

Canadian Law

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I. 2003 Developments in Canadian Class Actions Law

Canadian class action jurisprudence remains in a developmental phase. In fact, Ontario, Canada's most populous, and one might argue, litigious province, is only now embarking on its second decade of class action legislation. At the time class action legislation was passed in Ontario, its drafters had expressly adopted a regime thought to be more hospitable to the certification of class actions than had previously been exhibited for many years in the United States. Now, ten years later, it is apparent that the challenges associated with successfully managing a class proceeding remain substantial, and any smooth path to success for plaintiffs remains illusive. The past year has been another challenging period for plaintiffs.

In 2001, the Supreme Court of Canada appeared to endorse a liberal environment for class actions in a series of cases now known as the class action trilogy: *Western Canadian Shopping Centre, Inc. v. Dutton*,¹ *Hollick v. Toronto*,² and *Rumley v. British Columbia*.³ Given Chief Justice McLachlin's comment in *Hollick* that "it is essential . . . that courts not take an overly restrictive approach to the legislation, but rather interpret the Act in a way that gives full effect to the benefits foreseen by the drafters," one might have expected more success for plaintiffs since the release of these judgments.⁴ However, the courts (particularly in Ontario) appear to have not received the message.

Cases where plaintiffs have experienced little or no success have dealt with a variety of issues from price fixing to product liability. The class actions have failed for reasons varying

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1. [2001] 2 S.C.R. 534.

2. [2001] 3 S.C.R. 158.

3. [2001] 3 S.C.R. 184.

4. *Id.*

from evidentiary shortcomings to doubts about the extent to which the class proceeding would be the preferable procedure for a resolution of common issues raised in the action. Correctly, these decisions reflect the fact that many cases that are ostensibly commenced to address the grievances of a group of individuals are not good candidates for certification as a class proceeding.

In *Hughes v. Sunbeam Corp. (Canada)*,⁵ a proposed class of approximately ten million Canadians complained of allegedly defective smoke detectors against the manufacturers and a third party tester and endorser of the product. The court restricted the claim to include only the defendant manufacturer for whom the representative plaintiff had a valid cause of action. It also found the facts pleaded against the third party tester and endorser failed to disclose a reasonable cause of action with respect to the claims for economic loss on the basis that a duty of care was not owed to the plaintiff class in the circumstances.

In *Chadha v. Bayer, Inc.*,⁶ Ontario's Court of Appeal upheld the decision of a majority of the Divisional Court which overturned the motions judge's order to certify a class proceeding in an alleged price fixing case. This case related to allegations of price fixing with respect to the iron oxide component of brick. No evidence was provided by the plaintiffs to demonstrate that the alleged cost increases incurred by builders to purchase the material were passed on to the buyer, and no proposal was placed before the court to explain how such evidence could be obtained. In coming to its decision, the court made reference to a number of American decisions pertaining to the impact on indirect purchasers in assessing the motion judge's decision to decline to follow the *Illinois Brick* line of reasoning from the United States.

Canadian courts have experienced the same spate of vanishing premium insurance suits as in the United States. In two companion appeal decisions,⁷ the Ontario Court of Appeal upheld the dismissal of certification motions on the basis that a necessary inquiry into individual issues would significantly increase the time, costs, and complexity of the proceedings. Additionally, the courts found that the class proceeding would not be the preferable procedure for the resolution of any common issues that might exist.

Plaintiffs were similarly unsuccessful on appeal in *M.C.C. v. Canada (Attorney General)*.⁸ The claim sought damages on behalf of approximately 1,400 residential school students and included claims for breach of fiduciary duty, negligence, assault, battery and breach of aboriginal and treaty rights, which were described as a "sustained, systematic program of physical, emotional, spiritual and cultural abuse."⁹ On appeal, the motions judge and a majority of the Divisional Court dismissed the motion for certification on the basis that individual proceedings would be inevitable to deal with the numerous allegations of different types of abuse by different perpetrators in differing circumstances, resulting in different damage claims, arising from experiences before and after attendance by the students at the school.

Canadian class proceedings have rarely been brought successfully in the securities field. Recently, in *Menegon v. Philip Services Corp.*,¹⁰ the Court of Appeal affirmed a lower court

5. [2002] 61 O.R.3d 433.

6. [2003] 63 O.R.3d 22.

7. *Williams v. Mut. Life Assurance Co.*, [2001] 510 R.3d 54; *Zicherman v. Equitable Life Ins. Co. of Can.*, [2003] 226 D.L.R.4th 131.

8. [2003] O.J. No. 2698.

9. *Id.*

10. [2003] O.J. No. 353.

judgment dismissing a proposed class proceeding by shareholders of an insolvent company against the company and its auditors and underwriters. The plaintiff had purchased his shares on the secondary market. Significantly, the court found that a duty of care owed by professionals such as the auditors and the professional underwriters to the investing public must be limited. In the circumstances, no special relationship existed that could give rise to a duty of care owed by these professionals.

