Bennett Jones

Class Actions: Looking Forward 2024

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Bennett Jones

Introduction

Nina Butz

In our 2024 edition of *Looking Forward*, we review notable class action developments from the past year and consider what recent trends in the law might tell us about what to expect in the years ahead.

We begin with an update on a trilogy of privacy class action appeals in which the plaintiffs sought, unsuccessfully, leave to appeal to the Supreme Court of Canada to expand the tort of intrusion upon seclusion.

Next, we review a decision in which the Ontario Superior Court clarifies the effect of the 2020 amendments to Ontario's class proceedings legislation on the test for certification, specifically the superiority and predominance requirements introduced into the preferable procedure criterion.

In a similar vein, we discuss the utilization of section 7 of Ontario's class proceedings legislation to convert the major junior hockey abuse class action into up to 60 joinder actions after certification was dismissed. After the certification judge determined a class action was not the preferable procedure given the case's complexity, the question became: what process is available in Canada for mass torts when a class action cannot be certified?

We then discuss the latest court commentary out of British Columbia regarding the effect of differences among provincial consumer protection statutes on plaintiffs' ability to certify national class actions against product manufacturers.

Shifting focus, we turn to another British Columbia decision, in which certification was denied in a class action regarding a wildfire, demonstrating the court's commitment to the certification application as a meaningful screening device for proposed class actions. In this case, the failure to provide sufficient, admissible evidence regarding causation was determinative of the class action's failure.

Next, we canvass a series of competition class actions demonstrating that defendants have had increased success in criticizing proposed class actions as speculative by attacking pleadings and case theories, rather than focusing primarily or exclusively on issues of harm.

Moving on, we discuss the Ontario Superior Court's recent emphasis on the need, in a negligent design class action, for evidence on the product from a qualified design expert, even in the context of a certification motion. The case at issue concerned the 2018 Danforth shooting in Toronto and the product at issue was a Smith & Wesson handgun.

We then provide an overview of the highly anticipated common issues trial decision in the COVID-19 business interruption insurance coverage class action, in which the Ontario Superior Court dismissed the action in its entirety. The decision is the first of its kind in Canada to consider the application of insurance contract interpretation principles to COVID-19 pandemic-related claims.

Exploring more trends in Ontario, we turn to a discussion of a demonstrative securities class action decision from the Ontario Court of Appeal concerning secondary market misrepresentation claims. In this decision, the court endorsed a robust approach to the test for leave to assert secondary market claims, affirmed that motions judges are entitled to carefully scrutinize the evidence led in support of leave, and gave direction as to what constitutes a "public correction" under the Ontario *Securities Act*.

Finally, we provide a report from Quebec highlighting notable cases concerning consumer class actions heard on the merits, causation in the no-fault liability context and challenging the scope of a proposed class based on jurisdiction.

Our Class Action Litigation group continued to drive results for clients in the most high-profile, high-stakes and most complex cases of the year, successfully acting on several precedent-setting decisions.

The firm won the Class Action Firm of the Year at the 2022 Canadian *Benchmark Litigation* Awards. Practice group co-chair Mike Eizenga has won *Benchmark's* Class Action Litigator of the Year six times in the last eight years, and co-chair Cheryl Woodin was awarded *Benchmark's* Class Action Litigator of the Year in 2023. Other practice group members have also received recognition and distinction for their expertise in the field by *Chambers and Partners*. Bennett Jones' Class Actions practice group is highly ranked in *Chambers and Partners* in Dispute Resolution: Class Actions.

Our national reach continues to expand with the growth of our new Montréal office over its first full year in operation, enabling us to further serve class action and competition clients in all Canadian jurisdictions where they may face litigation.

Bennett Jones

Judicial Economy, Access to Justice and Certainty in the Law: The Supreme Court of Canada's Denial of Leave to Appeal in the Intrusion Upon Seclusion Trilogy

Nina Butz and Mehak Kawatra

On July 13, 2023, the Supreme Court of Canada denied leave to appeal from three Ontario Court of Appeal decisions declining to apply the tort of intrusion upon seclusion to "database defendants" (i.e., organizations that collect and store personal information in the course of carrying on a commercial activity and whose databases are "hacked" by unauthorized third parties). The Supreme Court of Canada's denial of leave is a significant development for database defendants, as data breach plaintiffs must now prove compensable loss to make out a claim against such defendants in connection with a breach by an unauthorized third party. This can pose a substantial challenge for plaintiffs, particularly in class actions, where the plaintiff class has not incurred sufficiently serious or compensable losses rising above everyday reasonable expenses or inconveniences.

The tort of intrusion upon seclusion is a common law breach of privacy cause of action first adopted by the Ontario Court of Appeal in 2012 in *Jones v Tsige* to recognize moral harm stemming from the intentional invasion of a plaintiff's privacy. The tort has three elements:

1. the defendant must have intruded upon the plaintiff's private affairs or concerns, without lawful excuse (the conduct requirement);
2. the conduct which constitutes the intrusion must have been done intentionally or recklessly (the state of mind requirement); and
3. a reasonable person would regard the invasion of privacy as highly offensive, causing distress, humiliation or anguish (the consequence requirement).

As the tort recognizes the moral wrong, it does not require proof of pecuniary loss in order to generate an award of damages. This potential for an award of damages without proof of pecuniary loss made the tort an appealing cause of action for plaintiffs in privacy breach class actions against database defendants.

Following *Jones v Tsige*, there was uncertainty in Ontario's case law concerning the application of intrusion upon seclusion to database defendants. In that context, three privacy class actions were initiated in the Ontario Superior Court, and ultimately came before the Ontario Court of Appeal in 2022: *Owsianik v Equifax Canada Co. (Equifax)*, *Obodo v Trans Union of Canada Inc. (Trans Union)*, and *Winder v Marriott International Inc. (Marriott)* (collectively the Trilogy). Bennett Jones acted for Marriott.

The Trilogy cases each involved database defendants that collected and stored some form of personal information belonging to Canadian customers including names, birth dates, addresses and/or credit or payment card information. In each case, those databases were breached by unknown and unauthorized third-party hackers. In *Equifax*, the plaintiff argued that Equifax committed the alleged intrusion upon seclusion by recklessly storing the personal information it had collected. In *Trans Union*, the plaintiff argued that Trans Union committed the alleged intrusion upon seclusion by enabling the third-party hack. And in *Marriott*, the

plaintiff argued that Marriott committed the asserted intrusion upon seclusion when it allegedly failed to protect the information in its database in accordance with its representations and legal obligations.

In *Equifax* (the lead decision in the Trilogy), the Ontario Court of Appeal held that intrusion upon seclusion does not apply to database defendants because they do not commit the requisite "intrusion" identified as the first element of the tort in *Jones v Tsige*. Regardless of how each plaintiff tried to frame the database defendants' alleged misconduct, the Court held that there were no facts to demonstrate that they directly committed an "intrusion". The intentionality or recklessness of the defendants' actions under the tort must relate to the prohibited conduct, which is the actual intrusion upon the plaintiffs' private affairs—in each case the Court found that the intrusion was committed by the unknown and unauthorized third-party hackers, not by the database defendants. The Court also declined to expand the tort in order for it to apply to the alleged conduct of the database defendants.

In finding that the tort of intrusion upon seclusion does not apply to database defendants, the Ontario Court of Appeal reaffirmed the principles enunciated by the Supreme Court of Canada in 2020 in *Atlantic Lottery Corp Inc v Babstock (Babstock)* regarding the "plain and obvious" standard used to assess whether pleadings disclose a tenable cause of action and the importance of disposing of claims at an early stage if appropriate. In *Babstock*, the cause of action at issue was waiver of tort. The Supreme Court of Canada held that a claim will not survive an application to strike simply because it is novel; if a court would not recognize a novel claim even when the facts as pleaded are taken to be true, then the claim is plainly doomed to fail and should be struck.

In *Equifax*, the Ontario Court of Appeal added to the *Babstock* principles by holding that a court may determine the validity of a claim on a pleadings motion even where the legal question to be answered is complex, policy-laden and open to some debate. Early resolution of the legal viability of claims—particularly those plainly doomed to fail—serves judicial efficiency, enhances access to justice and promotes certainty in the law. The Court held that this approach would also minimize the unfairness arising from any legal uncertainty that could exacerbate the defendants' potential liability and provide the plaintiffs with a "leg up" in the certification process.

The tort of intrusion upon seclusion—like the waiver of tort doctrine that came before it—was useful for plaintiffs seeking certification. Plaintiffs were able to utilize the novelty of the alleged causes of action and the courts' reluctance to dismiss claims on the basis of motions to strike pleaded cause of actions in order to advance class proceedings by eliminating the need for individualized inquiries which degraded their ability to satisfy the commonality requirement. This strategy is now far less available to plaintiffs.

Looking Forward

While businesses that collect and store their customers' personal information remain subject to statutory, contractual and other legal obligations (including the tort of negligence), the Supreme Court of Canada's denial of leave to appeal the Trilogy brings welcome certainty and predictability for these companies facing claims for moral damages under the tort of intrusion upon seclusion, if the tort is pleaded at all. The Supreme Court of Canada's denial of leave to appeal also affirms the law, as reiterated and advanced by the Ontario Court of Appeal, that courts may (and should) resolve seemingly complex claims early in the proceeding where those claims are clearly doomed to fail—a principle that will reduce cost and uncertainty in litigation going forward.

