the United States can lead to enforcement proceedings in Canada. The general rules governing the enforcement of foreign judgments applies to the enforcement of foreign class actions awards, albeit with some unique twists. As such, we will explore the general enforcement of foreign judgments in Canada, while also analyzing the factors involved in determining whether to enforce a foreign class actions award.

II. Recognition and Enforcement of Foreign Judgments: Basic Principles

Recognition and enforcement of foreign judgments in Canada is determined primarily by common law principles. However, each province and territory (except for Québec) has enacted legislation providing for the reciprocal enforcement of judgments issued by courts throughout Canada, as well as in certain foreign countries.⁹⁵

The evolution of Canadian law has resulted in adopting a generous and liberal approach to the recognition and enforcement of foreign judgments. In Canada, the basic mandatory requirements for recognition and enforcement of a foreign judgement are: (i) the issuing court has properly established jurisdiction; (ii) the judgment is final and conclusive; and (iii) the judgment is not for a penalty, taxes, or enforcement of a foreign public law.⁹⁶

III. Jurisdiction: A Real and Substantial Connection

The history of the courts' discussion concerning jurisdiction in the context of proceedings to recognize and enforce a foreign judgment can be traced through several decisions of the Supreme Court, commencing in 1990.⁹⁷

In the past, foreign judgments were only enforceable if the foreign court that issued the judgment took jurisdiction in one of two ways: (i) the defendant was present in the jurisdiction; or (ii) the defendant had attorned (or consented) to the foreign court's jurisdiction.⁹⁸

However, the Supreme Court of Canada introduced an additional principle to determine whether a foreign court has exercised its jurisdiction appropriately: where a "real and substantial connection" exists between the foreign court and action's subject matter or its defendants, the foreign judgment should be recognized and enforced.⁹⁹

The traditional criterion of jurisdiction including attornment, agreement to submit to the jurisdiction of the foreign court, and/or evidence of residence and presence in the foreign jurisdiction will increase the foreign court's real and substantial connection to the action or parties.¹⁰⁰ As stated by the Supreme Court of Canada in *Beals v. Saldanha*, "because the defendant has chosen to have his day in court in the foreign forum, no unfairness results from the enforcement of the foreign court's judgment."¹⁰¹

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A case that helps illustrate the concept of a 'real and substantial connection' is that of *Marcus Food Co. v Di Panfilo*.¹⁰² In that case, the applicant which was in the food distribution business, had its principal place of business in the State of Kansas. The respondent was an individual who resided in Toronto, Ontario. The respondent was to act as agent for the applicant for purchases and sales of food products in Ontario.

The case was held to be sufficiently linked to the State of Kansas because the applicant was headquartered in Kansas, and the negotiations with respect to the contract between the two parties had taken place by telephone from the applicant's headquarters. The application judge recognized the Kansas judgment in Ontario as a result of the 'real and substantial connection' of the parties to the jurisdiction of the Kansas court. It should be noted that *Marcus Food* also involved a default judgment. A default judgment is equally as enforceable by a Canadian court as a judgment derived at trial by judge or jury.¹⁰³

IV. Defences to Recognition and Enforcement

In addition to challenging the jurisdiction of the foreign court, defendants are limited to three narrow defences available in the common law to attempt to resist the recognition and enforcement of a foreign judgment: (i) fraud; (ii) denial of natural justice; and (iii) public policy concerns. Importantly, a defendant is not entitled to raise merits-based defences that were subject to adjudication by the foreign court. Once the "real and substantial connection" test is found to apply to a foreign judgment, the court will then examine the scope of the defences available to a defendant in contesting the recognition of such a judgment.¹⁰⁴ These limited defences were established by the common law to guard against potential unfairness in the recognition and enforcement of judgments. but they are narrow in their application.¹⁰⁵

V. Challenges to US Class Action Enforcement in Canada

In *Currie v. McDonald's Restaurants of Canada Ltd.*,¹⁰⁶ the Court of Appeal for Ontario refused to recognize a foreign class action for the purposes of enforcement. The case had been brought in Illinois on behalf of American and international customers of the McDonald's family burger chain. The Court of Appeal set out the test for the recognition of foreign class actions:

- (i) there is a real and substantial connection linking the cause of action to the foreign jurisdiction;
- (ii) the rights of non-resident class members are adequately represented; and
- (iii) non-resident class members are accorded procedural fairness, including adequate notice. In such circumstances, failure of the non-resident class member to opt out of the action may, in the words of the court, "be regarded as a form of passive attornment sufficient to support the jurisdiction of the foreign court."¹⁰⁷

The court held that the Illinois judgment did not meet the test due to the inadequacies in the Notice of Action provided to Canadian residents. Notice to Canadian class members was limited to the publication of an advertisement in some newspapers in Québec, and in a national magazine that had a limited readership base.¹⁰⁸

In *King v. Drabinsky*,¹⁰⁹ the Court of Appeal for Ontario enforced a foreign class action judgment. The case involved a \$36 million judgment in a New York class action against theatre impresario Garth Drabinsky ("Drabinsky") and Myron Gottlieb ("Gottlieb"). The respondents were investors who had brought the class action in New York, a jurisdiction where the appellants had conducted business through the company, Livent Inc. The class action alleged that the appellants had defrauded Livent Inc. and rendered it insolvent. The Ontario Court of Appeal held that regardless of ongoing criminal proceedings against the appellants, they had chosen to conduct business in New York, and had registered the company in the United States.¹¹⁰ The principle of comity required that the New York judgment be recognized in Ontario, even if Drabinsky and Gottlieb had chosen not to testify in the American class action out of fear that it could harm their defence in their criminal case.¹¹¹

VI. Concluding Remarks

While Canadian courts are generally receptive to the enforcement of foreign class actions judgments, especially American ones, enforcement is not a certainty. The Supreme Court of Canada has held that the enforcing court must ensure that the defendant was granted a fair process in the foreign court. A fair process is one that

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reasonably guarantees basic procedural safeguards-such as judicial independence, and fair ethical rules governing the participants in the judicial system.¹¹² Importantly, the defence of natural justice is restricted to the form of the foreign procedure, to due process, and not to the merits of the case.¹¹³ However, as is set out in *Currie*, foreign class actions that have not provided adequate notice to non-resident claimants will not be enforced in Canada.

- 1 Michael Eizenga, *The Class Actions Handbook* (Toronto: LexisNexis, 2022) at 1
- 2 *Ibid* at ix (Preface).
- 3 Jessica Lam, Alysha Li and Jacob Webster, "P.E.I. Adopts Ontario Class Action Model in New Legislation:" <https://www.mondaq.com/canada/trials-appeals-compensation/1176778/pei-adopts-ontario-class-action-model-in-new-legislation>
- 4 [S.O. 1992, c 6](#) [Ontario CPA].
- 5 S.O. 2020, c. 11.
- 6 Ministère de la Justice du Québec, *Consultation Publique: Perspectives de réforme de l'action collective au Québec* (Québec City: April 2021).
- 7 *Western Canadian Shopping Centres v. Dutton*, [\[2001\] 2 SCR 534](#) at para. 26 [*Western Canadian Shopping Centres*].
- 8 *Ibid*.
- 9 Law Commission of Ontario, *Class Actions: Objectives, Experiences and Reforms: Final Report* (Toronto: July 2019) at 14 [LCO Report].
- 10 *Western Canadian Shopping Centres Inc. v. Dutton*, [\[2001\] 2 SCR 534](#) at para. 33.
- 11 *Western Canadian Shopping Centres Inc. v. Dutton*, [\[2001\] 2 SCR 534](#) at para. 34.
- 12 *King & Dawson v. Government of PEI*, [2019 PESC 27](#); *King & Dawson v. Government of PEI*, [2021 PESC 46](#).
- 13 Michael Eizenga, *The Class Actions Handbook* (Toronto: LexisNexis, 2022) at ix (Preface).
- 14 Michael Eizenga, *The Class Actions Handbook* (Toronto: LexisNexis, 2022) at ix (Preface).
- 15 Michael Eizenga, *The Class Actions Handbook* (Toronto: LexisNexis, 2022) at ix (Preface).
- 16 Michael Eizenga, *The Class Actions Handbook* (Toronto: LexisNexis, 2022) at ix (Preface).
- 17 M. Bastarache, "The Role of Academics and Legal Theory in Judicial Decision-Making" [\(1999\) 37 Alta. L. Rev. 739](#).
- 18 M. Bastarache, "The Role of Academics and Legal Theory in Judicial Decision-Making" [\(1999\) 37 Alta. L. Rev. 739](#).
- 19 [\[2011\] 3 SCR 45](#).
- 20 [\[2019\] 2 SCR 144](#).
- 21 [2020 SCC 19](#).
- 22 Michael A. Eizenga, Michael J. Peerless, John E. Callaghan, Ranjan Agarwal, *Class Actions Law and Practice, 2nd Edition* (Toronto: LexisNexis, 2008).
- 23 [\[2001\] 3 SCR 158](#) [*Hollick*].
- 24 [\[2013\] 3 SCR 477](#).
- 25 [\[2013\] 3 SCR 545](#)
- 26 [2019] 3 SCR 295.
- 27 <https://www.warchild.ca/>
- 28 Michael Eizenga, *The Class Actions Handbook* (Toronto: LexisNexis, 2022) at 2.
- 29 Michael Eizenga, *The Class Actions Handbook* (Toronto: LexisNexis, 2022) at 2.
- 30 *L'Oratoire Saint-Joseph du Mont-Royal v. J.J.*, [2019] 2 SCR 831 at para. 8.