Much criticism has been levied on the reluctance of our legislators to amend our securities laws to allow for more access to the courts by the investing public. Recently, amendments have been proposed to the Ontario Securities Act¹¹ that would recognize a new civil right of action established, particularly in respect of secondary market distribution. At common law, the need to establish reliance and causation with respect to claims for misrepresentation has been a significant barrier to establishing a cause of action. The major principle of the proposed legislation is the establishment of the doctrine of deemed reliance. These amendments have yet to be proclaimed in force and at the time of this writing, it is not known when such proclamation may occur.

A. CLASS ACTION LAW REFORM IN QUEBEC

As of January 1, 2003, amendments to class action procedure in Quebec have created a particularly plaintiff-friendly environment. Of note, a petitioner no longer has to file an affidavit in support of their motion; an application for authorization can now only be contested orally; and, respondents have a reduced right to adduce any evidence at the hearing.

A number of challenges have been made to these amendments in respect of issues relating to a respondent's ability to provide a full answer or defense and similar "due process" arguments. It remains to be seen as to whether the Quebec amendments will withstand challenge on these grounds.

B. JURISDICTION ISSUES

Case law broadly supports the certification of class actions on a national or Canada-wide basis. In *Segnitz v. Royal & Sun Alliance Insurance Co. of Canada*,¹² an action purportedly to be brought on behalf of certain policyholders of the defendant across Canada was stayed with respect to out-of-province class members. The court found that relevant statutory provisions in other provinces materially differed from those in Ontario where the claim had been brought and that order and fairness would not be served by assuming jurisdiction with respect to the claims of out-of-province class members.

C. CONCLUSION

This section has highlighted the frequent denial of class action status notwithstanding the perceived broad nature of our legislation and both judicial and statutory steps to provide greater access to this procedural tool. Of course, a number of Canadian class proceedings have and will continue to be certified. In the main, most of the difficulties come down to

11. Bill 198, Keeping The Promise for a Strong Economy (Budget Measures) Sess., 37th Leg., Ontario, 2002.

12. [2003] C.C.L.I.4th 144.

fundamentals: the pleadings must be carefully and skilfully drafted; potential representative plaintiffs must ensure that their own factual circumstances and causes of action are sound; adequate evidence to meet the test of certification set out in the legislation must be met; and greater consideration must be given by plaintiffs to the process of assessing the suitability of an action for certification as a class proceeding.

An obvious case in point is the very recent denial of certification of Canada's first motion for certification in a tobacco complaint. The court held that the claim was too broad and did not meet the requirements for certification. The court stated, "In essence, the plaintiffs seek certification of an amorphous group of people comprised of individuals of different ages, covering different decades, who knew different things concerning the risk inherent in smoking and who began to smoke for different reasons."¹³ The court added, "[t]he only apparent common element in this action is that all of the proposed class members allegedly smoked cigarettes at one time or another."¹⁴

II. 2003 Developments in Canadian Health Law

The year 2003 was a year of great consequence for health law in Canada. Several dramatic issues came to the fore in the courts, before the legislators, and in the health care community. The most notorious event of the year was the emergence of Severe Acute Respiratory Syndrome (SARS). The legal impact of the outbreak was immediately evident in the response of the government and health agencies given the tasks of containing the outbreak. Additionally, the federal legislature introduced and proposed legislation to regulate the use of *in vitro* human embryos for scientific research, assisted human reproduction, the availability and use of marihuana for medicinal purposes, and the production of generic pharmaceuticals for export to developing countries. Noteworthy decisions of the courts included the constitutionality of marihuana legislation, legislation preventing private health care services, and a determination of professional misconduct in the context of cross-border prescription of medication.

A. SARS

In the summer of 2003, SARS emerged in several communities around the world. The World Health Organization reported 8,422 worldwide cases of SARS, resulting in 916 deaths across thirty-one countries.¹⁵ The economic impact of SARS, as estimated by the Canadian Tourism Commission, is that SARS will cost the Canadian economy well over one billion dollars by 2006.¹⁶ In Ontario, the government and health care officials, in an attempt to control the disease, restricted access to hospitals and other locations where the disease could be transferred, restricted access to non-emergency services, and ordered quarantines for all individuals potentially exposed to SARS.¹⁷

13. *Caputo v. Imperial Tobacco Ltd.*, [2004] WL 178789 (Ont. S.C.J.).

14. *Id.*

15. World Health Organization, *Summary Table of SARS Cases by Country, 1 November 2002—7 August 2003*, available at http://www.who.int/csr/sars/country/en/country2003_08_15.pdf.