Statutory Amendments to Certification Test: *Banman v Ontario*, 2023 ONSC 6187

Cheryl Woodin and Sidney Brejak

Approximately four years have passed since the new amendments to Ontario's *Class Proceedings Act, 1992* came into force. One of the most significant amendments was the addition of subsection 5(1.1) to the preferable procedure criterion set out in section 5(1)(d).

Previously, certification required the plaintiff to provide some basis in fact that the class action is the preferable procedure for resolving the complaint, in that the class action must be: (1) fair, efficient and manageable; and (2) preferable to any other available method of resolution. The amendments added two additional requirements, stipulating that a class action will be deemed preferable for resolving common issues "only if, at a minimum": (i) the class action is superior to all reasonably available alternative resolution procedures; and (ii) the common issues predominate over individual issues.

Many legal scholars have speculated on the potential legal and practical impacts of the amendments,[1] with some courts offering obiter commentary suggesting that the amendments may either reflect existing jurisprudence[2] or reflect a material change in the law.[3] However, until recently, there has been little judicial analysis on the matter.

This changed when Justice Perell, one of Canada's most distinguished class action judges, rendered his decision in *Banman v Ontario (Banman)* on October 31, 2023.

In *Banman*, the plaintiffs sought to certify a class action against the Ontario Government and the Attorney General on behalf of 429 patients treated in the forensic psychiatric unit of the St. Thomas Psychiatric Hospital between 1976 and 1992. Allegations included breach of fiduciary duty, negligence, vicarious liability, breach of non-delegable duty, and breach of sections 7, 9, 12, 15, and 28 of the *Canadian Charter of Rights and Freedoms (Charter)*. The defendants opposed certification, contending that the individual issues would predominate over the common issues and that a joinder action would be superior to the proposed class proceeding.

Justice Perell dismissed the action against the Attorney General but certified the action against the Ontario Government, finding that the plaintiffs satisfied the certification criteria, except for certain *Charter* claims and several common issues regarding causation and damages.

A Stricter Certification Test

In assessing the effect of the amendments on the preferability analysis, Justice Perell looked to the language of the amendments and the legislative history concluding that the purpose of the amendments "was to raise the threshold, heighten the barrier, or make more rigorous the challenge of satisfying the preferable procedure criterion." Accordingly, the proposed class action "must" be superlative to any alternatives, and the common issues "must" also predominate, as a whole, over individual issues.

1. See e.g., Michael Eizenga and Michael Peerless argue that Ontario's certification test "has been made more rigorous", meaning that Ontario is the only jurisdiction to "have a preferable procedure test this strict". See "Class Actions: From Case #1 to the 2020 Amendment in Ontario", 40 Adv J No 4, 21-25.
2. *Woods et. al. v University of Ottawa*, 2021 ONSC 5720; *McGee v Farazli et al.*, 2022 ONSC 4105.
3. *Coles v FCA Canada Inc.*, 2022 ONSC 5575.

Justice Perell next considered the stringency of the amended preferability requirement. He concluded that the new analysis involves determining: (1) the manageability of the class action; (2) whether there are reasonable alternatives; (3) whether the common issues predominate over the individual issues; and (4) whether the proposed class action is superior to the alternatives.

This analysis is to be conducted by comparing the advantages and disadvantages of the alternatives to the proposed class action through the lens of judicial economy, behaviour modification, and access to justice—though access to justice should always be the primary lens through which preferability is assessed. A class action will not be preferable if, at the end of the day, claimants remain faced with the same economic and practical hurdles that they faced at the outset of the proposed class action.

Predominance

Justice Perell concluded that the purpose of determining whether the common issues predominate over the individual issues is to ensure that the common issues—*taken together*—advance the objective of judicial economy and sufficiently advance the claims of the class members to achieve access to justice. The commonly used "football game" metaphor—that a common issue must just move the yardstick—is no longer applicable under the new more rigorous preferability analysis.

In determining whether the common issues, taken together, predominated over the individual issues in *Banman*, Justice Perell considered the broad monetary range of the patients' claims. He found that, as individuals, many of the patients had nominal claims which could not justify the costs of individual litigation. While a number of patients could have multi-million-dollar claims that would be worthy of pursuing individually, he held that the benefit to class members who had nominal claims was sufficient for the common issues to predominate, as the class action would be the only way to achieve access to justice for those patients.

Superiority

In assessing whether the proposed class action was superior to alternatives, Justice Perell concluded that the alternatives would be uneconomic, lengthy and expensive. He found the case of *Barker v Barker* (a proposed institutional abuse class action that was converted into a joinder action lasting 23 years and marred by delay, excessive cost and other difficulties) instructive and exemplified the significant financial expense and unmanageability of prosecuting individual institutional abuse or malfeasance actions. In the case before him, Justice Perell noted that individual actions would require vulnerable, marginalized and elderly patients to go through protracted discoveries, all for the prospect of recovering nominal damages.

Justice Perell also reminded the defendants that they would benefit from the economics of defending a single action, which would discharge the defendants from liability for all class members if the action were to settle.

Grozelle v Corby Spirit and Wine Limited, 2023 ONSC 7212

In the 2023 case of *Grozelle v Corby Spirit and Wine Limited (Grozelle)*, Justice Akbarali cited *Banman* with approval in a contested certification motion, affirming the impact of the amendments as imposing a stricter, more rigorous certification test.

The plaintiffs in *Grozelle* alleged that the defendant was liable for damages caused to their properties which they claimed occurred as a result of a fungus stemming from emissions of whisky aging warehouses. The plaintiffs claimed negligence and negligent misrepresentation.

In contrast to *Banman*, Justice Akbarali determined that a class action was not the preferable procedure because the individual issues overwhelmed the common issues—both in quantity and in the scope of evidence required for plaintiffs to demonstrate damages, and potentially also the elements to make out a claim for negligent misrepresentation—and that individual issues trials would place the same burdens on class members as if they would have initially pursued individual actions.

Looking Forward

Banman and *Grozelle* provide early insights into the application of the new preferability analysis, offering guidance for class action practitioners in Ontario. We are on notice that:

- the preferability criterion is now a more onerous hurdle for plaintiffs;
- access to justice is the primary consideration when assessing preferability;
- to satisfy the predominance requirement, common issues—*taken together*—must predominate over the individual issues; and
- economic feasibility and efficiency are considerations in determining whether a class proceeding is superior to reasonable alternatives.

Though it may be too early to appreciate the full effect of the amendments on future class actions, *Banman* and *Grozelle* confirm that the preferability criterion is to be understood as a more onerous hurdle for plaintiffs as compared to what was required under the old statute. However, it remains to be seen how courts will continue to interpret and apply the new preferability analysis in other factual contexts and as other adequate alternatives are considered.

The Inbetweeners—Mass Torts That Do Not Meet the Certification Criteria

Ethan Schiff and Marshall Torgov

What Canadian process is available for mass torts when a class action cannot be certified? That is one question addressed by the Ontario Superior Court of Justice in *Carcillo v Canadian Hockey League (Carcillo)*.

In that proceeding, the motions judge declined to certify a class action brought by major junior hockey players who allege various abuses over nearly 50 years against the Canadian Hockey League corporation, three hockey league corporations and the 74 entities representing the 60 teams playing in those leagues.

Following the dismissal of certification, the plaintiffs brought a motion pursuant to, among others, section 7 of the *Class Proceedings Act, 1992* (the Act), requesting that the motions judge transition the proposed class action to an alternative process. The motions judge granted the motion and ordered that the proposed class action be converted into up to 60 opt-in joinder actions (the Section 7 Order), each to be prosecuted by plaintiffs alleging abuse suffered against one team, the applicable regional league in which that team plays and the CHL.

The Section 7 Order has not been implemented. The plaintiffs have appealed both the order dismissing certification and the Section 7 Order. Those appeals remain outstanding, but—looking forward—*Carcillo* provides a precedent for judges and parties to fashion alternative procedures to determine mass tort claims when neither a class proceeding nor individual litigation are preferable.

The Dismissal of Certification and Granting the Section 7 Order

In February 2023, the motions judge dismissed certification. Among other things, he held that the proposed class action suffered from want of collective liability of the defendants because players have no claim against the teams and the leagues for whom they did not play. The motions judge separately concluded that there was insufficient commonality to satisfy the certification test. In his words:

> the proposed class action would not be manageable and no conceivable litigation plan and certainly not the boilerplate litigation plan of Class Counsel could make this proposed class action manageable. The court would be asked to manage: (a) the individual defences of 78 defendants in 13 different jurisdictions; (b) hundreds of inevitable third party claims against the actual perpetrators, pedophiles, sadists, and sociopaths who apparently saw nothing wrong in torturing their teammates; (c) events of "abuse" that are a myriad of sins and a myriad of torts; (d) events over a 50-year period; (e) choice of law issues with respect to the common law, civil law, and possibly American law; and (f) limitation period defences; etc.

The motions judge, however, concluded that joinder of claims based on similar experiences for a single team would be a more appropriate and feasible means to achieve access to justice.

Beginning in August 2023, the motions judge presided over five hearings for the plaintiffs' motion for the Section 7 Order. The plaintiffs initially proposed a claims-style process that included determination of claims by referring them to non-judicial adjudicators, to be confirmed by a judge. The motions judge rejected that proposal noting, among other things, limitations on the court's jurisdiction to order "procedural innovations".

