

**Class Actions in Canada and
the Role of the Forensic Accountant**

Research Project for Emerging Issues/Advanced Topics Course

Diploma in Investigative and Forensic Accounting Program

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Bibliography

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Restrictions

This report has been compiled as a research project for profession Leonard Brooks. It is not intended for general publication or any other purposes.

A Objective

1. There has been an unprecedented increase in the volume of class action litigation in Canada. New class actions are filed every few days that seek millions of dollars in general and punitive damages. These cases are typically complex and require multi-disciplinary teams involving lawyers, forensic accountants and information technology professionals.
2. With this growth in class action litigation, comes large settlements of these actions and the need to quantify defendants' financial liabilities, and to effectively and efficiently distribute the settlement funds that are to be paid out to the plaintiffs. Forensic accountants are increasingly involved in various aspects of class action litigations.
3. The objective of this paper is to review various ways in which forensic accountants can assist in class action matters. Forensic accountants possess relevant skill sets for assisting with class actions. This includes professional accounting and investigative skills, experience in quantifying damages as well as an understanding of electronic discovery, data management procedures and business processes.
4. Class actions, in general and from a legal point of view, have been widely covered in books, articles and essays, but not much has been written about the involvement of forensic accountants in these actions.

B Executive Summary

5. A lot has happened since the enactment of class action legislation in Canada. While provincial class action legislation was enacted primarily between 1992 and 2004 (except Quebec, which was the pioneer in 1978), the Canadian class action landscape has rapidly developed in the last few years. Canadian courts now appear more willing to certify class action proceedings than they were just a few years ago.
6. When a class action begins, the first order of business for a defendant is usually to assemble a multi-disciplinary team with the collective skills to handle a labyrinth of complex tasks. This team may include in-house legal counsel, external legal counsel, forensic accountants, e-Discovery specialists and persons with various other skill-sets (e.g., translators, IT staff, etc.).
7. In this research project, I have attempted to explain the specific ways in which forensic accountants have assisted in the past, and to describe how they can further assist in class action litigation.
8. Forensic accountants possess an unusually pertinent skill set for assisting with class actions. Besides the traditional professional accounting and investigative skills, they have experience quantifying damages as well as possessing an understanding of electronic discovery, data management procedures and business processes.
 - a. Project management

The defense of class actions requires a strong project management team to plan, monitor and track progress of the complex tasks involved. Working in conjunction with legal counsel, forensic accounting expertise can help keep the case on track and moving forward.

b. Litigation hold procedures

Litigation hold procedures are imperative to preserving evidence that can include both electronic and paper documents. Forensic accountants are trained to identify pertinent sources of documents, collect and organize them for review, and perform analysis to find relevant information for evidence. These tasks facilitate the production of documents. Forensic accountants are best positioned to plan, along with legal counsel, and execute litigation hold procedures in the most efficient and effective manner.

c. Data mining, data analytics and financial analysis

Typically class action matters involve a substantial volume of data due to the large number of the class members and because the cause of the action could have arisen a number of years in the past. Data mining techniques are often the best way to extract relevant information from a variety of available and relevant sources. Data analytic tools are then useful to sift through the voluminous amounts of data. If the information is incomplete, assumptions are required to be made for financial analysis. Forensic accountants can perform scenario analysis, develop reasonable assumptions, and carry out sensitivity analysis to assess the impact of choosing alternative approaches.

d. Interview senior executives and employees

Certain facts and information that are not available from documents can only be obtained through interviews with focus groups or individuals. Experienced forensic accountants know exactly what to ask (and how to ask), and it is generally easier for an objective and independent source to collect this financial information from employees than someone within the organization.

e. Analysis of defendants' financial liability

Financial exposure analysis could involve performing calculations on an individual or aggregate basis. Forensic accountants can perform preliminary analysis of defendants' exposure to help with case planning, as well as detailed analysis for the purpose of settlement discussions, or litigating the matter in court.

f. Claims analysis

By their very nature, class actions generally involve a large number of individual claims. The decision to calculate the damages for a class or sub-class claims on an individual or aggregate basis, is a practical and strategic issue to be decided by legal counsel, and depends, at least in part, on the nature and extent of information available. However, if required, experienced forensic accountants can use statistical sampling techniques to perform analysis on a test basis that can be extrapolated to the entire class or sub-class.

g. Class action administration

When a defendant decides to compensate plaintiffs in an action, pursuant to a settlement agreement or a court order, large amounts of money are often involved.

A well designed system of internal controls helps ensure these funds are administered properly and reduces the risk of improper use of such funds.

Forensic accountants can help devise a sound system to control the outflow of cash.

h. Litigation readiness

Forensic accountants can also help organizations prepare proactively for class action litigation and provide valuable assistance throughout the litigation process.

9. Many legal professionals are discovering that forensic accountants are a ‘must-have’ as members of these class action litigation teams, because they know how to prepare proactively and then provide specialized support throughout the process.

C Scope of Research

10. Comments and findings contained in this research project have been based on various

types of research material including:

- a. Journals and textbooks
- b. Presentations
- c. Various relevant websites and on-line information
- d. Statutory law
- e. Case law

11. A complete listing of reference material is contained in the footnotes to this report.

D Class Actions in Canada

History and Growth of Class Actions in Canada

12. Class actions appear to have originated in the English courts of Equity in the late seventeenth and early eighteenth centuries¹. However, class actions in Canada are a relatively recent phenomenon. The Canadian class action landscape is rapidly evolving. It has become a specialized practice area for legal professionals.
13. A review of the National Class Action Database maintained by the Canadian Bar Association showed the number of class actions filed annually in Canadian courts have risen significantly, from less than 10 in 2002 to more than 100, in recent years:

Year	Number of actions filed as proposed class actions
2001	2
2002	3
2003	10
2004	16
2005	21
2006	24
2007	147
2008 (January to May)	44

Source: The Canadian Bar Association

¹ See para 1 of *Western Canada Shopping Centres – 2001 SCC 46*

Key Provisions of Class Action Legislation in Canada

14. Currently, seven Canadian provinces have specifically enacted class action legislation. Quebec was the pioneer in 1978; Ontario enacted its legislation in 1992, British Columbia in 1996, Newfoundland and Labrador in 2001, Saskatchewan in 2002, Manitoba in 2003 and Alberta in 2004. For other provinces, the provisions relating to class actions can be found generally in the Rules of Civil Procedure (provisions dealing with “representative actions”).
15. In the United States (U.S.) the provisions relating to Class actions, which are contained in Rule 23 of the Federal Rules of Civil Procedure, have existed since 1938. The United States has seen larger number of class actions, involving higher dollar amounts in settlements.
16. In Canada, class action legislation has been enacted by various provinces and there is no federal legislation for national class actions. While the courts have allowed nation-wide actions in certain cases under the provincial statutes, the constitutionality of this is yet to be tested². Except for class action legislation in B.C. and Saskatchewan, other provincial legislations are silent on the inclusion of class members from other provinces.