16. *The Economic Impact of SARS*, CBC News, July 8, 2003, available at <http://www.cbc.ca/news/background/sars/economicimpact.html>.

17. Ontario Ministry of Health and Long Term Care, *SARS Health Update*, at http://www.health.gov.on.ca/english/public/updates/archives/hu_03/hu_sars.html.

In an attempt to understand the cause of SARS and in an effort to help prevent any future outbreaks, the federal Health Minister commissioned the National Advisory Committee on SARS. In October 2003, the committee released a report, which condemned the federal and provincial responses to the crisis, pointing out that an alert system for such an infectious outbreak was ill prepared and slow to inform doctors; that directions from agencies were unclear and came from separate sources; that hospital infection control measures were ineffective; and that a national surveillance system did not exist.¹⁸ The Committee made seventy-five recommendations, including the creation of an organization similar to the U.S. Centers for Disease Control and a national strategy to address the shortage of doctors, nurses, and infection control experts.¹⁹

The Ontario provincial government established two investigations.²⁰ The second provincial investigation led by Dr. David Walker of Queen's University, was charged with highlighting lessons for the future. The interim report of this panel again was critical of the government. The report indicated that political pressure to downplay the disease contributed to key mistakes, which could have helped detect the second SARS outbreak sooner.²¹

B. LEGISLATIVE DEVELOPMENTS

On January 1, 2004, the third phase of the federal Personal Information Protection and Electronic Documents Act²² (PIPEDA) came into force. The legislation endeavors to protect the right to privacy with respect to the personal information of individuals and was initially passed in response to e-commerce concerns and the desire to inspire consumer confidence in e-commerce activities.²³ PIPEDA governs the collection, use, and disclosure of personal information by all organizations in the course of commercial activities, and includes personal health information. The legislation will apply within each Canadian jurisdiction unless the particular provincial or territorial government enacts its own legislation that is deemed substantially similar to the federal legislation. Of the ten provinces and three territories, only Quebec has legislation that has been deemed substantially similar.²⁴

In October 2003, the House of Commons passed Bill C-13, An Act Respecting Assisted Human Reproduction.²⁵ The bill will become law if also passed by the Senate. The bill

18. *SARS Report Urges New Health Agency, More Funds*, CTV News, Oct. 7, 2003, available at http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20031007/sars_report_031007/Canada?s_name=#top.

19. National Advisory Committee on SARS and Public Health, *Learning from SARS: A Renewal of Public Health in Canada*, available at <http://www.hc-sc.gc.ca/english/pdf/sars/sars-e.pdf> (last visited Sept. 10, 2004).

20. Justice Archie Campbell was appointed to head the SARS Commission, under § 78 of the Health Protection and Promotion Act, R.S.O. 1990, ch. H.7 (Can.). The report of this commission is not expected until late 2004.

21. *Panel calls for major overhaul in wake of SARS*, CTV News, Dec. 16, 2003, available at http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20031216/sars_report_031215.html.

22. Personal Information Protection and Electronic Documents Act, S.C. 2000, ch. 5 (Can.).

23. Mark J. Wong, *Impact Of The Personal Information Protection And Electronic Documents Act (PIPEDA) on Charitable and Non-Profit Organizations*, CHARITY LAW BULLETIN no. 28, Nov. 29, 2003, available at <http://www.carters.ca/pub/bulletin/charity/2003/chylb28.htm>.

24. The Governor in Council made the order deeming the Quebec legislation, An Act Respecting The Protection Of Personal Information In The Private Sector, substantially similar to PIPEDA at SOR/2003-374 on November 19, 2003.

25. Bill C-13, An Act Respecting Assisted Human Reproduction, 37th Parliament—2nd Session, available at <http://www.parl.gc.ca/LEGISINFO/index.asp>.

prohibits human cloning, sex selection, the buying and selling of human eggs and sperm, and commercial surrogacy. The bill also regulates the use of *in vitro* human embryos for stem-cell research, and provides for the creation of the Assisted Human Reproduction Agency of Canada.

In November 2003, Bill C-56, An Act to Amend the Patent Act and the Food and Drugs Act²⁶ was introduced. This bill would amend the Patent Act to allow generic pharmaceutical companies to produce low cost medicines for export to developing and least developed countries with public health problems. Although not solely aimed at combating the African AIDS epidemic, the bill was introduced following an appeal by Stephen Lewis, the U.N. envoy for AIDS to the G-7 nations. The bill did not pass before Parliament ended in November; however, Prime Minister Martin had indicated a commitment to re-introduce the legislation during the October 2003 session of Parliament.²⁷

Additionally in 2003, the federal government struggled with how to implement an exemption from criminal conviction for the possession and use of marihuana for medicinal purposes. The federal government in July 2003 implemented the Marihuana Exemption (Food and Drugs Act) Regulations.²⁸ This very short regulation was enacted the day before a court declared invalidity over the legislation was to take effect, and provides that "marihuana produced under contract with Her Majesty in right of Canada is exempt from the application of the Food and Drugs Act and the regulations made under it."²⁹