The Section 7 Order Plan

The motions judge instead approved a tailored process to transition the proposed class action into up to 60 opt-in joinder actions, each against one team, the league applicable to that team and the CHL. The Section 7 Order also includes provisions affecting the process for the determination of the joinder actions, including to create efficiencies. Among others, the Section 7 Order provides for the following:

1. notice to the class members of the dismissal of certification and the ability to opt into a joinder action applicable to them (the notice is to include both direct notice through contact information within the defendants' possession and indirect notice by posting on websites and social media, and is to be paid by the defendants);
2. process by which the plaintiffs may opt into a joinder action, including requirements for plaintiffs to provide information to class counsel necessary to place them into the correct joinder action;
3. requirements for filing confidential pleadings, to include redactions for identifying information until the close of the pleadings period;
4. requirements for plaintiffs to deliver specialized offers to settle;
5. processes for managing third party claims;
6. case management of all opt-in joinder actions by a single judge; and
7. specific contemplation of use of bellwether trials.

Looking Forward

As noted, the plaintiffs have appealed the Section 7 Order. However, the *Carcillo* case provides a precedent for future Canadian courts to implement similar processes, but it remains unclear if other courts will make similar orders or if plaintiffs will pursue such orders. To date, no additional cases have been published applying section 7 of the Act to create a comparable process. Until and if Canadian jurisdictions establish a process analogous to the U.S. multidistrict litigation, the Section 7 Order provides the closest thing to a Canadian non-class action mass tort blueprint.

Bennett Jones acts for the defendants.

Bennett Jones

Differences in Consumer Protection Legislation Continue to Deter National Consumer Protection Based Class Actions

Peter Douglas

The Supreme Court of British Columbia's recent December 2023 decision in *MacKinnon v Pfizer Canada Inc. (MacKinnon)* illustrates that certifying a national class action against product manufacturers based on breaches of provincial consumer protection statutes remains onerous.

The plaintiffs in *MacKinnon* sought to certify a class proceeding against various pharmaceutical manufacturers alleging that birth control products they manufactured were not effective in preventing pregnancies. In addition to claims in negligence regarding manufacturing defects, the plaintiffs alleged that the defendants engaged in unfair practices in violation of various provincial consumer protection statues by misrepresenting that the birth control products contained certain ingredients and that they were more than 99 percent effective in preventing pregnancy.

While the Supreme Court of British Columbia granted certification of certain claims under a number of the provincial consumer protection statues, the Court declined to certify claims under Ontario's *Consumer Protection Act, 2002* and Prince Edward Island's *Business Practices Act*, finding that privity of contract is required in those provinces in order to advance claims under these statutes.

As the plaintiffs and the proposed class members in this case did not purchase the alleged defective birth control products directly from either of the defendant manufacturers, they did not have a relationship of contractual privity with either of the defendants. For this reason, the Court struck the plaintiffs' claims under the Ontario and Prince Edward Island consumer protection statutes as the claims were doomed to fail.

Looking Forward

This decision highlights that there are stark differences in the requirements to advance claims under the consumer protection statutes of each province. For instance, as found by the Supreme Court of British Columbia in *MacKinnon*, it has been repeatedly recognized that privity of contract must be plead in order to advance claims under the statues of Ontario, Prince Edward Island, and Newfoundland and Labrador, while the consumer protection statutes of all other provinces do not include such a requirement.

It has also been recognized that plaintiffs must plead that proposed class members relied on alleged misrepresentations in order to advance claims of unfair practices under the consumer protection statues of British Columbia, Alberta, Saskatchewan, Prince Edward Island, and Newfoundland and Labrador. This requirement—which poses additional difficulty in asserting that claims have sufficient commonality to be determined on a class-wide basis—is not required under the statutes of Ontario and Manitoba.

Because of these differences, it is exceedingly rare for class proceedings to be certified on a national basis with only breaches of provincial consumer protection legislation as the certified causes of action. So long as these legislative differences continue, we expect to continue to see plaintiffs seek to certify other causes of action alongside consumer protection claims—such as breaches of the *Competition Act*, breach of contract or common law torts such as negligence—in order to avoid the more stringent requirements of certain provincial consumer protection statutes.

O'Connor v Canadian Pacific: Lack of Factual Basis Derails Certification in British Columbia

Certification Application Fails Due to Insufficient Evidence in Underlying Allegation

Ilan Ishai and Jackson Spencer

On June 30, 2021, the Village of Lytton in rural British Columbia was devastated by a wildfire that resulted in personal injury, the destruction of homes and livelihoods, and the tragic loss of life. Various court proceedings related to the wildfire were commenced, including a proposed class action brought by representative plaintiffs Jordan Spinks and the late Christopher O'Connor (*O'Connor v Canadian Pacific Railway Limited [O'Connor]*).

Mr. Spinks claimed against Canadian National Railway, Canadian Pacific Railway and Transport Canada, among others, in various torts (negligence, nuisance and the rule in *Rylands v Fletcher*), alleging that railway operations in the area caused or contributed to the start of the wildfire.

On August 9, 2023, the Honourable Chief Justice Hinkson of the British Columbia Supreme Court denied the plaintiff's certification application. He found that the central allegation against the railway operations was unsupported by the evidence, and identified serious deficiencies in the pleadings such that none of the alleged causes of action satisfied the requirements under section 4(1)(a) of the British Columbia *Class Proceedings Act*. The Court ruled that, without any evidence that the defendants caused or contributed to the wildfire, the plaintiff had failed to establish some basis in fact that the proposed common issues could be proven in common across the class.

This certification decision is indicative of the British Columbia Supreme Court's commitment to view the certification application as a meaningful screening device. In particular, plaintiffs must provide sufficient evidence that an issue can be determined in common for the class. Despite the low bar for this standard, it is a hurdle nonetheless.

The Court Engaged with the Evidence and Found It to Be Lacking

At certification, the plaintiff tendered six expert reports "generally related to the cause of the fire". While the Court reviewed the expert evidence in detail, it identified that none of the plaintiff's experts opined as to what actually caused the wildfire, let alone whether it was caused by an act or omission of any of the defendants. As a result, the expert reports were of "marginal probative value", were not legally relevant and thus were deemed inadmissible.

The plaintiff was then left to rely on the supporting fact witness affidavits. In his own affidavit, Mr. Spinks asserted that upon his arrival in the area of the wildfire, he saw smoke rising near a pedestrian bridge that runs parallel to the train tracks over the Fraser River (south-east of Lytton). The plaintiff also tendered an affidavit from a Lytton resident who deposed that he saw a train pass the area east of the pedestrian bridge, after which he saw smoke and flames about 150 feet north of the tracks. The resident also affirmed that he "did not see anything else that could have sparked or otherwise caused the Wildfire." Video evidence from the train that passed through Lytton before the start of the fire reveals that there were three pedestrians near the pedestrian bridge as the train passed the area.

The Court found that the only evidence possibly connecting the railway to the wildfire was the evidence regarding the sequence of the train passing and smoke arising in the area shortly thereafter, which it held was insufficient "even on the low standard" on which it must consider the evidence.

The Causation Analysis was Fatal to the Common Issues Analysis

For the Court to certify the plaintiff's proposed class action, Justice Hinkson found that the plaintiff needed to show some basis in fact that the class members' claims raise common issues, which necessarily required "some basis in fact that there is a common issue in the first place"—an implicit acceptance of the "two-step" common issues test. Here, beyond the assertions that several trains passed through Lytton on the day the wildfire started and that some vegetation was present adjacent to the tracks, there were no facts alleged as to how any of the railway companies' trains, tracks or employees caused the wildfire. The central allegation against the defendants was therefore "nothing more than wishful thinking, and certainly not enough to amount to a 'basis in fact' to support [the plaintiff's] claim."

Looking Forward

This decision is notable in that it provides a signal to class counsel and potential representative plaintiffs that they must provide more than mere assertions or "wishful thinking"—admissible evidence regarding causation is required. Where plaintiffs seek to rely on the fact that causation *could* be determined and that the defendants *could* have internal documents in their possession that *could* be material to the plaintiff's claims, this will not satisfy the Court.

Plaintiffs must put forth a "cohesive theory", with evidence in support, for how the defendant's actions or omissions give rise to issues in common between putative class members. Without that evidence, the Court has signaled that it will not connect the dots, nor draw inferences between previous cases in order to alleviate the plaintiff of its burden to provide evidence in support of certification. For example, although the Court accepted that Lytton was an area known for setting temperature records and that railway activity *can* increase the possibility that a wildfire will spark in a given area, "simply because trains have sparked fires in the past, does not mean that a train was the cause of the Wildfire in this case."

Defendants should be alive to this requirement and similarly question whether the evidence is admissible, what the evidence actually proves, and whether the evidence simply demonstrates possibilities and speculation as opposed to some basis in fact for the proposed common issues.

Bennett Jones represented Canadian Pacific Railway Company and Canadian Pacific Railway Limited—two of the named defendants in the proposed class action—in their successful opposition to certification. While Justice Hinkson dismissed the certification application, he granted leave to Mr. Spinks to amend his pleadings and bring a new application for certification. Since the dismissal of the certification application, a number of additional actions have been commenced against the railway companies and others in connection with the Lytton wildfire by those who were part of the putative class in *O'Connor*. Pursuant to an Order by Chief Justice Hinkson in April 2024, the vast majority of these overlapping actions are to be collectively case managed by the same judge. To date, no public or private investigation has concluded that train activities caused or contributed to the Lytton wildfire.