² Recently in May 2008, in *Gerald Wuttunee v. Merck Frosst Canada Ltd.*, the Saskatchewan Court of Queen’s Bench, ruled that the scope of previously certified class proceedings in the VIOXX lawsuit be expanded from a class primarily consisting of Saskatchewan residents to a class of Canadian residents outside Quebec. Also, some guidance on this topic can be elicited from the Supreme Court of Canada’s decision in *Morguard Investments Ltd. v De Savoye* [1990] 3 S.C.R. 1077

17. Typically, class action legislation provides that ordinary rules of court apply in a class action. Hence, most applicable rules of civil procedure will apply, in addition to those contained in the class action legislation.
18. For the purpose of this research, I have focused on Ontario's *Class Proceedings Act*, 1992 (CPA). CPA is a relatively short piece of legislation with 37 sections and approximately 18 pages in length. Prior to its enactment, rule 12.01 of the *Ontario Civil Procedure* contained provisions relating to class actions. It was felt that Rule 12.01 was not well-suited to the kinds of complicated cases that were beginning to come before the courts³. Pursuant to an Ontario Law Reform Commission ("OLRC") report which proposed new class action legislation, the CPA was adopted to ensure that the courts had a procedural tool sufficiently refined to allow them to deal efficiently, and on a principled rather than *ad hoc* basis, with the increasingly complicated cases of the modern era.
19. The Supreme Court of Canada ("SCC") held in *Western Canada Shopping Centres*⁴ that class actions offer three important advantages over a multiplicity of individual suits, as set out below.
- a. First, by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. The efficiencies thus generated free judicial resources that can be directed at resolving other conflicts, and can also reduce the costs of litigation

³ Hollick

⁴ *Western Canada Shopping Centres*, paras 27 to 29.

both for plaintiffs (who can share litigation costs) and for defendants (who need to litigate the disputed issue only once, rather than numerous times).

- b. Second, by allowing fixed litigation costs to be divided over a large number of plaintiffs, class actions improve access to justice by making economical the prosecution of claims that would otherwise be too costly to prosecute individually. Without class actions, the doors of justice remain closed to some plaintiffs, however strong their legal claims. Sharing costs ensures that injuries are not left unremedied.
- c. Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers do not ignore their obligations to the public. They help achieve behavioural modification in the conduct of actual and potential wrongdoers. Without class actions, those who cause widespread but individually minimal harm might not take into account the full costs of their conduct, because for any one plaintiff the expense of bringing suit would far exceed the likely recovery. Cost-sharing decreases the expense of pursuing legal recourse and accordingly deters potential defendants who might otherwise assume that minor wrongs would not result in litigation.

E Stages in Class Action Litigation

20. A class action matter can be divided into two stages at a high level:

- a. Certification stage

- b. Trial stage. If a proposed class action is certified by the court, it moves to trial, where the court will adjudicate on the merits of the case. It has been seen that in Canada, class actions generally do not proceed to the trial stage. Once a class action has been certified, the parties generally start the process of negotiating a settlement. Hence, this stage is not discussed further in this report.
21. Parties can reach settlement of the proposed action at any stage. Unlike settlement in other civil litigation matters, the settlement reached in a class action must be approved by the court. The certification of class actions is discussed below.

Certification

22. Certification refers to the process in which a court decides if the proposed class action case can be allowed to proceed as a class action (versus an individual claim). This is an important stage. Certain legal requirements must be satisfied in order for a proposed class action to be certified. In Ontario, section 5 of the *Class Proceedings Act* state as follows regarding certification:

“5. (1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,

(a) the pleadings or the notice of application discloses a cause of action;

(b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;

(c) the claims or defences of the class members raise common issues;

(d) a class proceeding would be the preferable procedure for the resolution of the common issues; and

(e) there is a representative plaintiff or defendant who,

(i) would fairly and adequately represent the interests of the class,

(ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

(iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members. 1992, c. 6, s. 5 (1).”

23. From the above sections of the CPA, the certification requirements can be summarized as follows:

- a. there must be a cause of action;
- b. there must be identifiable class,
- c. there must be common issues,
- d. class action is a preferable procedure
- e. there must be a representative plaintiff who can represent the interests of the class members fairly, who should not have a conflict of interest and who has a plan for advancing the proceedings and notifying other class members of the proceeding.

24. From a simple reading of above provisions, it may appear that the Canadian criteria for certification of a proceeding as a class action are relatively undemanding⁵.

However, courts have traditionally refused certification in a large number of cases.

Further, various decisions by lower courts have been reversed on appeal, which is indicative that the law and practice relating to class actions is still in the early stages in Canada.

25. Certification of a class action has significant implications. Plaintiffs suddenly have enhanced leverage available to them and defendants are typically under pressure.

This generally leads to settlement of class actions even before the trial stage.

Therefore, frequently, even where the merits of the defence case are not good, the legal strategy for the defendant is to oppose certification vigorously⁶.

26. Courts are cautious when certifying a class action or approving any settlement. While the provisions relating to certification of class actions are very brief in the CPA, there are a large number of judicial precedents involving certification of class actions, which provide significant guidance. The next few paragraphs provide some key judicial precedents regarding certification of class actions in Canada.

Class Action Trilogy

27. The Supreme Court of Canada delivered the following three landmark and precedent setting decisions in 2001, which are collectively referred to as the “Class Action

⁵ The Civil Litigation Process, Cases and Materials, by Emond Montgomery Publications, Pg 886

⁶ Jim MacMaster in his article on Class Action Settlements: 10th Anniversary Perspectives on the Canadian Experience.

Trilogy”. These decisions dealt with the certification of class action matters, provided a cornerstone for various other decisions and included comprehensive number of factors to consider when evaluating the criteria for certification motions:

- a. Western Canada Shopping Centres Inc. v. Dutton, 2001 SCC 46
- b. Hollick v Toronto (City) 2001 SCC 68
- c. Rumley v. British Columbia, 2001 SCC 69

28. SCC allowed certification in the Dutton and Rumley cases, but denied certification in the Hollick case. In Hollick, while agreeing that other certification conditions had been met, the Court disagreed with plaintiffs that the class action was a “preferable procedure”.

29. In spite of a number of intended benefits of class action litigation that may have been perceived by the legislators, their certification has been difficult and challenging thus far. Courts have denied certification in a majority of cases.

30. The defendants, which are typically large corporations, traditionally focused on defeating the certification motions. As discussed above, this could, in part, be due to the plaintiff leverage / defendant’s risk. However, the trend now seems to be changing and courts are more likely to certify an action today than they did just a few years ago. Sometimes defendants find that the class action certification to their advantage as it can reduce the number of litigations against it, and more importantly, helps bring finality to the issue as it binds the class members and prevents them litigating on the same cause of action. However, in order to be binding, the class

action must be (a) certified as class action; and (b) settlement must be approved by the court.

31. In Ontario, when class action is started the defendants are not required to file a Statement of Defence until the matter has been certified. However, defendants would typically start with various other activities internally such as assessing the merits of the case, putting litigation hold on documents, quantifying the potential liability, etc. Putting together a strong, multi-disciplinary team, is a key step in defending the class action litigation. This is where forensic accountants typically get involved.