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- 31 <https://webarchive.nationalarchives.gov.uk/ukgwa/20060214041452/http://www.dca.gov.uk/civil/final/overview.htm> (Sub-section 1(2)).
- 32 [CQLR c. C-25.01](#) [CCP].
- 33 Remarks of the Right Honourable Richard Wagner, P.C., Chief Justice of Canada, "Access to Justice: A Societal Imperative:" <https://www.scc-csc.ca/judges-juges/spe-dis/rw-2018-10-04-eng.aspx>
- 34 Michael Eizenga, *The Class Actions Handbook* (Toronto: LexisNexis, 2022) at 3.
- 35 Michael Eizenga, *The Class Actions Handbook* (Toronto: LexisNexis, 2022) at 4.
- 36 *30 & 31 Victoria, c. 3 (U.K.)* at Sub-section 92(13).
- 37 Michael Eizenga, *The Class Actions Handbook* (Toronto: LexisNexis, 2022) at 4.
- 38 *Federal Courts Act, RSC 1985, c F-7* at s. 50.1.
- 39 Michael Eizenga, *The Class Actions Handbook* (Toronto: LexisNexis, 2022) at 4..
- 40 [\[2014\] 1 SCR 87](#).
- 41 Michael Eizenga, *The Class Actions Handbook* (Toronto: LexisNexis, 2022) at 15.
- 42 Michael Eizenga, *The Class Actions Handbook* (Toronto: LexisNexis, 2022) at 15, 16.
- 43 Michael Eizenga, *The Class Actions Handbook* (Toronto: LexisNexis, 2022) at 16.
- 44 Michael Eizenga, *The Class Actions Handbook* (Toronto: LexisNexis, 2022) at 32.
- 45 Michael Eizenga, *The Class Actions Handbook* (Toronto: LexisNexis, 2022) at 32, 33.
- 46 Jasminka Kalajdzic, "One Step Forward, Two Steps Back: Commentary on Proposed Changes to Ontario's Class Proceedings Act" (December 10, 2019): <https://classactionclinic.com/2019/12/10/one-step-forward-two-steps-back-commentary-on-proposed-changes-to-ontarios-class-proceedings-act/>
- 47 Michael Eizenga, *The Class Actions Handbook* (Toronto: LexisNexis, 2022) at 39.
- 48 Michael Eizenga, *The Class Actions Handbook* (Toronto: LexisNexis, 2022) at 39.
- 49 Michael Eizenga, *The Class Actions Handbook* (Toronto: LexisNexis, 2022) at 41.
- 50 Michael Eizenga, *The Class Actions Handbook* (Toronto: LexisNexis, 2022) at 41.
- 51 Michael Eizenga, *The Class Actions Handbook* (Toronto: LexisNexis, 2022) at 43.
- 52 Michael Eizenga, *The Class Actions Handbook* (Toronto: LexisNexis, 2022) at 45.
- 53 Michael Eizenga, *The Class Actions Handbook* (Toronto: LexisNexis, 2022) at 45.
- 54 Michael Eizenga, *The Class Actions Handbook* (Toronto: LexisNexis, 2022) at 47, 48.
- 55 Michael Eizenga, *The Class Actions Handbook* (Toronto: LexisNexis, 2022) at 51.
- 56 Michael Eizenga, *The Class Actions Handbook* (Toronto: LexisNexis, 2022) at 52.
- 57 Jasminka Kalajdzic, "One Step Forward, Two Steps Back: Commentary on Proposed Changes to Ontario's Class Proceedings Act" (December 10, 2019): <https://classactionclinic.com/2019/12/10/one-step-forward-two-steps-back-commentary-on-proposed-changes-to-ontarios-class-proceedings-act/>
- 58 Michael Eizenga, *The Class Actions Handbook* (Toronto: LexisNexis, 2022) at 53.
- 59 Michael Eizenga, *The Class Actions Handbook* (Toronto: LexisNexis, 2022) at 53.
- 60 [CQLR c C-25.01](#).
- 61 Michael Eizenga, *The Class Actions Handbook* (Toronto: LexisNexis, 2022) at 85.
- 62 Michael Eizenga, *The Class Actions Handbook* (Toronto: LexisNexis, 2022) at 56.
- 63 *Western Canadian Shopping Centres Inc. v. Dutton*, [\[2001\] 2 SCR 534](#) at para. 41.
- 64 Michael Eizenga, *The Class Actions Handbook* (Toronto: LexisNexis, 2022) at 77.