C. COURT DEVELOPMENTS

The debate over private health care came before the courts in 2003. The right of a citizen to pay for private health care services is being sought in *Chaoulli et al. v. Procureur général du Québec*.³⁰ The Supreme Court of Canada granted leave to appeal in May 2003, following the applicant's failure in lower courts to challenge the constitutionality of federal and provincial laws that prohibited patients from accessing private health services. Mr. Zellotus waited in pain for more than a year for hip replacement surgery and contends that prohibiting patients from receiving private treatment in a medically desirable amount of time places patients lives in danger, and the government prohibition violates section 7 of the Canadian Charter of Rights and Freedoms which guarantees the right to "life, liberty and the security of person."³¹ Advocates for the applicants have pointed out that it seems peculiar that citizens of a free country cannot spend their own money on the legal medical services of their choice.³²

Another issue that came before the courts was that of privilege for quality assurance documents prepared at a hospital. The promotion of patient safety has become a matter of increasing focus in both Canada and the United States. A recent Hastings Center Report

26. Bill C-56, An Act to Amend the Patent Act and the Food and Drugs Act, available at <http://www.parl.gc.ca/LEGISINFO/index.asp>.

27. *Canada Commits to Making Generic AIDS Drugs Available*, CBC News, Oct. 1, 2003, available at <http://www.cbc.ca/storyview/CBC/2003/10/01/aids031001>.

28. Marihuana Exemption (Food and Drugs Act) Regulations, SOR/2003-261 (Can.).

29. *Id.*

30. *Chaoulli et al. v. Procureur général du Québec*, [2002] 116 A.C.W.S.3d 266.

31. CAN. CONST. (Constitution Act, 1982) pt.I (Canadian Charter of Rights and Freedoms) § 7.

32. *The Freedom to Choose For-Profit Care*, NAT'L Post, May 26, 2003.

indicates that as many as 98,000 Americans die each year as a result of medical error.³³ The decision in *Steep (Litigation Guardian of) v. Scott*,³⁴ is therefore of significance. In *Steep*, a medical malpractice action arose from the birth of the infant plaintiff with severe brain damage. The plaintiffs moved for the production of two “quality assurance reports,” or “peer review evaluations,” and the defendants refused production on the ground that the memoranda were privileged under the common law.³⁵ The Ontario Superior Court of Justice held that the memoranda did not fall into an established category of common law privilege; however, the evidence supported a common law privilege on a case-by-case basis. The court held that it is in the public interest for hospital care and services to be effectively assessed and improved to ensure that they are constantly improving, and that the injury that would result from the disclosure of the communication was greater than the benefit gained for the correct disposal of the litigation.³⁶

Finally, the issue of importation of pharmaceuticals from Canada has become topical in the United States in 2003. Americans, such as Senator Byron Dorgan, have noted that if all drugs in the United States were sold at Canadian prices, American consumers would save up to \$38 billion a year.³⁷ However, while the United States passes legislation dealing with the importation of pharmaceuticals,³⁸ debate has emerged in Canada about the impact of cross-border importation on the Canadian consumer. Concern has developed over the impact of importation on the long-term supply of Canadian pharmaceuticals, dangers due to differences of nomenclature, the long-term price impact for Canadian consumers, as well as the ethical and professional responsibility of Canadian physicians and pharmacists who prescribe and supply drugs to patients that they may have never personally examined.³⁹ While the legislators have remained silent, governing bodies across the country have indicated that a lack of physical examination will often amount to professional misconduct.⁴⁰ In Ontario, a number of investigations have been commenced against physicians,⁴¹ and in *Loiselle*,⁴² the New Brunswick Court of Queen’s Bench agreed with the College of Physicians that the risk to public health was sufficient to justify the immediate suspension of the physician’s licence to practice.

33. Virginia A. Sharpe, *Promoting Patient Safety: An Ethical Basis for Policy Deliberation*, Hastings Center Report (July-Aug. 2003) S3.

34. *Steep (Litig. Guardian of) v. Scott*, [2002] 62 O.R.3d 173.

35. *Id.*

36. *Id.* at 175.

37. CNN, *Senate votes to allow drug importation from Canada*, June 20, 2003, available at <http://edition.cnn.com/2003/ALLPOLITICS/06/20/medicare.senate/index.html>.

38. Medicare Prescription Drug and Modernization Act of 2003, H.R. 1 and the Prescription Drug and Medicare Improvement Act of 2003, S. 1 (Can.).

