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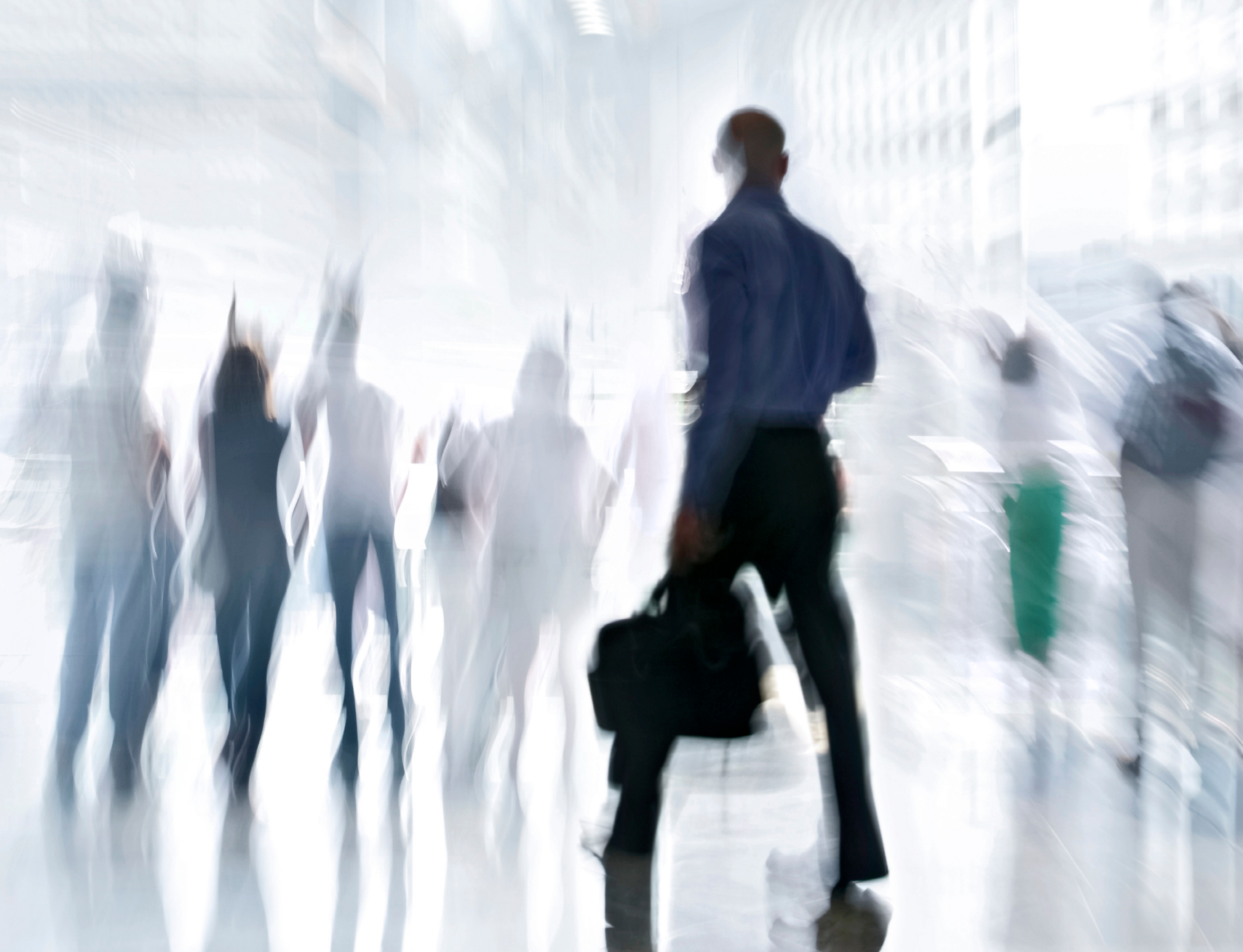
Class Actions: Looking Forward 2022



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Introduction

Gannon Beaulne, Ranjan Agarwal, Cheryl Woodin, and Mike Eizenga

If 2020 was a year of seismic shifts affecting Canada's class actions landscape, 2021 was a year of reverberations and aftershocks. The instability and uncertainty created by the COVID-19 pandemic did not disappear. Canadian businesses adjusted to the new normal, pandemic-related class actions entered into a new phase, and judges reacted to landmark decisions and legislative changes from the year before in key substantive and procedural areas. The result was some new, and some familiar, fault lines.

The Class Actions Practice Group at Bennett Jones continued its tradition of nationwide thought leadership in class actions and driving results for clients in the most significant, high-stakes cases of the year. Bennett Jones won the Class Action Team of the Year category in the 2021 Canadian Law Awards for its work in *Winder v Marriott International Inc.* While practice group members showed exceptionally well in Chambers and Partners and other lawyer rankings and awards, co-heads of the practice group Michael Eizenga, L.S.M. and Cheryl Woodin received the *Best Lawyers in Canada* Lawyer of the Year award for Class Action Litigation and Product Liability Law, respectively. Michael also received *Benchmark's* Canadian Class Action Litigator of the Year award. Look out for his newly published monograph, *The Class Actions Handbook*, as a helpful contribution to the class actions literature.