32. Like most civil litigation matters, the class members and defendants aim to settle a majority of class action claims. However, unlike other civil litigation, the settlement of all class actions commenced under the CPA must be approved by the Court to help ensure the protection of absent class members⁷. The key characteristics which necessitate the courts to review and approve the proposed settlement arrangement, and not to rubber stamp the settlement agreements are:

- a. The plaintiff's legal counsel could have a conflict of interest with other class members. Courts have challenged the legal fees claimed by plaintiffs' legal counsel, even though it may have been agreed by the defendants.
- b. The settlement is binding on absent class members who may not be able to bring an action later on (without permission from the court).

⁷ The Civil Litigation Process, Cases and Materials, by Emond Montgomery Publications, Pg 887

33. Courts will only certify an action if the proposed settlement is seen to be fair, reasonable and equitable to all the members. Courts may even appoint independent counsel to review and comment on the terms of proposed settlement. A great deal of care is required to manage class actions at every step of the way. Forensic accountants may be involved even if an action has been settled for example, in the calculation of ongoing liabilities due to class members (which is different than settlement in other civil litigation cases where often the role of the forensic accountant ends once the matter has been settled).

F Some Large Class Action Matters in Canada and U.S.

34. Class actions generally involve a large sum of money. For this research project, I have studied the amounts involved in all types of class actions settled in Canada recently, and only those relating to unpaid overtime in United States. Canadian class action settlements (during the last 10 years) were searched online and analyzed for settlement amounts involved. For U.S. settlements, only those class actions involving allegations of unpaid overtime to employees were researched. The results for both these searches are discussed in this section of the report.

35. Class action settlements in Canada in the last few years are summarized below. More detailed information about these cases is set out in Appendix A to this report. The information below shows defendant name, matter involved, settlement year (in brackets) and settlement amount (in Canadian \$).

- i. Government of Canada – Hepatitis C victims (1998 & 2007) – \$2.1 billion
- ii. Government of Canada – Residential schools (2006) – \$1.9 billion plus
- iii. Government of Ontario – Residents and non – residents of Brockton, formerly the town of Walkerton (2001–2002) – \$66 million
- iv. Province of Alberta – Government’s treatment of severely handicapped, widowed, and poor Albertans (2006) – \$100 million
- v. Province of Alberta – Province of Alberta accused of treating people on social assistance programs oppressively (2007)– \$24 million
- vi. The U.S. Government – Softwood lumber dispute (2006) – \$4 billion
- vii. Servier Canada Inc. et al. – Drug causing health issues (2004) – \$25 million
- viii. The Great Atlantic & Pacific Tea Company, Inc. – Violation of terms of franchise agreement (2004) – \$32 million
- ix. Enbridge Gas Distribution Inc. – Late payment fees charged by the utility (2004) – \$100 million
- x. Ford Motor Co. of Canada Ltd. – Auto dealers who were adversely affected by Ford’s decision to convert Mercury outlets into Ford stores (2004) – \$50 million

- xi. 14 Major International Vitamin Manufacturers – Price fixing on vitamins and food additives sold in Canada from 1990 to 1998 (2004) – \$132 million
- xii. Bell Canada – Pay equity (2006) – \$104 million
- xiii. Qwest Communications – Insider trading in the stock of Qwest by current and former executives and management (2004) – \$25 million
- xiv. Dow Corning – Health problems cause by silicone breast implants (2004) – \$24 million
- xv. Government of Ontario – pay–equity suit filed against the government of Ontario by female public sector workers – \$414 million

36. Ignoring the effect of some outliers, most settlements in Canada are in the range of \$25 million to \$100 million. These are a large sums of money in the Canadian context, and sufficient to require the presence of a large team consisting of various personnel, including forensic accountants.

37. As mentioned, I have also reviewed some large U.S. class actions involving allegations of unpaid overtime to employees. These are set out in the table below. As can be seen, most settlements are multimillion dollar lawsuits and would have required significant review and financial analysis for defendants to agree to settle the litigations for these amounts.

Fair Labor Standard Act (“FLSA”) Class Action Settlements/Awards in U.S.⁸

Defendant	Settlement amount \$ million
Farmers Insurance Exchange	\$200
State Farm Group	\$135
IBM	\$65
Albertsons LLC	\$53
Farmers Insurance Exchange	\$52
Computer Sciences Corp.	\$24
Smart & Final Inc.	\$19
Electronic Arts	\$15
RadioShack Corp.	\$15
Pizza Hut	\$13
Bank of America (loan sellers)	\$9

38. From a review of above cases in both Canada and United States, typical parties in class action matters include:

⁸ Source: www.lawyersandsettlements.com website

- a. A representative plaintiff – all plaintiffs in above cases are typically individuals (e.g., employees, customers, card-holders, etc.) or relatively small organization.
- b. Typical defendants in class action suits are large corporations such as drug companies, banks, government departments, etc.

G Practical Aspects of Class Actions

Key Challenges in Class Action Litigation for Large Organization

39. There are many challenges for organizations when defending a class action. The key ones include:
- a. Should the defendant challenge or consent to certification? If the matter is not certified, the defendant could still face extensive litigation on the same matter brought individually by other potential plaintiffs. Further, if the class action is certified and settlement approved by the court, it is binding on the entire class and no member can then bring a separate action on the same matter. On the other hand, allowing the matter to certify (without settlement being reached) on the assumption that the matter would be fought on merits, can be uncertain and risky.
 - b. Class action litigation takes management attention away from day to day operations. It requires management time and leads to additional costs for defending the litigation. This could adversely impact the financial and operational performance of the organization.

- c. Typically, in this electronic age, corporations have a large volume of electronic information relevant to the litigation, which must be preserved when the litigation commences and may need to be produced. Preservation and production of documents requires:
- i. Brain-storming to decide the scope of documents that need be preserved;
 - ii. Identifying, and locating the source of documents;
 - iii. Co-operation from a large number of employees and other individuals in order to collect information from them. This could be disruptive to their day-to-day activities;
 - iv. Co-operation from defendants' external service providers (e.g., if certain functions have been outsourced to a Business Process Outsourcer ("BPO")).
 - v. Once collected, documents need to be organized in a reviewable form (e.g., hard-copy documents may need to be organized, labeled and scanned). This may be a time-consuming and expensive process.
 - vi. Review of the documents in order to identify their relevance. Further document review will likely be required for privilege and privacy concerns. If not done properly, there may be serious consequences for failing to disclose or produce relevant documents.

In summary, the cost of complying with preservation and collection requirements of documents alone may be a deterrent to litigation and an incentive for some organizations to settle the matter.

- d. Estimating the defendant's liability in a class action is generally a complex process with various combinations and permutations for different class members, and for different situations for a class member. There may be numerous claimants, and when considered along with the unique situations that could exist for each claimant, the process may become myriad. If there are only some common issues to be resolved, the exercise is relatively easier, but loading individual issues on top of common issues, can make it complex. In this case, the financial impact (defendant's liability) may need to be quantified on a case by case basis, for a very large number of situations.
- e. In the past, some defendants have tried to argue that the class action is not a preferable procedure because of the complexity involved, citing practical difficulties. Courts have not always agreed with this reason. Recently, this issue was discussed by the Ontario Court of Appeal in *Markson v. MBNA Canada Bank*⁹ MBNA case. The Court in this case indicated that if such a defense were allowed, the wrongful conduct of the defendants would not stop (i.e., behaviour modification, which is one of the three objectives of class actions).