39. Fraleigh, M.B. & L.J. Kucis, *Cross-Border Prescribing and Internet Pharmacies: Legal Issues for Ontario Physicians and Pharmacists*, Ontario Bar Association, It’s in you! Regulation and Hot Topics in the Pharmaceutical, Medical Device, Food and Alternative Therapies Industries (2002) 8.

40. In January 2003, the Ontario College of Pharmacists released a policy statement on the topic of out of country prescriptions, which indicated that “[p]harmacists shall not facilitate or enter into agreements with physicians for the purposes of co-signing or rewriting prescriptions for out-of-country patients.” See Policy Statement, *New Policy Respecting Out of Country Prescription Approved*, PHARMACY CONNECTION (Jan.-Feb. 2003).

41. *Supra* note 37, at 13.

42. *Loiselle v. Coll. of Physicians and Surgeons of New Brunswick* [2003] N.B.J No. 111.

III. 2003 Developments in Canadian Privacy Law*

Since January 1, 2001, the Personal Information Protection and Electronic Documents Act⁴³ (PIPEDA) has applied to the collection, use, and disclosure of personal information in the course of commercial activities, by federal works, undertakings, and businesses, and to the personal information of employees of those organizations.⁴⁴ On January 1, 2004, PIPEDA's application was broadened to include the collection, use, and disclosure of personal information, in the course of commercial activities, by provincial organizations,⁴⁵ within provinces that have not passed privacy legislation that is substantially similar to PIPEDA.⁴⁶

According to the Department of Industry, substantially similar legislation will be expected to: (1) incorporate the privacy principles that are found in Schedule 1 of PIPEDA;⁴⁷ (2) provide for an independent and effective oversight and redress mechanism with powers to investigate; and (3) restrict the collection, use, and disclosure of personal information to purposes that are appropriate or legitimate.⁴⁸

A. THE PROVINCES

Since 1994, An Act Respecting the Protection of Personal Information in the Private Sector⁴⁹ (Québec Act) has applied to any person carrying on an enterprise in the Province of Québec.⁵⁰ In November 2003, the federal government determined that the Québec Act was substantially similar to PIPEDA.⁵¹ In December 2003, the Government of Québec challenged PIPEDA⁵² on the grounds that:

- It is outside the legislative competence conferred on the Parliament of Canada by the Constitution Act, 1867;
- The exemption process granting the federal government the right to review the Québec Act is incompatible with the principles of Canadian federalism; and
- A challenge of PIPEDA will allow Québec to ensure that its jurisdiction over privacy and personal information is respected.⁵³

It is expected that the Court of Appeal of Québec will hear this matter early in 2004.

In order to avoid the application of PIPEDA to the intra-provincial collection, use, and disclosure of personal information by provincial organizations, both Alberta and British

*This is an overview of selected highlights and is not intended to be a comprehensive summary of the 2003 developments. © Karen A. Spector, January 2004.

43. S.C. 2000, ch.5.

44. On January 1, 2002, PIPEDA also applied to personal health information (subsection 30(1.1)).

45. Subsection 30(2) PIPEDA does not apply to the personal information of employees of organizations governed by provincial legislation with respect to labour relations.

46. Clause 27(2)(b).

47. The principles are: accountability, identifying purposes, consent, limiting collection, use and disclosure, retention, accuracy, safeguards, openness, individual access, and challenging compliance.

48. *Canada Gazette* part I, Aug. 3, 2002, at 2385–2389.

49. R.S.Q., ch. P-39.1.

50. "The carrying on by one or more persons of an organized economic activity, whether or not it is commercial in nature . . . constitutes the carrying on of an enterprise." Article 1525 of the Civil Code of Quebec.

51. Organizations in the Province of Quebec Exemption Order, P.C. 2003-1842, Nov. 19, 2003.

52. The challenge is only to part I of PIPEDA, which deals with the protection of personal information.

53. From Order in Council of the Government of Quebec, No. 1368-2003.

Columbia passed private-sector privacy legislation, which came into force on January 1, 2004.⁵⁴ The federal government has not yet determined whether these new provincial privacy laws are substantially similar to PIPEDA.

B. THE PRIVACY COMMISSIONER OF CANADA'S CASE SUMMARIES

Under PIPEDA, the Privacy Commissioner of Canada is required to prepare a report that contains findings and recommendations within one year after a complaint is filed or is initiated by the Commissioner.⁵⁵ Generally, the Commissioner posts anonymized, summary versions of the reports, called Case Summaries, at www.privcom.gc.ca. During 2003, the Commissioner issued approximately 110 Case Summaries⁵⁶ dealing with alleged breaches of PIPEDA by banks and credit agencies; telecommunication, railway, and trucking companies; and airports and airlines. Frequent subjects of the complaint-driven Case Summaries included: disclosures of personal information to third parties without knowledge and consent; failure to identify the purposes for collection; and denial of access to personal information or exceeding the statutory time limits.