In our 2022 edition of *Looking Forward*, we review notable class action developments of the past year and consider what trends in the law might tell us about the year ahead. We begin with an update on COVID-19 class actions; while some of the initial explosion of claims have now been settled or affected by legislation, others appear headed for merits determinations and new issues are emerging, including those associated with the "Freedom Convoy" protests. Next, we canvass recent case law relevant to product liability class actions, including decisions addressing negligence and breach of warranty causes of action and the approach to claims of pure economic loss. We then discuss the higher certification standard introduced in Ontario in late 2020 as well as diverging approaches across Canadian jurisdictions to certifying class actions, including a noteworthy competition class action decision. We also survey how Canadian courts are using pre-certification stays of overlapping and duplicative proceedings and interjurisdictional coordination and communication to manage parallel class actions. We next consider substantive developments favouring institutional defendants in privacy breach class actions, and highlight an important appeal that will proceed in 2022. Finally, we discuss how recent Ontario and British Columbia decisions may signal a culture shift towards a more bespoke approach to sequencing certification motions and other steps in class actions.

The year ahead could be another volatile one for businesses in Canada. We look forward to helping our clients make full use of available, cutting-edge tools and strategies to limit exposure and navigate claims in the increasingly complex world of Canadian class actions.

An Update on COVID-19 Class Actions in Canada

Gannon Beaulne and Rabita Sharfuddin

Nearly 2 years after the launch of more than 30 proposed class actions arising from the COVID-19 pandemic upended the Canadian class action landscape, pandemic-related class actions risk, and ongoing litigation appear to have entered a new phase.

After the initial explosion of claims in 2020, plaintiffs started fewer new COVID-19 class actions in 2021. Some potential liability was settled or legislated out of existence, other issues appear headed for a merits determination, and new battlegrounds may be emerging, such as those associated with the "Freedom Convoy" that made international headlines in early 2022 or other pandemic-related protests, including how those protests are funded and governmental responses.

Notable developments in 2021 give us insight into what we can expect for COVID-19 class actions in Canada over the rest of 2022.

Long-Term Care Home Negligence

Several class actions allege that the owners and operators of long-term care and retirement facilities (LTCs) failed to take appropriate health and safety measures to protect their residents from COVID-19.

In a 2021 carriage decision in *Nisbet v Ontario*, Justice Belobaba of the Ontario Superior Court of Justice referred to high-profile reports by the Ontario Auditor General and Ontario Long-Term Care COVID-19 Commission criticizing the government's response and management of COVID-19 in LTCs. We expect that these types of public reports will be key to LTC litigation, in 2022 and beyond, particularly in settlement discussions, certification analyses and any merits determinations.

On the other hand, a number of provincial governments passed legislation limiting the potential liability of LTC owners and operators. For example, under the *Supporting Ontario's Recovery Act, 2020*, plaintiffs need to show that those operating LTCs were grossly negligent to avoid statutory liability protection, a higher standard than applies to ordinary negligence claims. The courts have not yet considered the meaning of gross negligence under this new legislation, but the phrase has been defined in Supreme Court of Canada case law going back 80 years (see *Cowper v Studer* and *McCullough v Murray*) as a very marked departure from the required standard of care or a very great negligence.

While some LTC claims seem destined for trial (although none have been certified or set down for trial yet), the settlement of others is on the horizon. In a 2021 Québec decision in *Schneider (Succession de Schneider) c Centre d'hébergement et de soins de longue durée Herron inc*, the Superior Court approved a $5.5-million settlement for estates and surviving spouses and children of LTC residents who passed away.

Business Interruption Insurance Claims

Over the last two years, policyholders have started a spate of claims against insurers, including proposed class actions, seeking insurance coverage for alleged business interruption losses arising from the COVID-19 pandemic.

Insurers are defending these claims by relying on policy language that connects the existence of coverage for business interruption losses to physical loss of or damage to property, as well as on exclusion clauses related to viruses and government-mandated closures, among other defences.

While the coverage issues are expected to be hard-fought, COVID-19 business interruption decisions have been released in other jurisdictions, including the United States and England, generally favouring defendant insurers.

In Canada, insurers and insureds alike will be watching closely for the release of the first merits decision that directly engages with the policy interpretation question at the heart of these claims, which will likely occur within the next year or so.

Cancellation and Refund Actions

The airline industry has been hard-hit by the COVID-19 pandemic. Government shutdowns and closed borders have led to countless cancelled flights over the past two years. At first, many airlines refused to refund cancelled flights, instead offering consumers travel credits to be used in the future. After several class actions were started seeking refunds, many airlines shifted gears and implemented full-refund policies.