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Competition Class Actions—The Year in Review

Emrys Davis

For many years, defendants resisted certification of competition class actions primarily by arguing that determining harm to class members defied calculation—or, at least, defied those methods the plaintiffs typically proposed. They had little success. Between 2010 and 2019, Canadian appellate courts—including the Supreme Court of Canada—largely rejected such arguments.

Plaintiffs and defendants responded to these appellate decisions. Plaintiffs began filing more ambitious cases that did not always contain all the elements of their prior successful cases (*e.g.*, alleged secret conspiracy, government enforcement outcome, parallel United States class action, etc.). Defendants began arguing that plaintiffs' cases were increasingly speculative (even if they were not) and often did not—as a matter of law—give rise to liability under the *Competition Act*.

As recent outcomes demonstrate, to date, defendants have had greater success relying on these arguments than they enjoyed previously.

In April 2023, the Federal Court of Appeal kicked off a string of successes for defendants when it upheld the lower court's decision in *Jensen v Samsung Electronics Co. Ltd. (Jensen)*. The lower court had denied certification, primarily because the plaintiffs had not pleaded sufficient material facts—nor provided any other evidence—that the defendants had formed an agreement related to the price of DRAM, as opposed to having acted independently. The Federal Court of Appeal unanimously endorsed the lower court's decision. Among other findings, it noted that the plaintiffs in *Jensen* had provided far fewer material facts about the alleged agreement than in other cases that had been certified. It also rejected the plaintiffs' argument that the lower court had inappropriately examined the merits, writing that, "[n]othing can be further from reality." Instead, "[a]ssessing whether the claim made by putative class members is genuine, even if asserted in common by a number of claimants, is entirely distinguishable from an examination of its merits." The plaintiffs sought leave to appeal, but the Supreme Court of Canada denied their application in January 2024.

Defendants secured another victory in August 2023 when the Ontario court denied certification of a case related to canned tuna in *Lilleyman v Bumblebee Foods LLC. (Lilleyman)*. There, unlike in *Jensen*, Ms. Lilleyman did not have to speculate about the existence of an agreement. Defendants had already pleaded guilty or been convicted of forming an unlawful agreement for the sale of canned tuna in the United States. However, much like in *Jensen*, Justice Perell held that Ms. Lilleyman's claim was speculative as it related to an agreement for the sale of canned tuna in Canada. The undisputed evidence confirmed that the Canadian and U.S. markets for canned tuna featured different products sourced from different suppliers and sold by different players. Indeed, Ms. Lilleyman had sued companies that did not sell tuna *in Canada,* yet failed to sue other companies who commanded a significant Canadian market share. For these and other reasons, Justice Perell held that Ms. Lilleyman had failed to plead a reasonable cause of action and had failed to demonstrate "some basis in fact" for her proposed common issues. He denied certification. Ms. Lilleyman has appealed.

The Federal Court then delivered decisions in August and September that—while not complete victories for defendants—reinforced the trend that courts will not accept speculative pleadings or causes of action that do not fit the statutory framework. In *Difederico v Amazon.com, Inc. (Difederico)*, the Federal Court denied certification of a case against Amazon. Amazon prohibited third party sellers from charging higher

prices on Amazon than they charged on other websites. The court held that it was plain and obvious that these contractual provisions as pleaded did not violate section 45 of the *Competition Act*. Third party sellers were free to set whatever price they chose. The contractual provisions simply prevented them from setting a higher price on Amazon than on alternative websites. After a detailed review of the language of the relevant section, its legislative history and the applicable jurisprudence, the court concluded that such conduct does not violate s. 45. The Federal Court conducted a similar analysis in *Sunderland v Toronto Regional Real Estate Board (Sunderland)*, a case about rules promulgated by real estate associations related to compensation among their members. As in *Difederico*, in *Sunderland*, the court carefully reviewed the pleaded case in view of the statutory language, history and case law. It concluded that: (1) the claim disclosed a cause of action only in respect of one narrow aspect and only against certain defendants; (2) the claim disclosed a cause of action against certain other defendants for having aided and abetted the alleged underlying violation; and (3) the claim did not disclose any cause of action against certain defendants. Accordingly, it certified the case but only against certain defendants and based on a theory of the case that was more limited than that advanced by the plaintiff. Both *Difederico* and *Sunderland* have been appealed.

The end of the year featured another example of an untenable legal theory producing victory for defendants. In *Williams v Audible Inc. (Williams)*, the plaintiff struggled to articulate a coherent legal theory, leading to multiple iterations of his case over several years. While many class actions evolve through the certification process, in *Williams*, the evolution was so complete that the evidence on which the plaintiff advanced at certification no longer aligned with his most recent case theory (which he advanced for the first time at the certification hearing itself). The plaintiff asserted that his evidence sufficed, but in the alternative asked for an adjournment to file more evidence. The certification judge denied his adjournment request and dismissed his certification motion, finding that to permit the plaintiff to file evidence at this late stage after so many prior amendments would prejudice the defendants. In December 2023, the British Columbia Court of Appeal agreed and dismissed the plaintiff's appeal.

Looking Forward

Although *Lilleyman*, *Difederico* and *Sunderland* are all under appeal, the appellate courts did not rescue plaintiffs in *Jensen* and *Williams*. They may not do so in those three cases either. Regardless, all these decisions demonstrate a shift from battles at certification over issues of harm (although those battles still occur) to battles over pleadings and case theories. We expect that trend to continue in 2024. However, we would predict less success for defendants in future years as plaintiffs will likely react to these decisions by taking fewer chances on difficult or complex case theories, improving the quality of their pleadings and choosing other avenues for cases that do not fit squarely under the current legal framework.

Bennett Jones

Certification Denied in Proposed Negligent Design Class Action Against Gun Manufacturer for Mass Shooting

Gannon Beaulne and Thomas Feore

The Ontario Superior Court recently emphasized the need in a negligent design claim for evidence on the product from a qualified design expert, even in the context of a certification motion.

In *Price v Smith & Wessen Corp (Price)*, Justice Paul Perell refused to certify a class action against the manufacturer of the handgun used to carry out the 2018 mass shooting on Danforth Avenue in Toronto. The plaintiffs brought their claim on behalf of those killed or otherwise affected by the tragedy. After a two-phase process, Justice Perell found no basis in fact for concluding that the handgun used in the shooting had been negligently designed or that the manufacturer's alleged negligence had caused the plaintiffs' injuries.

The decision followed an earlier determination in the case that the plaintiffs' negligent design claim—based on the lack of certain safety features in the handgun's design—was not bound to fail based on the pleadings. In 2020, Justice Perell bifurcated the certification process into two phases: (1) an initial assessment of the adequacy of the plaintiffs' claims based only on the pleadings; and (2) if the claims could proceed to the next phase based on the pleadings, an assessment of the threshold adequacy of those claims at the certification stage based on the evidence. While the plaintiffs' negligent design claim survived pleadings scrutiny (as discussed in *Are Gun Manufacturers Liable for Mass Shootings?*), Justice Perell found that the plaintiffs' evidence in support of that claim did not meet the "some basis in fact" standard applied at the certification stage.

This decision sets clear and specific guidelines for the evidence that courts will expect from plaintiffs before certifying a negligent design claim. It also shows that any "information deficit" of plaintiffs relative to defendants about design decisions and other details—often highlighted by plaintiffs in products liability cases—does not relieve plaintiffs of the onus of proving some basis in fact for their design negligence claims, including through expert evidence.

This decision also reinforces the now well-established principle that proving some basis in fact for common issues requires not only some basis in fact that the proposed issues can be answered in common across the class, but also some basis in fact that the proposed common issues actually exist.

No Basis in Fact for Negligent Design

To make out a negligent design claim, a plaintiff must:

1. identify the design defect in the product;
2. establish that the defect created a substantial likelihood of harm; and
3. establish that there are safer yet economically feasible ways to manufacture the product.

Whether a manufacturer designed a product negligently turns on a risk-utility analysis that weighs the utility of the chosen design against the foreseeable risks associated with that design. Economic feasibility is a factor—the alternative design must be able to be manufactured without unduly impairing the utility of the product or spiking its cost.

In *Price*, the product was Smith & Wesson's M&P40, a semi-automatic pistol made for military and police use. The plaintiffs alleged that the design defect was

the absence of "smart gun" technology, also known as "authorized user technology". In the firearms context, authorized user technologies aim to prevent the criminal misuse of weapons by unauthorized persons. Those technologies seek to prevent a firearm from functioning in the hands of anyone other than an authorized user. They include radio-frequency identification (RFID), proximity tokens, magnetic rings, palm-print recognition, fingerprint recognition, voice identification, other mechanical, automated identification and biometric identification tools.

The M&P40 used in the Danforth shooting was manufactured in the United States and lawfully exported to Canada in 2013. It was reported stolen in Saskatchewan in 2016 and came into the possession of the shooter in or about 2018. The shooter was not an authorized user of the M&P40 used in the shooting.