⁹ *Markson v. MBNA Canada Bank* [2007] 85 O.R. (3d) 321

- f. Class actions attract significant media attention, which can affect the reputation and goodwill of the defendant.
- g. The outcome of class action litigation in trial is uncertain, no matter how strong the merits for the defence. This uncertainty could expose the defendants to vast financial liabilities that may in some cases threaten their existence.
- h. Class members may not be located, hence leaving the organizations or class action administrators with large sums of money. The organizations are expected to continue searching for the class members for a long period (typically years) of time, which is both costly and requires management's/administrator's attention.

Overcoming Challenges to Class Actions

40. Some of the challenges discussed above can be overcome by taking various steps such as:

- a. Assembling a strong multi-disciplinary team comprising following skill sets:
 - i. External legal counsel
 - ii. In-house counsel
 - iii. A project manager – typically this will be an individual who understands legal and financial issues

- iv. Other individuals in an organization from the relevant department (e.g., the engineering or technical department in the case of product liability; personal lending in the case of credit card charges, or the HR department in the case of pay equity litigation);
- v. Forensic accountant – for investigations, analysis, damage quantification and other litigation support;
- vi. Other subject matter experts (litigation consultants, expert witnesses);
- vii. E-discovery personnel;
- viii. Others – translators, PR consultants;
- ix. Information Technology personnel;
- x. Class action administrators;

Every class action litigation is unique. The total number of people affected by the class action, class members, eligibility criteria, time limits, distribution terms and many factors vary from case to case. To avoid difficulties, the team must have an excellent understanding of the class action issues.

- b. Developing a project management plan to deal with the potential tasks involved in class action litigation;
- c. Promptly identifying potential sources of evidence and putting in place a litigation hold, with the ultimate aim of collecting and organizing documents;

- d. Adhering to a higher standard of care will help overcome negative publicity associated with class action. Stakeholders will see the organization as doing the right thing, which will help alleviate negative publicity that may be associated with class action.
- e. Experienced forensic accountants and other experts may be able to estimate the initial liability, if any, for the organization. This will help legal counsel make some strategic decisions relating to class actions and assess merits of the case.

H Possible Roles for the Forensic Accountant in Class Actions

The Forensic Accountant's Skills and Expertise

41. As a result of their training and experience, forensic accountants possess a variety of valuable skills. Some skills that are relevant to deal with a complex class action litigation include:

- a. professional accounting skills, which in this context include various sub-components, such as:
 - i. an understanding of how business activity is documented, recorded, reported, managed and controlled;
 - ii. the ability to identify, obtain, examine and evaluate relevant information;

- iii. the ability to quantify the financial impact of actual or expected transactions or events.
- b. investigative skills, which in this context include various sub-components, such as:
 - i. an understanding of the context within which the engagement is to be conducted (for example, the tribunal process, laws, regulations, contracts or policies relevant to the engagement);
 - ii. the ability to identify, obtain, examine and assess information relevant to the engagement;
 - iii. the ability to analyze and compare various types and sources of information;
 - iv. the ability to document and present investigative findings and conclusions for decision making purposes.
- c. An “investigative mindset”, which requires a skeptical attitude in the identification, pursuit, analysis and evaluation of information relevant to each engagement, contemplating that it may be biased, false and/or incomplete. This is applicable in identifying and assessing relevant issues, the plausibility of the underlying assumptions, substance over form, and developing hypotheses for the purpose of addressing the issues under investigation.

The Forensic Accountant’s role in Class Actions

42. Similar to other litigation, forensic accountants can assist in a class action matter in a variety of ways as listed below.

a. Litigation consultant

When a forensic accountant is retained by legal counsel as a litigation consultant, his/her work product is protected by privilege and will not necessarily be presented in the court as evidence. In this role, the forensic accountant generally acts as an advisor to legal counsel (plaintiffs or defendants) and in a large class action would be part of strategic preparation and development, identifying sources of relevant information, collecting, organizing and analyzing it. Forensic accountants would use their professional accounting skill and expertise involving an understanding of how business activity is documented, recorded, reported, managed and controlled, and also, may identify and collect documents.

Often there could be multiple sources of information. Forensic accountants can use their expertise to analyze and compare various types and sources of information available, and use the one that is most efficient, while taking care to preserve other sources for legal purposes.

Typically, class action matters involve a cause of action that can go back several years. When quantifying damages for all those years, information may be incomplete, which may require forensic accountants to develop hypotheses for the purpose of quantifying the defendant's potential liability.

In this role, the forensic accountant can assist with class action cases in the following ways:

- i. Educating legal counsel and other team members in respect of complex financial and accounting issues
- ii. Evaluate, from a financial perspective, the merits and implications of positions being advanced;
- iii. Reviewing disclosures and information produced by other parties (e.g., MBNA case where the importance of forensic accountant in class action is discussed later in this research paper);
- iv. Reviewing reports of experts retained by other parties;
- v. Assisting with direct and cross examination of testifying experts, and other witnesses related to financial or accounting matters;
- vi. Attending the court hearings to provide current assistance as the litigation proceeds.

b. Expert witness

Sometimes referred to as a testifying expert, the role of the forensic accountant could be to provide independent assistance to the Court with his/her expert testimony in an objective and unbiased manner. The expert may at the conclusion of his or her review and analysis, prepare a report that is intended for use in court, arbitration or mediation to assist with understanding

the relevant financial issues such as, damage quantification for plaintiffs, investigations into a specific issue, or accounting issues (e.g., in securities class action litigation).

In this role, the experience of the forensic accountant can assist by explaining and presenting complex analysis and calculations in an objective, independent, qualified and professional manner that will assist the court, arbitrator, or mediator to fully understand and assess the relevant issues.

The forensic accountant could be independently involved to review the financial issues in a settlement proposed by the defendant to the claimants and could provide independent opinion on (a) the settlement process as far as financial issues are concerned, and (b) the reasonableness of the amounts offered by defendants to the class members.

When retained as a testifying expert, the forensic accountant remains, in fact and appearance, independent and objective. The testifying expert does not become an advocate for the position of the party who retained the expert.

Possible Tasks for the Forensic Accountant as Litigation Consultant

Project Management

43. Class actions generally involve a labyrinth of complex tasks which require a strong project management plan that can monitor and track progress of various activities involved in order to keep the process moving. Working in conjunction with legal counsel, forensic accounting expertise can help keep the case moving forward.

44. Forensic accountants' understand

- a. the stages involved in litigation motions and trials (certification motion, settlement approval, or trial stage of class actions, in cases not settled);
- b. document preservation, collection, review and analysis, production, reporting, settlement discussions, and
- c. damage quantification and other financial liability issues.

This enables them to develop a solid, workable plan that covers the breadth of issues, which need to be addressed, in sufficient depth.

45. There are tangible benefits from a strong project management plan including cost containment, resource allocation, and timely execution of litigation activities in an orderly manner. A well-developed plan provides direction to the core-litigation team provides regular updates to the top management, minimizes the disruption in day-to-day activities for other employees and achieves better results.