C. FIRST HEARING BY THE FEDERAL COURT-TRIAL DIVISION UNDER PIPEDA

Mathew Englander complained to the Commissioner that Telus Communications, Inc. (Telus) was inappropriately charging customers a monthly fee of \$2.00 for opting not to have their personal information published in its white-pages directory and on its own directory assistance Web site.⁵⁷ The Commissioner decided that the complaint was not well-founded. Not satisfied with the Commissioner's finding, Mr. Englander was the first complainant to exercise his rights under PIPEDA to apply to the Federal Court-Trial Division for a hearing.⁵⁸ In June 2003, Mr. Justice Blais determined the following issue: Does PIPEDA restrict Telus from charging a fee for the provision of Non-Published Number Service? Unfortunately for Mr. Englander, he "entirely failed to convince" Mr. Justice Blais that Telus' \$2.00 monthly fee contravened PIPEDA.

D. SOME ADDITIONAL DEVELOPMENTS OF NOTE

In addition to the developments mentioned above:

- In July 2003, the Commissioner withdrew an action to declare the RCMP's video surveillance activities in Kelowna, British Columbia unconstitutional as a violation of the Canadian Charter of Rights and Freedoms.
- In November 2003, a proposed regulatory amendment to PIPEDA was introduced which, if passed, would expand the prescribed "investigative bodies" to include the entities that regulate many Canadian professionals, such as, physicians, lawyers, and accountants.

54. Personal Information Protection Act, S.B.C. 2003, ch. 63 and Personal Information Protection Act, S.A. 2003, ch. P-6.5 (Can.).

55. Subsection 13 (1) and clauses 13 (1) (a)-(d).

56. There is usually a delay of approximately three months between when the decision is issued and the Case Summary is posted.

57. Mr. Englander also complained about a related matter, which is not included in this article.

58. *Englander v. Telus Communications Inc.*, [2003] F.C.T. 705 § 14.

- In December 2003, the Health Information Protection Act, 2003, which applies primarily to the health sector, was introduced into the Ontario Legislature. It is expected to be passed into law in 2004.

IV. 2003 Developments in Canadian Securities Law

The following are the major developments in Canadian securities law which occurred or originated in 2003.

A. FORMATION OF THE CANADIAN PUBLIC ACCOUNTABILITY BOARD

The Canadian Public Accountability Board⁵⁹ (CPAB) was incorporated on April 15, 2003. The CPAB is a joint undertaking of the Canadian federal, provincial, and territorial regulators along with the Canadian Institute of Chartered Accountants. Accounting firms that wish to provide audit services to reporting issuers (public companies) in Canada must be registered and in good standing with the CPAB. The CPAB will monitor the practices of accounting firms in Canada, and the CPAB has the authority to impose sanctions and restrictions on accounting firms that do not meet standards established by the CPAB.

As noted below, Canadian reporting issuers may only use accounting firms as auditors if they are registered and in good standing with the CPAB⁶⁰.

B. AMENDMENTS TO THE SECURITIES ACT (ONTARIO)

Amendments to the Securities Act (Ontario) passed in 2002⁶¹ came into force on April 7, 2003.⁶² These amendments permit the Ontario Securities Commission to exercise rule-making authority⁶³ including rules to define auditing standards for issuers' internal controls; rules for audit committees (standards for review, composition, qualifications and independence); rules regarding reporting issuers' internal controls and reporting; rules regarding disclosure controls (to ensure timely and accurate reporting); and rules requiring Chief Executive Officers and Chief Financial Officers to certify various annual and interim timely disclosure documents and disclosure controls and procedures.

C. AUDITOR OVERSIGHT, CEO AND CFO CERTIFICATION, AND AUDIT COMMITTEES

The Canadian Securities Administrators (CSA) the heads of the provincial and territorial securities regulatory authorities, published for comment new National⁶⁴ and Multilateral⁶⁵ Instruments relating to Auditor Oversight,⁶⁶ CEO and CFO Certification,⁶⁷ and Audit

59. See CPAB website at http://www.osfi-bsif.gc.ca/eng/issues/cpab_e.asp (last visited Sept. 10, 2004).

60. Canadian Securities Administrators National Instrument 52-108 (Mar. 30, 2004).

61. S.O. 2002, ch.22. amending Securities Act, R.S.O. 1990 ch. 55 as amended.

62. Except for §§ 182 and 185, regarding civil liability for non-disclosure and for misrepresentations in continuous timely disclosure documents. These sections are awaiting proclamation in force.

63. *Id.* § 143.

64. "National" means all provinces and territories agree.

65. "Multilateral" means most, but not all, provinces and territories agree. In the case of Instruments 52-109 and 52-110, British Columbia has opted out.