The plaintiffs alleged (among other things) that because Smith & Wesson knew the risks related to the unauthorized use of its firearms and had even sought patents for certain authorized user technologies, it was negligent in designing the M&P40 by not integrating authorized user technology into that product.

One "remarkable" feature of the expert evidence on the certification motion, Justice Perell observed, was the absence of any opinion from a qualified expert in handgun design. The plaintiffs' experts stated that the M&P40 should have included a mechanical internal lock, RFID and biometric recognition technology, and that an alternative design including these features would be safer. However, the plaintiffs led no evidence that a prototype of their proposed safer design had ever been tested. Indeed, the record before the court contained no evidence about the testing of *any* form of authorized user technology.

The plaintiffs argued that they should not be required to provide evidence for their risk-utility position at the certification stage. Justice Perell disagreed, finding that "the evidentiary threshold ... was to have an expert opine that: (1) an M&P40 without authorized user technology was a design defect that could have caused the harm suffered by the Class members; (2) an M&P40 with authorized user technology was a feasible alternative that could have been implemented at a reasonable cost; and (3) the implementation of authorized user technology would not have impaired the utility of the M&P40 for its intended users".

Justice Perell held that a "design negligence case ultimately requires evidence from an expert in design". The plaintiffs provided no evidence that an M&P40 designed with authorized user technologies would be reliable, economically feasible or even safer.

There was no evidence that a reasonable firearms manufacturer in Smith & Wesson's position would have chosen a different design for the M&P40.

The M&P40 was designed for use by military and law enforcement personnel. The reasonableness of the product's design thus depends on the needs of its intended users—in this case, members of the military and police trained in the use of handguns.

As the plaintiffs' experts acknowledged, adding authorized user technology to the product's design would affect the complexity, weight and balance (among other features) of the weapon, which would adversely affect its reliability and therefore utility. The plaintiffs' experts also acknowledged that adding authorized user technology to the product would increase the cost of manufacturing it. Justice Perell concluded that the feasibility of the authorized user technologies identified by the plaintiffs was at best "theoretical feasibility based on the existence of patents and by the use of authorized user technology in other products such as cell phones and automobiles". He found that there was no evidence that all M&P40s would be made safer for all users or for the public by the incorporation of locking mechanisms.

As a result, Justice Perell held that there was no basis in fact to conclude that Smith & Wesson's design fell below the standard of care. While he found that the plaintiffs may have a "public policy argument" that authorized user technology should be a product standard for all handguns, "a public policy argument is not the same thing as a design negligence cause of action against a handgun manufacturer who made design decisions not to incorporate authorized user technology in a handgun that it was manufacturing as a military and police weapon".

Causation

Justice Perell also considered, "because of the likelihood of appeals," whether general causation could be certified as a common issue. Answering in the negative, Justice Perell observed that the plaintiffs had failed to lead expert evidence from a criminologist to show that there is some basis in fact for concluding that adding authorized user technology to the M&P40 would reduce gun accidents and gun crimes of the nature that occurred on Danforth Avenue.

The plaintiffs contended that, since the shooter was an unauthorized user, he would not have been able to use the weapon to wound or kill the putative class members if the product's design had integrated authorized user technology. Justice Perell found that the shooter's use of an M&P40 without authorized user technology was an "incidental fact but not a causal fact that connects Smith & Wesson to the harm done". He found the harm was "caused by what [the shooter] did", not "by an aspect of how he did it."

Without expert evidence explaining how the lack of authorized user technology related to the shooter's crimes, Justice Perell held that "common sense does not fill the evidentiary void" and, especially because about half of gun crimes in Canada are committed by authorized users, "it cannot be said that but for the want of authorized user technology ... [the shooter] would not have perpetrated his evil crimes". The most that could be said, he found, was that the use of authorized user technology may have altered the *means* of the shooting, but not its occurrence.

While praising the plaintiffs "for their aspirations to find a means to prevent others from suffering as they have suffered", Justice Perell concluded that "it is for Parliament or the Legislatures not the courts to legislate public safety product standards."

Looking Forward

The *Price* decision emphasizes the need in a negligent design claim for evidence on the product from a qualified design expert, even in the context of a certification motion. As Justice Perell held, common sense—no matter how apparently compelling, as a matter of public policy—cannot displace properly qualified expert opinion (among other evidence) in support of an alternative product design being safer, yet also economically feasible to produce and as effective for its intended purpose and users.

This decision could greatly affect attempts by victims of mass shootings to use tort law and class actions to seek redress from the manufacturers of the firearms used in those shootings. The claims in the *Price* case were framed in negligent design. Importantly, Justice Perell did not foreclose the prospect of claims falling into that category of negligence or the prospect of other types of tort claims addressing similar facts, but he did make clear that the design features of a particular firearm used to carry out a shooting or other crime are—by themselves—merely incidental features of how the harm was caused and do not alter the shooter's ultimate causal responsibility.

Without expert empirical criminology evidence supporting that the plaintiffs' alternative product design would reduce gun crimes of the kind that in fact occurred, this decision suggests that meeting the some-basis-in-fact standard in relation to a causal chain between a manufacturer and a shooter will be difficult. The absence of adequate expert evidence in this matter was notably significant to the ultimate outcome.

The decision also suggests that any informational disadvantage as between the plaintiff-victim and the defendant-manufacturer on design decisions and other pertinent details does not diminish the requirement of satisfying the some-basis-in-fact standard through expert and other evidence at the certification stage of a proposed class action. While courts should take any imbalance into account, it is irrelevant to the ability of a plaintiff to identify the common alleged design defect and establish a methodology for making a risk-utility calculation.

The COVID-19 Virus Does Not Trigger Business Interruption Insurance Coverage

Joseph Blinick, Thomas Feore and Peter Douglas

In 2023, the Ontario Superior Court of Justice (Commercial List) released its highly anticipated decision in *Workman Optometry Professional Corporation v Certas Home and Auto Insurance Company (Workman)*. The Court's decision, which followed a three-week long common issues trial that included the testimony of representative plaintiffs and expert witnesses, was the first Canadian trial decision of its kind to consider the application of insurance contract interpretation principles to COVID-19 pandemic-related claims. While these issues have been subject to extensive litigation in the United States,[1] this case marked the first judicial consideration of these issues in Canada in the context of a trial involving extensive fact and expert evidence.

This class action was brought against fifteen large Canadian insurance companies and sought a multi-billion-dollar damages award for alleged business interruption losses resulting from COVID-19-related business closures. The plaintiffs' main allegation was that the presence of the SARS-CoV-2 virus in commercial properties caused physical loss or damage to property within the meaning of the business interruption insurance contracts such that business interruption coverage should have been provided by insurers for the period that businesses were interrupted.

In 2021, the action was certified, on consent, on behalf of a broad class comprised of businesses across the country (excluding Quebec) that purchased business interruption insurance and claimed for pandemic-related losses under their policies.

The case required co-ordination amongst virtually every major insurer in Canada that underwrote business interruption coverage. Each of the defendant insurer's business interruption policies were structured differently, but as the Court observed, each policy only applied if there was direct "physical loss of or damage to property". The policies covered "all risks" of "direct physical loss or damage to property", unless expressly excluded.

The insurers consented to the certification of three central common issues going to the core of the coverage dispute:

1. Can the presence of the SARS-CoV-2 virus or its variants cause physical loss or damage to property (within the meaning of the business interruption provisions of each defendant's property insurance wordings)?
2. Can an order of a civil authority in respect of business activities that was made due to the SARS-CoV-2 virus or its variants cause physical loss or damage to property within the meaning of the business interruption provisions of each defendant's property insurance wordings?
3. If the answer to either of the first two questions is "yes", are there any exclusions in any of the defendants' property insurance wordings that would result in coverage for such loss or damage being excluded?

The common issues trial was heard before the Ontario Superior Court of Justice's Commercial List in Toronto

1. American policyholders have filed well over 2,500 lawsuits in response to the COVID-19 pandemic, and more than 1,300 decisions have been released by federal and state courts, including over 200 appellate decisions.

and included the examination of four experts and seven representative plaintiffs. The trial evidence dealt with the nature of the SARS-CoV-2 virus, how it is transmitted and how it interacts with physical surfaces, as well as evidence relating to the purpose of the government orders. Despite all of this testimony, the Court noted that the issues for determination "were essentially all questions of contract interpretation." Moreover, none of the plaintiff fact witnesses offered any evidence that the virus caused actual physical loss or damage to their property; or that they were ever denied access to the insured property; or that they were prevented from using any tools and equipment that were insured; or that the insured property required any kind of repair or replacement as a result of the virus' presence.

The plaintiffs' primary theories of coverage were: (1) that the SARS-CoV-2 virus entered the plaintiffs' businesses and risked infecting healthy people inside as it sat upon surfaces, "such that there is a 'physical dimension' of some kind to the event", which caused "damage"; and (2) the SARS-CoV-2 virus, and the associated governmental orders restricting business operations, caused "damage" by preventing the plaintiffs from using their insured property. The Court rejected both of these submissions, in part on the basis of the expert evidence at trial, but principally in applying well-established principles of contractual interpretation.