Preservation of Documents (Litigation Hold)

46. As mentioned, in most class actions, plaintiffs are generally individuals or small businesses, while the defendants are large organizations. A large organization could have a number of business locations (e.g., multiple plants, subsidiaries, or branches). Documents relevant to class actions may be located at any or all of these geographical locations. Further, with the popularity of electronic documents, and the ease with which such documents can be created, copied, stored and sent to various sources, document preservation and production has become increasingly intricate. A whole

new area of electronic discovery has emerged to deal with this maze situation. Many forensic accountants have been involved in providing electronic discovery services or using these tools and techniques in their work.

47. Hence, when involved in class actions, forensic accountants can assist legal counsel in the preservation and production of documents as they have the ability to:
- a. Identify, analyze and assess types and sources of relevant information;
 - b. use an investigative mindset in pursuit, analysis and evaluation of information relevant to the matter, in evaluating the information available and contemplating that it may be biased, or incomplete.
 - c. Develop and execute a litigation hold plan for defendant organizations.
48. In class action matters, organizations may err on the side of caution and may preserve more information that is potentially relevant. In doing so, organizations will preserve most back-up tapes, servers, etc. which often contain all types of information about the organization. Some of this information could be sensitive or confidential.
49. For example, in a product liability case, information relating to the manufacturing department may be preserved. Included in this information, may be the e-mails that would have been sent by a manager in the manufacturing department to the human resource department about compensation and salary for his employees. Employee information may be sensitive and confidential (e.g., payroll, salary data, personal information such as employee addresses, etc.), which must be separated. In this

scenario, while the information will be preserved, initially, it will require to be reviewed, filtered and separated prior to production.

50. As soon as the class action litigation begins, parties must consider their obligation to take reasonable steps to preserve potentially relevant documents – both hard-copy and electronic. Due to the dynamic nature of electronically stored documents, any delay may increase the risk of allegations that the relevant evidence was destroyed due to negligence.

51. Hard-copy documents could reside in offsite storage locations, third party public storage, on-site storage, employees' offices, their drawers, "slush" piles, and so on.

52. Similarly, electronic documents could be located in a variety of places. Typical locations include:

- i. E-mails folders, both servers and off-line;
- ii. Hard-drives on laptops, workstations and home computer;
- iii. CDs, DVDs, thumb-drives;
- iv. Servers, eRooms, intranets, voice mail systems, Blackberry, Treo, etc.;
- v. Organizations time recording systems, payroll systems, employees' databases, performance appraisal systems, etc.;
- vi. Complex systems and archives; and
- vii. Legacy systems.

53. Hence, litigation hold procedures are important to preserving all potentially relevant documents. As mentioned, forensic accountants are trained to identify pertinent sources of documents, collect and organize them for review, and perform analysis to find relevant information for evidence. These tasks facilitate the production of documents. Forensic accountants are best positioned to plan, along with legal counsel, and execute litigation hold procedures in the most efficient and effective manner.

54. Some strategic planning is the necessary first step in any process designed to identify, collect and preserve evidence for class action litigation. Decisions made at the outset of the preservation and collection process will have long lasting implications, and guide and shape the next steps.

Processing and Production of Documents

55. The processing of documents includes management and organizing of documents, gaining an understanding of secured storage (could be for years), facilitating review and carrying out de-duplication process for e-mails using proprietary software. This is essential in class action litigation for a proper review and analysis. Further, the depth of analysis that may be required to convince the Court relating to what is “preferable procedure”, can depend significantly on the availability of the information relating to identification of class members, and financial liability.

56. The forensic accountants’ assistance in review of documents could include:

- a. Assisting with review of documents connected with financial issues;

- b. Other review assistance as may be necessary and requested by legal counsel
57. The forensic accountants' assistance in the production of documents may include:
- a. Reviewing and analyzing documents for privilege, relevance and privacy
 - b. Creating an e-Room to facilitate the use of electronic discovery tools and techniques
58. Often, the information technology used by large organizations has undergone changes due to upgrades in the computer hardware, and software application and systems. While the task for recovering data from a legacy system is those of information technology specialist, the review and analysis of data for completeness, reliability and its usefulness in class action matter is performed by forensic accountants. Often this data is incomplete, and requires reasonable assumptions to be made by forensic accountants in conjunction with legal counsel.

Data Mining, Data Analytics and Financial Analysis

59. Data mining is the process of sifting through large volume of data and picking out the relevant information. It involves using a variety of analytical tools to establish a pattern from large sets of transaction data for making decisions or reaching certain conclusions. Data mining techniques may be used to identify class members, quantify liability on an individual or an aggregate basis, etc.
60. Typically, class action matters involve a substantial volume of data due to the large number of the class members and because the cause of the action could have arisen over a number of years. For large defendant organizations, this means a large volume

of data which may call for using computer assisted techniques. A manual review of transactions in a class action, due to large number of plaintiffs, is no longer a viable option with large organizations. With the increase in the size of data sets, there is an increasing use of data analytics using more sophisticated tools.

61. Data mining techniques are often the best way to extract relevant information from a variety of available and relevant sources. Data analytic tools are then useful to sift through the voluminous amounts of data. If the information is incomplete, assumptions are required to be made for financial analysis. Forensic accountants can perform scenario analysis, develop reasonable assumptions, and carry out sensitivity analysis to assess the impact of choosing alternative assumptions.

Interview Senior Executives and Employees

62. Certain facts and information that are not available from documents can only be obtained through interviews with focus groups or individuals. Experienced forensic accountants know exactly what to ask. It is generally easier for an objective and independent source to collect this financial information from employees than someone within the organization.
63. In conjunction with legal counsel, forensic accountants can perform individual interviews or conduct focus group interviews to:
- i. Find out facts about the allegations in the lawsuit;
 - ii. Determine the class size;

- iii. Provide other assistance to legal counsel as required, including discoveries, financial analysis, review reports from plaintiff experts, etc.
- iv. Determine the culture in various functions or business units regarding the matter in litigation. For example, in case of an allegation of unpaid overtime by a bank's employees, the forensic accountant may:
 - conduct interviews for various branch managers and employees to gain an understanding of the issue and assess there is a culture of unpaid overtime in different branches.
 - determine if the HR department or branch managers have issued any instructions or directives, written or verbal, to not claim overtime (which could be contrary to applicable labour legislation);
 - determine any mis-classification of employees from overtime pay - e.g., "non-exempt" employees treated as "exempt"?

Analysis of Defendants' Financial Liability

64. A financial exposure analysis could involve performing calculations on an individual or aggregate basis. Forensic accountants can perform preliminary analyses of the defendants' exposure to help with case planning, as well as a detailed analysis for the purpose of settlement discussions, or litigating the matter in court. Forensic

accountants could be involved in analyses of financial liability in a variety of ways as follows:

- a. Preliminary calculations to determine the extent of issue, if any
- b. Develop a strategy, approach and assumptions using:
 - i. data analysis
 - ii. calculation models
 - iii. sampling approaches (statistical or otherwise)
- c. Perform interviews
- d. Loss modeling and scenario development, e.g.,
 - i. Time and motion studies
 - ii. Analysis of building access logs
 - iii. Analysis of computer access logs

Tax issues and approaches

65. There are various tax implications that need to be considered in class action matters.

This could involve income tax, goods and service tax and provincial retail sales tax.