66. NI 52-108, at <http://www.spsc.gov.sk.ca/ssc/files/publish/52-108mi.pdf> (last visited Sept. 10, 2004).

67. MLI 52-109, at <http://www.spsc.gov.sk.ca/ssc/files/publish/52-109mi.pdf> (last visited Sept. 10, 2004).

Committees.⁶⁸ These new Instruments will come into effect March 30, 2004, and will incorporate various transitional provisions. Each Instrument is accompanied by a Companion Policy which provides guidance on how to interpret and apply the Instruments.

The Auditor Oversight Instrument requires all accounting firms that wish to provide audit services to Canadian reporting issuers to be registered and in good standing with the CPAB. In conjunction with this requirement, Canadian reporting issuers may only have their financial statements audited by accounting firms registered and in good standing with the CPAB. The CPAB has the authority to supervise, sanction, and restrict the practice of accounting firms that provide audit services to Canadian reporting issuers. Sanctions and restrictions must be publicly disclosed.

The CEO/CFO Certification Instrument requires CEOs and CFOs to certify a standard form that specifies annual and interim disclosure documents of the reporting issuer, disclosing all material facts without omitting any material facts, and in all material respects fairly presenting the condition of financial statements, results of operations, and cash flows of the issuer. After a transition period, the certification will also confirm that the CEOs/CFOs have designed, or supervised the design of, disclosure controls and procedures which provide reasonable assurance that material information is made known to the CEOs/CFOs. After the same transition period, the certificate must also state that the CEOs/CFOs have designed, or caused to be designed, internal controls over financial reporting and have evaluated the effectiveness of the issuers' disclosure controls and procedures. The CEO/CFO certificates are required for financial years and interim periods beginning on or after January 1, 2004. The CEO/CFO certifications are required for annual and interim financial statements, Management's Discussion and Analysis (MD&A) and Annual Information Forms (AIFs). A number of exemptions exist for certain types of issuers and issuers which comply with SEC rules and make their SEC filings contemporaneously with the CSA.

D. PROPOSALS FOR FUNDAMENTAL CHANGE IN CANADIAN SECURITIES LAW

2003 saw the advancement of several models for fundamental reform of Canadian securities law. At present, securities regulation is predominantly a matter of provincial and territorial regulation with each of Canada's ten provinces and three territories exercising regulatory authority over securities matters in their respective jurisdictions. Canadian federal jurisdiction is currently exercised primarily through corporate legislation applicable only to federally incorporated corporations and through the Criminal Code (Canada) for securities frauds. As a result, Canadian and foreign issuers are exposed to a multitude of complex and variable regulatory regimes which are thought to deter capital formation and investment in Canada.

The provincial and territorial regulators and their political counterparts have responded to this challenge by proposing harmonized or uniform legislation. The goals are proposed to be accomplished through a "passport" system whereby approvals, registrations and the like in one jurisdiction are accepted automatically in all other jurisdictions. Drafts of the Uniform Securities Act and Model Securities Administration Act were released for comment on December 26, 2003,⁶⁹ to advance the uniform model.

68. MLI 52-110, at <http://www.spsc.gov.sk.ca/ssc/files/publish/52-110mi.pdf> (last visited Sept. 10, 2004).

69. Ontario Securities Commission Bulletin, Issue 26/51, available at http://www.osc.gov.on.ca/Regulation/OSCB/oscb_index.jsp.

The Canadian federal government commissioned a study by a task force called "Wise Persons" to report on a model for unitary federal regulation of securities in Canada. *The Wise Persons Report*⁷⁰ was published in mid-December 2003 recommending a unitary federal securities law for Canada and inviting the provinces and territories to cooperate with the Canadian federal government to enact the necessary legislation as soon as possible. The Report cited legal opinions that the federal government has the constitutional power and authority to enact the required legislation, whether or not the provinces and territories cooperate.

The debate on these two conflicting approaches will carry on well into 2004 and beyond notwithstanding the universal support for reform of Canadian securities laws to make them more effective, less bureaucratic, and more responsive to the evolving needs of the Canadian securities markets.

V. 2003 Developments in Canadian Trade Law

Last year was eventful for Canada in trade law developments, though some proved positive and others less so.

A. SOFTWOOD LUMBER

The softwood lumber dispute was Canada's biggest trade law file in 2003. The dispute, which began in 2001 with the imposition by the United States of antidumping and countervailing duties against imports of softwood lumber from Canada, evolved into a multi-pronged legal challenge by Canada under both the WTO and NAFTA Chapter Nineteen. The WTO and the Chapter Nineteen panels rendered decisions in 2003 with mixed results for Canada.