Despite the extensive expert evidence put before the Court, and the multiple days of cross-examination, the Court ultimately found that, "[o]n most [of the] fundamental points", both the plaintiffs' and the defendants' experts agreed. There was no dispute that the SARS-CoV-2 virus spreads primarily through the air and can settle on surfaces. While transmission of the virus from surfaces is theoretically possible, it was "unlikely". Where the experts disagreed, the Court accepted the evidence of the defendants' experts, agreeing that viruses do not alter inanimate surfaces in any way (tangible or intangible; physical or chemical).

On the basis of well-established principles of insurance contract interpretation, the Court determined that "physical loss or damage to property" required *tangible* physical loss or damage (contrary to the plaintiffs' submission that "physical loss or damage" meant "physical loss" and "damage" of any kind), and that the virus had no effect on tangible property as "[v] iruses affect people, not inanimate surfaces." The Court concluded that the SARS-CoV-2 virus could not itself cause "physical loss or damage to property" within the meaning of the insurance policies. Specifically, the Court held that "the phrase 'physical loss or damage to property' requires that the property have been altered, harmed, lost or destroyed in a tangible or concrete way"—which the presence of the SARS-CoV-2 virus could not do.

As for the plaintiffs' alternative theory of coverage—that the governmental orders restricting business operations caused "physical loss or damage" by preventing the plaintiffs from *using* their "property"—the Court rejected this submission on several grounds. First, as a matter of contractual interpretation, interpreting "physical loss or damage" to include "loss of use" would be inconsistent with how the ordinary policyholder would understand the policy. More fundamentally, though, the Court observed that such an interpretation "result[ed] in a nonsensical circularity" as, on the plaintiffs' interpretation, the business interruption insurance would cover losses suffered due to the inability to use property, resulting from the inability to use property (i.e., a covered peril resulting in a covered peril, rather than an effect on the insured property). The Court rejected this interpretation as absurd. Further, even if the plaintiffs' interpretation was correct, the plaintiffs' evidence—almost all of which was found to be otherwise irrelevant to the certified common issues—made clear that they had not, in fact, lost the use of their property. During the trial, each of the representative plaintiffs gave testimony that acknowledged that they were able to access their business premises throughout the pandemic, were able to use their tools and equipment (and all other tangible property) and were ultimately able to continue operating (albeit at a reduced level) during the pandemic.

In conclusion, the Court answered the first two certified common issues in the negative, finding that the SARS-CoV-2 virus could *not* cause physical loss or damage to property within the meaning of the policies and that the civil authority orders also could *not* cause physical loss or damage to the insured property. As the first

two common issues were answered in the negative, it was not necessary for the Court to consider the third common issue and the Court declined to do so.

The plaintiffs elected to appeal the Court's decision to the Ontario Court of Appeal. The plaintiffs' appeal was dismissed by the Ontario Court of Appeal in June 2024.

Looking Forward

The *Workman* decision has delivered much needed certainty to the insurance industry—including insurers and policy holders nation-wide—on the central issues impacting COVID-19 pandemic business interruption claims filed in Canada.

It followed an expedited common issues trial that occurred less than two years after the negotiation of a consent certification order, which focused exclusively on the central coverage issues. The parties agreed to an expedited trial schedule, and the fifteen defendants presented an entirely coordinated defence of fact and law which both accelerated the trial process and secured a clean and emphatic win for insurers. The decision, and the process through which the case was litigated, illustrates the efficacy with which class proceedings can be leveraged to secure the timely adjudication of time-sensitive industry-wide issues.

Bennett Jones and its client, the Dominion of Canada General Insurance Company (Travelers), played a critical role in the successful defence of this matter.

Bennett Jones

Ontario Court of Appeal Puts Teeth Into Leave Test for Secondary Market Misrepresentation Claims Under the *Securities Act*

Doug Fenton

It was another active year in securities class actions, with appellate courts demonstrating renewed interest in secondary market misrepresentation claims. In one such decision from February 2024, *Drywall Acoustic Lathing and Insulation (Pension Fund, Local 675) v Barrick Gold Corporation (Drywall)*, the Ontario Court of Appeal re-examined the test for leave to commence a secondary market claim under section 138.3 of the Ontario *Securities Act*. The Court of Appeal endorsed a robust approach to the test for leave to assert secondary market claims and affirmed that motions judges are entitled to carefully scrutinize the evidence led in support of leave. The Court of Appeal also gave direction as to what constitutes a "public correction" under the *Securities Act*.

Procedural Background

In *Drywall*, the plaintiff alleged that Barrick Gold made material misrepresentations in its continuous disclosure about a significant gold mine located in an environmentally sensitive area of Chile. The alleged misrepresentations focused on statements about the mine's accounting practices and projected financial performance, including the projected capital expenditure (capex) budget and production schedule. The plaintiff also alleged that Barrick Gold had misrepresented whether it followed applicable environmental regulations.

The proceedings were fractured and complicated. While the plaintiff's claim was issued in 2014, the proceeding was significantly delayed while two class counsel firms fought a "carriage motion" to determine which firm would be permitted to prosecute the putative class action. The Court directed that the plaintiff's action would proceed, largely because the plaintiff sought to pursue claims for both accounting and environmental misrepresentations. By contrast, the competing law firm would have only sought to pursue the alleged environmental misrepresentations.

A plaintiff seeking to bring a claim under section 138.3 of the *Securities Act* alleging, that an issuer made misrepresentations in its public disclosure must first obtain leave from the court. Section 138.8 provides that, in order to grant leave, the court must be satisfied that: (1) the action is brought in good faith; and (2) there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff. In order to satisfy the second prong of the test, the plaintiff must "offer both a plausible analysis of the applicable legislative provisions, and some credible evidence in support" of their claim.

On an initial motion for leave to pursue a claim under section 138.3 of the *Securities Act*, the plaintiff achieved very limited success: the Court only granted leave to pursue a single environmental misrepresentation claim. That decision was overturned on appeal.

On the second leave motion, the plaintiff sought leave to pursue damages arising from multiple alleged accounting, capex budgeting and production scheduling misrepresentations. The second leave hearing was lengthy and complex: the hearing lasted for five days, with 30,000 pages of evidence filed.

The motion judge dismissed the plaintiff's motion for leave to pursue the alleged accounting misrepresentations and the vast majority of the alleged capex budget and production scheduling misrepresentations. However, she granted leave to pursue claims that Barrick had misrepresented the capex budget and production scheduling forecasts in its Q4

and 2011 year-end report issued on February 16, 2012, and in its Annual Information Form for the year ended December 31, 2011.

The motion judge also decided that a press release issued by Barrick Gold in July 2012—which disclosed that costs would exceed the previously disclosed capex budget—was a public correction of the alleged misrepresentations. This had the effect of significantly narrowing the potential class period.

Court of Appeal

On appeal, the plaintiff challenged only the motion judge's denial of leave to pursue claims that Barrick Gold also made capex budget misrepresentations in its Q3 2011 Report, published in October 2011. It also argued the motion judge had identified the wrong potential public correction date.

The Court of Appeal rejected these arguments and dismissed the appeal. In arriving at this decision, the Court provided clarity on the level of scrutiny to be applied by motion judges at the leave stage, including how motion judges should approach conflicting evidence.

Evidentiary Principles on Motions for Leave

The plaintiff's core argument on appeal was that the motion judge had erred in her approach to the voluminous evidence filed on the leave motion and, in effect, impermissibly weighed and rejected credible evidence that supported granting leave. In rejecting this argument, the Court of Appeal identified three core principles applicable to the judge's role on a motion for leave.

First, the Court of Appeal reiterated that motion judges have a robust and important gatekeeping role in conducting the leave hearing, which includes determining whether there is sufficient evidence to support a reasonable or realistic chance that the action will be resolved in the claimant's favor. It is not enough for the moving party to show that there is a triable issue or a mere possibility of success. Instead, the Court indicated that the motion judge must engage in a "qualitative evaluation of the proposed action."

Second, the Court of Appeal clarified the interplay between the requirement to establish a "reasonable or realistic possibility of success" and the requirement to offer a "offer both a plausible analysis of the applicable legislative provisions, and some credible evidence in support of the [plaintiff's] claim." With respect to the latter requirement, while the Court affirmed that while the plaintiff must satisfy these conditions:

> "[they] do not alone express the leave standard. These conditions must be satisfied plus the record before the leave judge must demonstrate that there is a realistic or reasonable chance that the action will succeed."

As a result, it is not sufficient for a plaintiff to point to credible evidence in support of their claim, and argue that a reasonable prospect of success is made out on that basis:

> "[A]t times, [the plaintiff] proceeded as if the entire standard for obtaining leave is the 'some credible evidence' standard. It attempted on a number of occasions to identify 'credible evidence' favoring its case and then submitted on this basis that the motion judge should have granted leave. However, ... to be sufficient, evidence must be credible, but even credible evidence may not be sufficient to show that there is a realistic or reasonable chance that a claim will succeed."

Instead, on leave, the motion judge is required to conduct a holistic review of all of the evidence—not simply the evidence that supports the plaintiff's theory. If the evidence relied upon by the defendant is so compelling that there is no reasonable possibility that the plaintiff would succeed at trial, leave may be denied. If critical evidence offered by a plaintiff is shown by other evidence to be "completely undermined by flawed factual assumptions", a motion judge may choose not to accept that evidence.