Frequently, the tax issues will require the involvement of a tax expert. Working in conjunction with a tax expert, forensic accountants can devise a plan for a variety of tax issues such as:

- a. whether the calculations are made on a pre-tax basis or post-tax basis;
 - b. tax withholding requirements. Often, a settlement may involve a lump sum amount with interest. The tax implications for the defendant and plaintiff may vary depending on how such amount is treated.
66. For example, in the case of a class action brought on behalf of government employees for pay equity, the payments could include a lump sum payment of underpaid wages plus interest. The amount paid as lump sum wages would be treated as salary income and would be subject to CPP, EI, etc. It would require the issuance of a T4 form. The payment of interest would also require tax deductions, and issuance of T5 slips.

Claims Analysis

67. As outlined above, class actions involve a large number of individual claims. The decision to calculate the damages for a class or sub-class claims on an individual, or aggregate basis, is a practical and strategic issue to be decided by legal counsel, and depends, at least in part, on the nature and extent of information available. However, if required, experienced forensic accountants can use statistical sampling techniques to perform analyses on a test basis that can be extrapolated to the entire class or sub-class.
68. Sections 23 and 24 of the CPA provide for Statistical Evidence, and Aggregate Assessment of Monetary Relief, respectively. Forensic accountants, in conjunction with other experts, may be able to assist legal counsel with respect to alternative approaches available for quantifying individual and aggregate claims, developing assumptions and evaluating the approaches.

69. This is a key area where forensic accountants bring their financial knowledge and expertise to the table.

Class Action Administration

70. Class action settlements are usually large sums of money. Forensic accountants' knowledge and training can be readily adapted for the administration of class action settlements in a variety of ways. Forensic accountants may be:

- a. either directly involved in the claims administration process (e.g., firm of forensic accountants acting as claims administrator); or
- b. part of defendant's team but the claims administration process is handled by some other party.

71. When involved in the claims administration process, forensic accountants find ways to develop strategies to minimize operational costs throughout the class action administration process, while making the process efficient. Forensic accountants have at their disposal the technological resources that enable them to achieve cost optimization in the claims administration process. The fees and expenses related to the claims administration are usually deducted from their total amount available for distribution to the claimants. Hence, any cost savings in the administration process puts more money into the claimants' hands. Some services that forensic accountants could provide, when acting as claims administrator, include:

- a. Reviewing information submitted by claimants;
- b. Claims analysis and calculation of amounts owed to each class member;

- c. Review rejection of offers made to class members and revising them, if necessary;
 - d. Keeping proper tracks of opt-outs (or opt-ins depending on the provincial legislation) to ensure that such opt-outs are properly excluded from the claims payment process;
 - e. Providing support in appeals and/or the mediation process;
 - f. Distribution of funds and bank account management;
 - g. Conducting address searches in order to locate non-responding class members;
72. When not acting as the claims administrator, forensic accountants can help devise a sound system to control the outflow of cash from the defendant to the third party claims administrator, and then finally to claimants. A well designed system of internal controls helps ensure these funds are administered properly and reduces the risk of improper use of such of funds.

Litigation Readiness

73. Certain organizations are more prone to litigation and especially class actions (e.g., government departments, drug companies, tobacco companies, etc.). Such organizations need to tailor their business processes that can facilitate document management in case these organizations become subject to mass litigation.

74. Experienced forensic accountants working in conjunction with legal counsel can help organizations prepare proactively for class action litigation. Forensic accountants' experience and knowledge of litigation, business process and document management is pertinent in order to review and design the business processes which can facilitate record management (preservation and collection) during class action litigation.

75. This readiness also mitigates the risk of failing to preserve or produce evidence in class action litigation. Because of the great volume of relevant information in any class action litigation, absent proper preparation, organizations run a high risk of inadvertently missing some key piece of information that may be relevant to the matter at hand.

76. Litigation readiness would include a written document preservation and production policy, which

- a. will include detailed and orderly steps and procedures for preserving and producing potentially relevant information;
- b. establish process to identify, locate, collect, access, preserve, review, analyze and produce data; and
- c. identify who in the organization will have the ownership for the implementation of the detailed steps under the policy.

I Defendants' Own Claims Process

77. There may be situation in a class action where a defendant implements its own claims process prior to class certification [see for example *Lewis v. Shell Canada Ltd.* (2000), 48 O.R. (3d) 612]. In Ontario, these types of settlements or claims process may also be subject to court approval and judicial scrutiny. However, prior to any such “settlement”, defendants and claimants in such cases would require a financial analysis in order to assess whether the settlement is fair and reasonable. Later on, during the court approval process, the Court may scrutinize the objectivity with such claims were settled (including the reasonableness of the amounts offered to potential class members). Forensic accountants’ independent, objective involvement in the process may lend credibility to such voluntary claims processes and increase the chance of it being accepted by the Court.

J Some Recent Class Action Matters Involving Forensic Accountants

78. A search of the Canadian reported case law available on LexisNexis Quicklaw for key terms “class action AND forensic accountant” was performed. This resulted in identifying 18 reported cases as set out in Appendix B. These cases were reviewed to better understand the role of forensic accountants in class action matters. In 13 out of 18 cases, forensic accountants were involved in assisting legal counsel. In the other 5, the “hit” resulted because of reference to other cases. The matter that was subject of multiple search result hits, was a case relating to MBNA. I have therefore, selected this case for a detailed discussion.

MBNA Case

79. MBNA issues MasterCard credit cards. Cardholders (customers) can use their credit cards to make purchases and to obtain cash advances. MBNA charges a transaction fee for cash advances. At the applicable time, the transaction fee charged was the greater of \$7.50 or one percent of the cash advanced. The transaction fee falls within the definition of “interest” for the purpose of section 347 of the *Criminal Code*. An interest rate above 60% per annum is deemed illegal under the Code. Hence, if somebody borrowed \$62.50 for one month, he would have to pay at least \$70 back (plus daily compound interest for one month – approx \$1.70). This translates to 14.72% per month or approximately 177% per annum. The Court set out in its judgment the following:

9 *The defendant claims that there is no simple way to determine the interest rate that it charged its customers on various transactions. As of December 2003, it had approximately 2.5 million credit card accounts with current charging practices. Between January 2000 and December 2003, there were eight million cash advance transactions. Of these eight million cash advances, 17 per cent were for amounts less than \$62.00. It has no electronically-preserved data for the period before January 2000 and therefore provided no data as to the number of cash advances for that period. The motion judge described the defendant's position in these terms at para. 36:*

It claims that it is not possible to determine from its database the effective annual interest rate received by it for each cash transaction and that this could be done only by manually and individually tracking each advance from the time it was made to the time it was repaid in full. Even then, assumptions would have to be made about the effect of multiple transactions in the accounts in order to determine when a particular advance was repaid in full.