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- 65 Michael Eizenga, *The Class Actions Handbook* (Toronto: LexisNexis, 2022) at 77.
- 66 Michael Eizenga, *The Class Actions Handbook* (Toronto: LexisNexis, 2022) at 78.
- 67 Michael Eizenga, *The Class Actions Handbook* (Toronto: LexisNexis, 2022) at 83.
- 68 <https://www.jpml.uscourts.gov/>
- 69 *Canada Post Corp. v. Lépine*, [\[2009\] 1 SCR 549](#) at para. 57 [*Lépine*].
- 70 *Canada Post Corp. v. Lépine*, [\[2009\] 1 SCR 549](#) at para. 57
- 71 Michael Eizenga, *The Class Actions Handbook* (Toronto: LexisNexis, 2022) at 85.
- 72 Michael Eizenga, *The Class Actions Handbook* (Toronto: LexisNexis, 2022) at 85.
- 73 Michael Eizenga, *The Class Actions Handbook* (Toronto: LexisNexis, 2022) at 89
- 74 Michael Eizenga, *The Class Actions Handbook* (Toronto: LexisNexis, 2022) at 89.
- 75 Michael Eizenga, *The Class Actions Handbook* (Toronto: LexisNexis, 2022) at 96.
- 76 Michael Eizenga, *The Class Actions Handbook* (Toronto: LexisNexis, 2022) at 96.
- 77 Michael Eizenga, *The Class Actions Handbook* (Toronto: LexisNexis, 2022) at 97.
- 78 Michael Eizenga, *The Class Actions Handbook* (Toronto: LexisNexis, 2022) at 103.
- 79 Michael Eizenga, *The Class Actions Handbook* (Toronto: LexisNexis, 2022) at 103.
- 80 *Canada Post Corp. v. Lépine*, [2009 SCC 16](#) (CanLII), [\[2009\] 1 SCR 549](#) at para. 42.
- 81 Michael Eizenga, *The Class Actions Handbook* (Toronto: LexisNexis, 2022) at 132.
- 82 Michael Eizenga, *The Class Actions Handbook* (Toronto: LexisNexis, 2022) at 133.
- 83 Michael Eizenga, *The Class Actions Handbook* (Toronto: LexisNexis, 2022) at 133.
- 84 Michael Eizenga, *The Class Actions Handbook* (Toronto: LexisNexis, 2022) at 1.
- 85 Michael Eizenga, *The Class Actions Handbook* (Toronto: LexisNexis, 2022) at 141.
- 86 Michael Eizenga, *The Class Actions Handbook* (Toronto: LexisNexis, 2022) at 141.
- 87 Michael Eizenga, *The Class Actions Handbook* (Toronto: LexisNexis, 2022) at 142.
- 88 Michael Eizenga, *The Class Actions Handbook* (Toronto: LexisNexis, 2022) at 142.
- 89 Michael Eizenga, *The Class Actions Handbook* (Toronto: LexisNexis, 2022) at 157.
- 90 Michael Eizenga, *The Class Actions Handbook* (Toronto: LexisNexis, 2022) at 157.
- 91 Michael Eizenga, *The Class Actions Handbook* (Toronto: LexisNexis, 2022) at 157.
- 92 Michael Eizenga, *The Class Actions Handbook* (Toronto: LexisNexis, 2022) at 157.
- 93 Michael Eizenga, *The Class Actions Handbook* (Toronto: LexisNexis, 2022) at 158.
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- 95 See for example: Ontario: *Reciprocal Enforcement of Judgments Act*, [RSO 1990, c R5](#) and *Reciprocal Enforcement of Judgments (UK) Act*, [RSO 1990, c R6](#); Alberta: *Reciprocal Enforcement of Judgments Act*, [RSA 2000, c R6](#); British Columbia: *Court Order Enforcement Act*, RSBC 1996, c 78.
- 96 *Morguard Investments Ltd. v De Savoye*, [\[1990\] 3 SCR 1077](#); *Beals v Saldanha*, [\[2003\] 3 S.C.R. 416](#), [2003 SCC 72](#); *Pro Swing Inc. v ELTA Golf Inc.*, [2006 SCC 52](#); *Van Breda v Village Resorts Ltd.*, [2012 SCC 17](#); and most recently, *Chevron Corp. v Yaiguaje*, [2015 SCC 42](#).
- 97 *Morguard Investments Ltd. v De Savoye*, [\[1990\] 3 SCR 1077](#); *Beals v Saldanha*, [\[2003\] 3 S.C.R. 416](#), [2003 SCC 72](#); *Pro Swing Inc. v ELTA Golf Inc.*, [2006 SCC 52](#); *Van Breda v Village Resorts Ltd.*, [2012 SCC 17](#); and most recently, *Chevron Corp. v Yaiguaje*, [2015 SCC 42](#).