Third, in responding to the plaintiff's argument that the motion judge had impermissibly transformed the leave motion into a "mini trial", the Court of Appeal provided guidance as to how the motion judge should approach conflicting evidence on a leave motion. In particular, the motion judge should not attempt to resolve realistic

and contentious issues arising from conflicting credible evidence. The motion judge must also consider what evidence is not before them, given that leave motions are brought at an early stage of the proceedings and before discovery.

At the same time, the motion judge may assess the credibility and reliability of the evidence—including with reference to cross-examinations on affidavits—or the comparative strength of competing evidence: "a s. 138.8 motion judge cannot be found to have engaged in a mini-trial simply because their decision turned on considerations of the credibility and reliability or weight of the evidence."

Applying these principles, the Court of Appeal held that the motion judge had not erred in refusing to grant leave to pursue alleged misrepresentation in Barrick Gold's Q3 2011 disclosure. Importantly, there was no direct evidence establishing that Barrick Gold knew at that time that its capex budget was inaccurate or that its own capex budget forecasts were fundamentally unreliable. Instead, the plaintiff argued this could be inferred from Barrick Gold's own documents. The motion judge did not take issue with the credibility of this evidence but held that there was no realistic or reasonable chance that the inferences advanced by the plaintiff would be drawn at trial. As such, it was inaccurate for the plaintiff to suggest that the motion judge had weighed and disregarded credible evidence because, in the Court's view, she "found as she was entitled to do, that on the record as a whole, there was no realistic or reasonable possibility that this claim would succeed."

The Test for Public Correction

A "public correction" of an alleged misrepresentation serves as the "necessary time post" for any alleged misrepresentation and any "eventual damages calculation." As a result, determining when the issuer potentially corrected the alleged misrepresentation has important consequences in determining the potential class period and the potential damages arising from the misrepresentation.

The motion judge concluded that a press release issued by Barrick Gold in July 2012 corrected the alleged misrepresentation because the press released detailed challenges faced at the project, admitted that Barrick Gold's prior projections were inaccurate, and identified a revised budget and production timeline.

While the plaintiff argued the misrepresentation was not corrected until much later, the Court of Appeal agreed that the July 2012 press release satisfied the "linkage test" for a potential public correction because it was "reasonably capable of being understood in the secondary market as correcting what was misleading in the impugned" statements.

Looking Forward

Drywall provides welcome clarity on the governing evidentiary principles on a motion for leave under section 138.3 of the *Securities Act*. It endorses a robust approach to the test for leave and allows judges to carefully scrutinize the evidence filed in support of a motion for leave. Since the motion for leave to pursue a claim under section 138.3 of the *Securities Act* will most often be the key determinant of whether a class action for secondary market misrepresentation can proceed, *Drywall* teaches that reporting issuers and other defendants should put their "best foot forward" and, where possible, lead comprehensive evidence to respond to the plaintiff's leave motion. We expect that the evidentiary principles endorsed in *Drywall* will be particularly important as plaintiffs look to bring secondary market misrepresentation claims in new areas—including "greenwashing" claims—that may be susceptible to early challenge.

In 2024, we also expect to see continued development in the law applicable to secondary market misrepresentation claims. The Supreme Court of Canada recently granted leave to appeal from the Ontario Court of Appeal's decision in *Markowich v Lundin Mining Corporation (Lundin)*, which endorsed a broad interpretation of the concept of a "material change" in securities law. As we explained in last year's *Looking Forward* publication, *Lundin* has important implications for reporting issuers across Canada and expanded the range of events that could qualify as a material change. The Supreme Court of Canada's decision will be closely watched by reporting issuers and the capital markets more generally.

Bennett Jones

A Report on Quebec Consumer Class Actions: Key Legal Challenges

Causation in No-Fault Liability, Merits of Class Actions and Jurisdictional Scope

Pascale Dionne-Bourassa, Francesca Taddeo

Challenging Consumer Class Actions on the Merits

Lussier v Expedia inc. (Lussier)

On March 5, 2019, the Superior Court of Québec authorized (i.e., certified) a class action against the operators of various hotel booking websites.

The plaintiff alleged that the defendants violated various provisions of the Quebec *Consumer Protection Act* and the *Regulation Respecting Travel Agents* by failing to include hotel fees, establishment fees or resort fees charged directly by hotels (hotel fees) on certain website pages displaying search results for available hotels. In the reservation process, the hotel fees appeared only after a customer selected a particular hotel. The hotel fees and the currency in which they must be paid were also identified in the email received by customers confirming their booking. These fees were ultimately charged to the customer's credit card when completing the checkout process upon leaving a hotel after a stay.

The plaintiff alleged that class members paid higher prices for hotel rooms than advertised on the defendants' websites, as a result of the defendants' failure to disclose complete pricing.

The class action proceeded to trial on the merits in the summer of 2023 and a decision was rendered by the Superior Court of Québec on February 19, 2024, dismissing the action.

The trial judge began by recognizing that the defendants are third-party intermediaries (i.e., a marketplace) for hotel bookings. In this capacity, they do not determine hotel room availability and pricing, nor do they participate in consolidating information related to hotel policies, which is the responsibility of the hotels themselves. While the defendants do make a commission based on the cost of the hotel reservation, they do not make commission on hotel fees, nor have they ever requested, invoiced or collected any such fees.

The trial judge found that the defendants had not engaged in any practice prohibited by statute as no evidence had been led supporting the plaintiff's allegation that they were trying to hide the existence of the hotel fees. Although the hotel fees did not appear on the first page of the website displaying hotel search results, they were not "hidden", as they are announced early on in the reservation process and are clearly reiterated in the booking confirmation sent to customers. Furthermore, the manner in which the hotel fees are presented on the defendants' websites is clear and legible. The trial judge was careful to note that due to the manner and sequence in which the hotel fees were presented and reiterated throughout the reservation process, the "drip pricing" provision of 224(c) of the *Consumer Protection Act*—which provides that merchants, advertisers and manufacturers cannot charge consumers a higher price than what is advertised—did not apply.

The trial judge also concluded that the fact that hotel fees have to be paid at checkout is easily understandable, even to a "credulous and inexperienced consumer". The concept of a credulous and inexperienced consumer

does not extend to customers who make no effort to learn the extent of their obligations, particularly those that are clearly set out.

The plaintiff's personal claim also played an important role in the trial judge's decision dismissing the case, as he found that the plaintiff's ignorance of the hotel fees was attributable to his own conduct. The plaintiff's pre-trial examination revealed that he had chosen to pre-pay for his hotel room so all that was left for him to pay upon checkout of his hotel were the hotel fees. He further admitted to not having read the page confirming the conditions of his hotel room reservation on which the hotel fees were listed and conceded that the disclaimer about the hotel fees to be paid at checkout was clear.

The trial judge's damages analysis confirmed recent precedent confirming the need to prove the existence of damages even when the *Consumer Protection Act* provides for a presumption of prejudice. In this case, the plaintiff sought reimbursement of the hotel fees paid and an award for punitive damages. The trial judge held that, even if he had concluded that the defendants had committed a prohibited practice (which he did not), he would have dismissed any claim for damages. In relying on the 2022 Québec Court of Appeal decision in *Fortin v Mazda*, the trial judge would have denied the damages claim on the basis that the plaintiff had not proven that he suffered any damages, as he had benefitted from all the services for which he paid. Relying on the presumption of damages would not have been sufficient to ground the plaintiff's statutory claim, especially in a case where the plaintiff had pleaded his own turpitude.

Looking Forward

Lussier confirms that facts remain key in determining whether a violation of the Quebec *Consumer Protection Act* has occurred. It highlights the importance of examining elements relating to the conduct of the plaintiff (and class members, when applicable) in determining whether a defendant engaged in a prohibited practice under the statute.

Lussier also serves as a reminder for litigants that, when defending a claim under the Quebec *Consumer Protection Act*, the nature of a defendant's business will be considered by the Court. In this case, the fact that the defendants merely provided a marketplace was integral to the trial judge's liability analysis.

Finally, this decision confirms that, in the consumer protection context, damages must be proven, even where the statute provides for a presumption of prejudice in cases where a prohibited practice has been found to take place.

Duguay v General Motors du Canada ltée (Duguay)

On April 8, 2016, the Superior Court of Québec authorized a class action against General Motors of Canada and General Motors LLC (GM) on behalf of persons in Canada having purchased or entered a long-term lease for Chevrolet Volt electric vehicles.

The plaintiff alleged that GM had made false and misleading representations on its website and in brochures in advertising that the Volt did not require the consumption of any gasoline or emit greenhouse gases when the vehicle's battery was charged. They alleged that GM gave the false and misleading impression that the Volt's gas-powered generator would only kick in upon the battery's depletion when, in reality, the generator would kick in to warm up the vehicle's interior and battery in cold temperatures and therefore consumed a small quantity of gasoline even if the battery was charged. The plaintiff further posited that the disclaimer that the generator *could* start in cold temperatures was in and of itself misleading, and that the font was small and not in sufficient proximity to the "central message" concerning the Volt.

The class action proceeded to trial on the merits in February 2023, and a decision was rendered by the Superior Court of Québec on July 31, 2023, dismissing the action.

In contesting the merits of the claim, the defendants argued that the purpose of its representations was to present the function of the Volt in a summary manner, and that the website and brochures were not meant to be technical and detailed reference documents. The owner's manual and vehicle guides provided to all owners and long-term lessors of the vehicles—as well as GM's service bulletins—described the Volt's functionality explicitly, including the activation of the vehicle's gas-powered generator in cold temperatures.