10 *The plaintiff does not accept this position. The motion judge described his position in these terms at para. 37:*

From the information provided in the affidavits filed on behalf of the defendant, a forensic accountant retained by the plaintiff indicated that he was not satisfied of the accuracy and completeness of MBNA's assertion that it cannot determine, on an automated basis, the effective annual

interest rate it received for each cash transaction. In his opinion, if his firm was able to review MBNA's systems with the co-operation and assistance of its staff, it would be able to determine if it is possible to identify the potential class members and devise a system to do this.¹⁰

.....

36 The fundamental problem underlying the question of issues common to the claims for restitution and breach of contract is that the defendant has structured its affairs such that it is practically impossible to determine the extent of its breach of s. 347 of the Criminal Code. In framing the issue in this way, I should not be taken as having found that the defendant deliberately structured its affairs to avoid a possible class proceeding or a finding that it violated s. 347. The fact remains, however, that the effect of the defendant's accounting practices is that the precise extent of any violation of s. 347 can be determined only at great cost.

37 While the plaintiff continues to assert that it may be possible to design a computer programme that could determine the extent of the alleged breach of s. 347 and identify the individual cardholders who would be entitled to restitution or damages for breach of contract, I have not been persuaded that the motion judge's finding to the contrary is unreasonable. Accordingly, if the millions of transactions have to be examined individually, the motion judge is undoubtedly correct that those claims are not suitable for certification; the time and cost to determine the size of the liability in relation to each member of the class would

¹⁰ Underlined "forensic accountant" for adding emphasis – not underlined as such in the MBNA judgment,

overwhelm the common issues. However, if the motion judge is correct in finding that each transaction would have to be examined individually, the allegedly illegal conduct of the defendant will continue and its customers will receive no remedy for the previous violations.

46 If the defendant is correct, the kind of action sought to be pursued in this case will almost never be capable of certification. Large institutions allegedly receiving large amounts of illegal profits from millions of small transactions will effectively be immunized from suit.”

Analysis of the MBNA Case in the Context of the Forensic Accountant’s Role

80. Although legal counsel for MBNA argued that the proceeding should not be certified as a class action because of the fact that millions of transactions required review and the process could be both complex and unreasonable, the Court of Appeal ultimately refused to agree with this reasoning. The Court of Appeal certified the class action because it felt that large institutions receiving large amounts of illegal profits from millions of small transactions will effectively be immunized from suit. The court also said that if not certified, the alleged illegal conduct of the defendant would continue and its customers will receive no remedy for the previous violations.

81. The Trial Court had relied on the evidence of the forensic accountant who stated “in his opinion, if his firm was able to review MBNA's systems with the co-operation and assistance of its staff, it would be able to determine if it is possible to identify the potential class members and devise a system to do this. This seems to be the key piece of evidence for the court.

82. Presumably, MBNA would have to review millions of transactions using sophisticated technological tools and would have to design special computer programs. There is a significant amount of project management that would be required. The review and analysis of a large volume of transactions, and the quantification of the aggregate financial liability for defendants would likely be a very large undertaking.

Other cases

83. In *Fantl v. Transamerica Life Canada* the court held:

*The settlement would be an enormous undertaking for all concerned. The undertaking requires the assistance of forensic accountants.*¹¹

¹¹ *Fantl v. Transamerica Life Canada* [2008] O.J. No. 1536, Para 33

K Conclusion

Parties in class actions should assemble an adequately qualified, dedicated and multi-disciplinary team, with excellent understanding of class action legislation at the outset.

Class action litigation is a complex process and frequently involves more work than originally anticipated. Most aspects for a successful resolution of class action litigation require significant attention to details on various types of issues. Forensic accountants have skills acquired through their experience, training and learning that can assist legal counsel in a qualified, objective, and professional manner and are “must have” in such intricate cases where millions of dollars may be at stake.

Appendix A – Large Class Actions Settlements in Canada¹²

Defendant	Description	Year	Amount
Government of Canada	\$1 billion special settlement fund awarded to Hepatitis C victims and their families. – 2007. In 1998 the Canadian government had compensated Canadians who had contracted Hepatitis C from blood transfusions. Referred to as 'the tainted blood scandal', many victims were excluded from the \$1.1 billion settlement in 1998 if they contracted the disease outside the time frame - January 1, 1986 to July 1, 1990 -- of the compensation package. A settlement has been reached and the Canadian government will set aside about \$1 billion for people who contracted the virus before Jan. 1, 1986, and after July 1, 1990. Many Hepatitis C victims have already died but their families are entitled to receive some compensation.	1998 & 2007	\$2.1 billion
Government of Canada	The Indian residential schools settlement was approved by the Courts in 2006 for abuses suffered by aboriginal people.	2006	\$1.9 billion plus
Government of Ontario	A settlement was reached for residents and non-residents of Brockton (formerly the town of Walkerton), Ontario who were affected by the e-coli outbreak in the water system who consumed or used water delivered by the Walkerton PUC between April 1 to December 5, 2000, or who may have been infected with gastroenteritis or a similar type of illness by exposure to such person, or their family members.	2001 - 2002	\$66 million
Alberta Government	This Alberta class action was filed against the provincial government regarding its treatment of severely handicapped, widowed, and poor Albertans. The lawsuit claimed illegal and abusive bureaucratic treatment of people on the government's social programs. Policies arbitrarily docked these people for overpayments caused by administrative errors and denied them full compensation when they were underpaid. The Alberta Court of Queen's Bench has approved a \$100 million class action settlement. (Jan-14-06)	2006	\$100 million

¹² Most details about these cases have been obtained from the website: www.lawyersandsettlements.com unless otherwise specified

APPENDIX A

Defendant	Description	Year	Amount
Government of Alberta	This class action lawsuit was filed against the province of Alberta and accused it of treating people on social assistance programs oppressively. It challenged the arbitrary way the province docked their assistance payments when they were suspected of getting too much and wrongfully denied them full compensation when they were found to have not received the amounts they were entitled to. Though the province denied the allegations, it agreed to a historic class action lawsuit settlement. The average payout is approximately \$4,100 in addition to the \$10.5 million paid out to date. 5,862 people have filed claims, including 326 since the original deadline. The province had set aside \$24 million in anticipation that 15,000 people might be eligible to make a claim.	2007	\$24 million
Sony BMG Canada Inc.	Quebec – The Quebec Superior Court approved a class action lawsuit settlement. The lawsuit was filed regarding Sony music CDs that installed software on computers without authorization. The lawsuit claimed music CDs sold by Sony BMG included anti-copying software that was secretly installed on CD- drives when inserted into computers. The software made it possible for a computer to be hijacked by an attacker or susceptible to a computer virus. Sony BMG sold millions of copy protected CDs worldwide that used a computer program called a DRM RootKit to hide the fact that it is running, making it more difficult to disable. (Oct-11-06)	2006	Unknown
The U.S. Government	For many years, the U.S. and Canada have been involved in an ongoing dispute over softwood lumber tariffs. In 2002, the Bush administration imposed tariffs of 27 percent on lumber coming into the U.S from Canada and the duties were eventually reduced to 11 percent after a series of appeals and litigation. A settlement agreement was reached between the Canadian and U.S. governments to end all litigation between the two countries over the softwood lumber dispute as well, \$4 billion of the \$5 billion in tariffs collected by the U.S. was to be returned to Canadian producers.	2006	\$4 billion
Servier Canada Inc. et al.	This settlement granted Court approval in the class action lawsuit filed on behalf of Canadians (excluding those residing in Quebec) who ingested the diet drugs, Ponderal and Redux and suffered from Valvular Heart Disease ("VHD") or Primary Pulmonary Hypertension ("PPH"). (Dec-03-04)	2004	\$25 million
Canadian Imperial Bank of	A settlement has been approved in the class action lawsuit filed on behalf of CIBC VISA cardholders. The suit alleged that the bank did not adequately disclose fees or charges when cardholders charged something on their VISA cards outside Canada. (Oct-15-04)	2004	Unknown