B. WTO

In 2003, Canada replicated an earlier partial victory in its challenge of the U.S. Department of Commerce (USDOC) countervailing duty determinations. While the panel agreed with the United States that stumpage programs constituted the provision of goods and, as such, were potentially countervailable, the panel concurred with Canada's challenge of the use by the USDOC of cross-border benchmarks to determine that a benefit had been conferred. The panel also found in Canada's favor regarding the USDOC's failure to analyze whether subsidies passed through to producers who had purchased logs and lumber re-manufacturers who had purchased lumber in unrelated transactions. The United States appealed the decision. The Appellate Body reversed the panel's benefit finding but declined to complete the panel's analysis because the panel had made insufficient findings of fact. The Appellate Body also reversed the panel's finding respecting re-manufacturers, leaving Canada with little to show for two years of effort.

In 2003, Canada initiated WTO challenges to the USDOC's dumping determination and the threat of injury determination made by the U.S. International Trade Commission (USITC). These challenges have only reached the interim report stage, so final results will not be known until well into 2004.

70. Available at <http://www.wise-averties.ca/reports/WPC%20Final.pdf> (last visited Sept. 7, 2004).

C. NAFTA CHAPTER NINETEEN

Canada fared better in its Chapter Nineteen challenges. The Chapter Nineteen panel reviewing the countervailing duties largely deferred to the USDOC but, like the WTO panel, decided in Canada's favor respecting the USDOC's use of cross-border benchmarks. The panel remanded the issue of benefit to the USDOC, which made a number of revisions resulting in somewhat lower duties, but the dispute continues. The Chapter Nineteen panel reviewing the USDOC's dumping determination decided against Canada on the critical issue of zeroing (the practice of disregarding negative dumping margins which occur when export prices for a product category exceed normal values) but decided in Canada's favor on several other issues.

Canada's most significant achievement in softwood lumber was the decision of Chapter Nineteen panel reviewing the USITC's threat of injury determination that the USITC did not have a sufficient basis to make the determination. On remand, the USITC issued an affirmative determination, which Canada has challenged. If Canada's challenge of the USITC's threat of injury determination is ultimately successful, Canada will have won the current softwood lumber dispute.

D. WHEAT, MAD COW, AND DAIRY

Canadian wheat marketing practices continued in 2003 to be an issue between Canada and the United States. The United States initiated a WTO challenge of the practices of Canada's government-owned Canadian Wheat Board (CWB) as violating a number of WTO provisions. The U.S. also challenged certain Canadian wheat import practices as violating GATT 1994 national treatment requirements. While finding fault with some practices, the recently released panel report added to a long string of U.S. defeats on the CWB file by upholding Canada's right to maintain the CWB.

Canadian beef producers were subjected to a devastating embargo on imports of Canadian beef into the United States because of the discovery of an instance of mad cow disease in Western Canada. While the economic cost to Canadian cattlemen has been enormous, Canadian officials determined that working with their U.S. counterparts was a better course than litigation to resolve this situation. The difficulty in this case is that the Canadian and U.S. cattle and beef industries are highly integrated, and the sudden appearance of a border in the form of an embargo, however justified, causes massive disruption and results in economic hardship.

In 2003, Canada finally settled its long-standing dispute with the United States and New Zealand concerning certain export practices of Canada respecting dairy products. While settlement of this litigation is welcome, Canada's dairy and poultry supply management programs continue to be a contentious issue between Canada and the United States.

E. NAFTA CHAPTER ELEVEN

Canada had only one active Chapter Eleven file in 2003, namely the complaint brought by United Parcel Service (UPS). Canada achieved substantial success in 2003 in a jurisdictional challenge of the UPS claim by having the claim brought under the NAFTA minimum standard of treatment provision struck.

F. LEAST DEVELOPED COUNTRIES

In January 2003, Canada substantially improved market access for goods of least developed countries in the textile and clothing sector, where the duty free access for goods from those countries was extended to cover all goods described in HS Chapters 50 through 63. While eligibility depends upon complying with rules of origin, the rules do not require the use of Canadian fabrics or other components. This Canadian initiative could serve as a model to be adopted by other developed countries to assist in alleviating poverty.

G. TRADE AGREEMENTS

Canada shared the disappointment of many countries with the failure of the Doha Round negotiators to achieve agreement at the Ministerial that took place in Cancun in September 2003. Canada was also disappointed with the results of the Miami Summit in November 2003, at which the FTAA negotiators opted for a considerably watered-down version of what they originally hoped to achieve. The Canadian Government has consistently supported a comprehensive FTAA, covering all nine areas identified by the negotiators. Canada continued with certain bilateral and plurilateral free trade initiatives in 2003 but none was concluded.

H. CONCLUSION

While trade law developments were decidedly mixed for Canada in 2003, the year ended on the upbeat note of NAFTA at Ten. While government pronouncements on the effect of NAFTA tended to be uncritically positive and while the constituencies in Canadian society that are predisposed to dislike NAFTA (the unions, some environmental groups, Canada's left wing New Democratic Party) remain unchanged in their opposition, the more general consensus was that NAFTA has served Canada well.