In the lead-up to the trial on the merits, the Court granted the defendants the ability to examine 10 class members and the evidence derived from these examinations received significant attention from the trial judge at the trial. They revealed that many of the examined class members had neither consulted, read nor seen the representations at issue prior to purchasing or leasing their Volt. Three class members testified that they had explicitly been informed at the dealer that the gas-powered generator could become temporarily activated in cold temperatures. In analyzing the transcripts, the representations themselves, and the owner's manual and vehicle guide, the trial judge concluded that the plaintiff had simply not convinced the Court, on a balance of probabilities, that GM had consistently presented false and misleading statements to customers concerning the operation of the Volt, or that the class members had even taken note of any representations. Rather, the transcripts revealed that customers had been drawn to the Volt due to its innovative design and the fact that it addressed "range anxiety" by prolonging battery life.

The trial judge declined to presume that the class members would have been made aware of the representations at issue prior to purchasing or leasing their Volt, since there were insufficiently serious, precise and concordant facts in the record to support any such conclusion.

The Court also emphasized that in considering whether a representation is false or misleading, it cannot be considered by way of isolated excerpts, but instead must be considered in the context of the document in which they are made. The trial judge concluded that the disclaimers concerning the Volt's operation were neither false nor unclear, and that a credulous and inexperienced consumer who did indeed read the representations would have been left with the impression that the autonomy of the Volt's battery would at times be interrupted and require the consumption of some gasoline, which reflected the Volt's function in reality.

Looking Forward

Duguay highlights the strategic and substantive benefits of seeking leave to examine class members prior to trials on the merits. It also clarifies the plaintiff's burden of proof at the merits stage of a class action, especially where the impugned representations are not complete representations or central messaging relating to a particular product, but rather excerpts relating to a product as found in a set of promotional materials. Duguay serves as a reminder that the consumer protection context does not lower the plaintiff's burden of proof in satisfying presumptions as to class members' knowledge and decision-making processes.

Causation in the No-Fault Liability Context

On March 4, 2020, the Superior Court of Québec dismissed a class action following a trial on the merits in *Lalande v Compagnie d'arrimage de Québec ltée. (Lalande)*. In *Lalande*, the plaintiffs sought compensation for residents living in the vicinity of the Port of Québec who claimed to have suffered various nuisances resulting from the presence of abnormal dust produced by the activities of the Compagnie d'arrimage de Québec (CAQ) on the premises of the Port. The Port, as well as the *Administration Portuaire de Québec* (APQ), which managed the Port, were also defendants in the action.

The factual record at the 50-day trial on the merits was particularly dense. It included the testimony of over 100 class members and exhibits totaling nearly 50,000 pages. However, none of the class members testified as to the source of the dust and to the dust's mineralogical composition, nor that the allegedly excessive dust came from the CAQ's activities. They were only able to speculate in this regard, which the trial judge rejected as subjective testimony. The trial judge also did not accept the opinions of the plaintiff's experts. While the trial judge found that there was an amount of dust in the Port's vicinity causing serious inconvenience to its residents, he concluded that there were multiple sources of dust and that the evidence supported that the CAQ's activities only negligibly contributed to this problem. No evidence put forth by the plaintiff's fact or expert witnesses supported that the CAQ's activities materially contributed to the presence of dust. Thus, the causation requirement was not met, both under the *Civil Code of Québec* civil liability regime in article 1457 and the no-fault liability regime in article 976.

The plaintiff appealed the decision to the Québec Court of Appeal, which rendered its decision on July 24, 2023, upholding the Superior Court's ruling. In so doing, the

Court of Appeal upheld the Superior Court's finding that the causation requirement had not been met. The Court of Appeal also reiterated the extremely high threshold for claims related to concerns, fears or worries in the class action context.

Looking Forward

The Court of Appeal's decision in *Lalande* highlights the plaintiff's burden in proving—on a balance of probabilities—causation between a defendant's conduct and the alleged cause of action and damages suffered, even in the context of no-fault liability regimes. The Court of Appeal also confirmed the existing trend in case law to the effect that concerns, fears or worries about future health problems are not indemnifiable in Quebec law when the nature of the fears is not common or shared, and where each class member may experience differing levels of fear or worry based on their respective levels of tolerance. In so doing, the Court made a clear distinction between the situation experienced by the class members living in the Port's vicinity and the case of *Spieser v Procureur général du Canada*, in which the concerns, fears and worries of class members were considered to be objectively verifiable and were supported by public health authorities.

Challenging the Scope of a Proposed Class Based on Jurisdiction

The Québec Court of Appeal recently opined on the sequencing of jurisdiction motions, finding that the timing of such motions will depend on whether the jurisdictional question pertains to the claims of all class members or simply a subset.

In *Bourgeois v Electronic Arts Inc. (Bourgeois)*, the representative plaintiff sought authorization to institute a class action on behalf of two proposed classes: a Quebec-only class against corporate defendants located in Quebec, and a national class against corporate defendants located outside of Quebec. The claim alleged that the various respondents' design, development and operation of video games with loot boxes constituted unlicensed illegal gambling under Canadian law.

On a preliminary motion prior to the authorization hearing, the non-Quebec defendants challenged the scope of the proposed class, which they argued should be limited to Quebec residents on the ground that the Québec Superior Court did not have jurisdiction to authorize a national class against them. The Québec Superior Court dismissed the motion on the basis that the representative plaintiff had met the *prima facie* burden of demonstrating that two of the connecting factors conferring jurisdiction on the Court under article 3148 of the *Civil Code of Québec* over non-Quebec residents were present: (1) that the Canadian defendants had an establishment in Quebec; and (2) that the dispute related to their activities in Quebec.

The non-Quebec defendants appealed the Superior Court's decision to the Québec Court of Appeal. While the appellants acknowledged that the Superior Court could authorize the class action against them with respect to Quebec residents, they argued that the class definition should be limited to Quebec residents and that it would be efficient for the declinatory exception to be heard prior to the authorization hearing.

The Court of Appeal upheld the Superior Court's decision. The Court held that, on the face of the pleading, the Québec Superior Court had clear jurisdiction with respect to Quebec residents because they were alleged to have suffered damages in Quebec. It confirmed that the question of whether any activity had taken place at a Quebec establishment (one of the connecting factors set out in article 3148) must be interpreted as relating to an activity which existed at the time that the cause of action arose. Interpreting the "activity" requirement as ongoing activity would otherwise make it too easy for defendants to evade the jurisdiction of Quebec courts.

As for the non-Quebec class members, the Court of Appeal held that the preliminary motion was unfounded because it did not concern the representative plaintiff's individual claim. Rather, it concerned the claims of other putative class members who, by virtue of the class action mechanism, could not yet be considered members of the class given that the class action had not (yet) been authorized.

The Court of Appeal also provided guidance on the timing of preliminary motions contesting the scope of a proposed class based on jurisdiction, finding that such motions should be dealt with at the authorization

hearing, but can also be revisited at the common issues stage. The Court held that the same is true for any motions to dismiss the action in favour of arbitration with the goal of limiting the scope of the class. However, the Court also recognized that it remains appropriate for the Superior Court to consider and determine preliminary motions challenging the Court's jurisdiction prior to the authorization stage in cases that "necessarily concern either the representative plaintiff's individual claim or all of the individual claims", including that of the representative plaintiff.

Looking Forward

Key takeaways from the *Bourgeois* decision are that jurisdictional arguments aimed at challenging the scope of a proposed class should be dealt with at the authorization hearing.

That being said, it remains appropriate for motions aimed at contesting the Superior Court of Québec's jurisdiction to be presented prior to the authorization hearing if these motions concern the individual claims of all class members (for example, where an enforceable arbitration clause applies to the dispute at issue) or that of the representative plaintiff (for example, in a situation where the representative plaintiff does not meet the *prima facie* burden of proof of demonstrating the application of the connecting factors in article 3148 of the *Civil Code of Québec*).

Bennett Jones

Key Contacts and Authors

Mike Eizenga
416.777.4879
eizengam@bennettjones.com

Cheryl M. Woodin
416.777.6550
woodinc@bennettjones.com

Nina Butz
416.777.5521
butzn@bennettjones.com

Contributing Authors

Doug Fenton
416.777.6084
fentond@bennettjones.com

Emrys Davis
416.777.6242
davise@bennettjones.com

Ethan Z. Schiff
416.777.5513
schiffe@bennettjones.com

Francesca Taddeo
514.985.4522
taddeof@bennettjones.com

Gannon Beaulne
416.777.4805
beaulneg@bennettjones.com

Ilan Ishai
416.777.6238
ishaii@bennettjones.com

Jackson Spencer
604.891.5359
spencerj@bennettjones.com

Joseph N. Blinick
416.777.4828
blinickj@bennettjones.com

Marshall Torgov
416.777.7807
torgovm@bennettjones.com

Mehak Kawatra
416.777.7927
kawatram@bennettjones.com

Pascale Dionne-Bourassa
514.985.4510
bourassap@bennettjones.com

Peter T. Douglas
416.777.7921
douglasp@bennettjones.com

Sidney Brejak
416.777.7840
brejaks@bennettjones.com

Thomas Feore
416.777.7905
feoret@bennettjones.com

Class Actions: Looking Forward 2024, August 2024

Disclaimer

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