APPENDIX A

Defendant	Description	Year	Amount
Commerce			
The Great Atlantic & Pacific Tea Company, Inc.	A settlement was reached in the class action lawsuit filed on behalf of 29 operating and former franchisees of its Food Basics discount grocery operations in Ontario, Canada. The suit involved a dispute over certain terms contained in the previous franchise agreement. (Oct-01-04)	2004	\$32 million
Shell Canada.	A settlement was reached in the class action lawsuit filed on behalf of an estimated 500,000 Quebec drivers. The suit was filed in 2003 and alleged that tainted gas had caused damage to the plaintiff's cars in 2001 and 2002.	2004	Unknown
Enbridge Gas Distribution Inc.	The Supreme Court of Canada issued a \$100 million verdict in the class action lawsuit filed on behalf of thousands of customers who were charged late-payment fees. (Apr-23-04)	2004	\$100 million
Ford Motor Co. of Canada Ltd.	A settlement was approved in the class action lawsuit filed on behalf of approximately 100 auto dealers who were adversely affected by the auto maker's decision to convert Mercury outlets into Ford stores. (Mar-30-04)	2004	\$50 million
14 Major International Vitamin Manufacturers	A settlement was reached in the class action lawsuit filed on behalf of consumers, vitamin retailers and livestock farmers. The suit alleged that the defendants conspired to fix prices on 10 bulk vitamins and food additives sold in Canada from 1990 to 1998. (Dec-11-04)	2004	\$132 million
Bell Canada	Current and former telephone operators of Bell Canada (mostly women) accepted \$104 million settlement to end a 14 year-old dispute covering the years 1993 to 1999 with The Communications, Energy and Paper-workers Union of Canada ("CEP") and Bell Canada over pay equity for 4,765 telephone operators. CEP had filed its claim for pay equity on behalf of the largely female operators, dining service and house services workers in 1992 with the Canadian Human Rights Commission. (Jun-19-06)	2006	\$104 million
Qwest Communications	A settlement was reached in five class action lawsuits filed on behalf of investors of Qwest Communications. The suits alleged that 16 former and current executives and directors earned millions of dollars from misusing non-public information to profit from insider trading in the	2004	\$25 million

APPENDIX A

Defendant	Description	Year	Amount
	stock of Qwest and other companies. (Jun-16-04)		
Dow Corning	A settlement of about \$24 million was reached in the class action lawsuit filed on behalf of between 2,000 and 3,000 Canadian women who claimed their silicone breast implants caused them health problems.	2004	\$24 million
Government of Ontario	A settlement was reached in the pay-equity suit filed against the government of Ontario on behalf of 100,000 female public-sector workers. Under the terms of settlement, the pay adjustments are to be phased in by one per cent of payroll each per year until 2011.		\$414 million

Appendix B – Search results from LexisNexis Quicklaw for search terms "class actions" AND "forensic accountant"

	Case name & citation	Court	Judgment date	Source
1	Fantl v. Transamerica Life Canada, [2008] O.J. No. 1536	ONSupCtJus	Apr 23, 2008	Ontario Judgments
2	Markson v. MBNA Canada Bank, [2005] O.J. No. 4625	ONSupCtJusDivCt	Oct 27, 2005	Ontario Judgments
3	Markson v. MBNA Canada Bank, [2005] O.J. No. 4625	ONSupCtJusDivCt	Oct 27, 2005	Ontario Judgments
4	Lee Valley Tools Ltd. v. Canada Post Corp., [2007] O.J. No. 4942	ONSupCtJus	Dec 18, 2007	Ontario Judgments
5	McLaine v. London Life Insurance Co., [2007] O.J. No. 5035	ONSupCtJusDivCt	Dec 18, 2007	Ontario Judgments
6	Markson v. MBNA Canada Bank, [2004] O.J. No. 3226	ONSupCtJus	Jul 28, 2004	Ontario Judgments
7	Markson v. MBNA Canada Bank, [2007] O.J. No. 1684	ONCA	May 02, 2007	Ontario Judgments
8	Currie v. McDonald's Restaurants of Canada Ltd., [2007] O.J. No. 3622	ONSupCtJus	Sep 25, 2007	Ontario Judgments
9	Consumers' Assn. of Canada v. Coca-Cola Bottling Co., [2006] B.C.J. No. 1245	BCSC	Jun 02, 2006	British Columbia and Yukon Judgments
10	Blacklaws v. Morrow, [1997] A.J. No. 1281	ABQB	Dec 12, 1997	Alberta Judgments
11	Kerr v. Danier Leather Inc., [2004] O.J. No. 1916	ONSupCtJus	May 07, 2004	Ontario Judgments
12	Blacklaws v. Morrow, [2000] A.J. No. 725	ABCA	Jun 21, 2000	Alberta Judgments
13	Mont-Bleu Ford Inc. v. Ford Motor Co. of Canada, [2004] O.J. No. 1270	ONSupCtJus	Mar 26, 2004	Ontario Judgments
	International Nesmont Industrial Corp. v. Continental Insurance Co. of Canada, [2002] B.C.J. No. 356			British Columbia and Yukon Judgments
14		BCCA	Feb 22, 2002	
15	Cini et al. v. Micallef et al., [1987] O.J. No. 795	ONHCJ	Aug 28, 1987	Ontario Judgments
16	Kerr v. Danier Leather Inc., [2001] O.J. No. 950	ONSupCtJus	Mar 15, 2001	Ontario Judgments
17	Alton (Re), [2003] O.J. No. 3135	ONSupCtJus	Aug 05, 2003	Ontario Judgments
				British Columbia and Yukon Judgments
18	Davis & Co. v. Jiwan, [2007] B.C.J. No. 2617	BCSC	Dec 07, 2007	Yukon Judgments

Source: Quicklaw website search conducted on June 19, 2008

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 - b. Hollick v Toronto (City) 2001 SCC 68
 - c. Rumley v. British Columbia, 2001 SCC 69
5. Ontario Class Proceedings Act, 1992 available at:
<http://www.canlii.org/on/laws/sta/1992c.6/index.html>
6. Article by Stephan Drolet and Richard Lepine entitled “More than Just Sending Out the Cheques – Administering Class-Action Settlements”;
7. Discussions and review by Mr. John Lorn McDougall, Q.C. of Fraser Milner Casgrain LLP regarding the Executive Summary portion of this project;
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