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- 98 *Morguard Investments Ltd. v. De Savoye* [[1990\] 3 SCR 1077](#).
- 99 [[2003\] 3 S.C.R. 416](#), [2003 SCC 72](#) at para 29.
- 100 *Beals v Saldanha*, [[2003\] 3 S.C.R. 416](#), [2003 SCC 72](#) at para 37.
- 101 *Beals v Saldanha*, [[2003\] 3 S.C.R. 416](#), [2003 SCC 72](#) at para 208.
- 102 [2012 ONSC 1505](#) [*Marcus Food*].
- 103 *Marcus Food Co. v Robert DiPanfilo*, [2012 ONSC 1505](#).
- 104 *Beals v Saldanha*, [[2003\] 3 S.C.R. 416](#), [2003 SCC 72](#) at para 39.
- 105 *Beals v Saldanha*, [[2003\] 3 S.C.R. 416](#), [2003 SCC 72](#) at para 41.
- 106 [2005 CanLII 3360](#) (ON CA).
- 107 *Currie v. McDonald's Restaurants of Canada Ltd.*, [2005 CanLII 3360](#) (ON CA) at para. 30 [*Currie*].
- 108 *Currie v. McDonald's Restaurants of Canada Ltd.*, [2005 CanLII 3360](#) (ON CA) at para. 37.
- 109 [2008 ONCA 566](#).
- 110 *King v. Drabinsky*, [2008 ONCA 566](#) at para. 43-44.
- 111 *King v. Drabinsky*, [2008 ONCA 566](#) at para. 4, 5, 43 and 44.
- 112 *Beals v Saldanha*, [[2003\] 3 S.C.R. 416](#), [2003 SCC 72](#) at paras 59-62.
- 113 *Beals v Saldanha*, [[2003\] 3 S.C.R. 416](#), [2003 SCC 72](#) at para 64.