In 2021, in *Lachaine c Air Transat AT inc*, the Superior Court of Quebec allowed a class action to proceed against Sunwing Airlines and its tour operator, Sunwing Vacations, but dismissed the action against other airlines that implemented refund programs. Airlines willing to proactively “make their customers whole” may thus avoid potentially long and costly class action litigation.

The Year Ahead

Although the pace of new COVID-19 class actions slowed in 2021, new claims may be filed in 2022 as more losses crystallize, limitation periods for pandemic-related claims approach and novel developments, such as “Freedom Convoy” or other protests and new government measures related to them, inevitably generate disputes.

Meanwhile, ongoing COVID-19 class actions, including those alleging LTC negligence, business interruption losses, and entitlement to refunds for cancelled flights, will continue to advance towards merits determinations. Businesses may also face claims related to COVID-19 outbreaks on their premises, as new and potentially more infectious variants of the coronavirus circulate.

In 2022, businesses with operations in Canada will continue to face COVID-19 class action risk. Despite pandemic fatigue, businesses should therefore stay vigilant when it comes to pandemic-related issues, and consider what steps may be available in their circumstances to manage their class action risk, including by proactively adopting and reviewing COVID-19 health and safety protocols and policies, among other steps.

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The Expansion and Contraction of Product Liability Causes of Action

Ashley Paterson and Julien Sicco

Product liability case law in 2021 brought clarity to certain causes of action that often form the basis of product liability claims. In particular, Ontario courts considered new duty of care categories arising within the commonly pleaded negligence cause of action, and within claims for breach of express warranty and breach of the implied warranties that underlie consumer protection legislation. These decisions provide updated guidance in the context of both motions to strike and motions for certification. Manufacturers carrying on business in Canada should be aware of these developments.

Negligence: The Duty Owed by Manufacturers of Inherently Dangerous Goods

In *Price v Smith & Wesson Corp*, the Ontario Superior Court of Justice determined on a preliminary motion to strike that gun manufacturers, and manufacturers of other inherently dangerous goods, may be responsible for the misuse of their products when feasible safety measures could have prevented harm.

This proposed class action arose out of the "Danforth Shooting" in Toronto, which involved a stolen Smith & Wesson handgun. Smith & Wesson argued that the Court should strike the plaintiffs' negligence claims in part because Smith & Wesson did not owe the plaintiffs a duty of care under any recognized category of duty.

The Court declined to strike out the plaintiffs' negligence claims after identifying two potentially applicable duty of care categories: (i) the "goods dangerous *per se*" category, under which manufacturers of a good "dangerous in itself" owe a duty to those who necessarily come within the good's proximity; and (ii) the modern "products liability" category, under which manufacturers of a good with a design defect owe a duty to those who are injured because of the defective good. The Court accepted that Smith & Wesson could be found to have failed to satisfy these duties by not making use of "authorized user technology" allowing handguns to be fired only when activated by an authorized user.

This decision could significantly affect the firearms industry in Canada, and may reverberate in other industries as well. But the decision, which was decided on a preliminary motion-to-strike standard, leaves open questions of whether independent criminal acts by a third party can affect liability, what precautions would satisfy these duties, and when a good is "dangerous in itself."

Negligence: Clarifying Pure Economic Loss

The Ontario Superior Court of Justice's 2021 decision in *Carter v Ford Motor Company of Canada* interpreted and applied the Supreme Court of Canada's 2020 decision in *1688782 Ontario Inc v Maple Leaf Foods Inc*, showing the limited scope of negligence claims for pure economic loss. Bennett Jones acted for Ford.

Claims for pure economic loss encompass claims for lost profits, reputational harm, and other economic injuries not accompanied by harm to person or property. In *Carter*, the plaintiffs alleged that certain Ford vehicles contained a water pump defect that created a propensity for dangerous engine failure after "moderate mileage." A subclass sought to recover damages for the diminution in value of the defective vehicles.

Applying *Maple Leaf Foods*, the Court refused to certify the claim because the plaintiffs failed to plead an "imminent threat" of injury to person or property, instead pleading that the defect may arise "at some indeterminate time in the future," which the Court characterized as a "danger ... that may never be borne." The Court also held that diminution in value would not be recoverable, since recovery in pure economic loss cases is limited to the costs of averting injury.

Carter emphasizes the limited scope of, and recovery in, negligence relating to pure economic loss, and will likely guide future courts in their interpretation of *Maple Leaf Foods*. Similar decisions in other Canadian jurisdictions will likely do the same. For example, in *0790482 B.C. Ltd v KBK No 11 Ventures Ltd*, a British Columbia case, the unit-owning plaintiffs failed to recover the costs of repairing allegedly dangerous exterior windows in the Shangri-La Hotel because they did not plead a "real and substantial danger" to their property (*i.e.*, their units). Looking ahead, Canadian courts will likely continue to explore the "imminent threat" and "real and substantial danger" requirements and further clarify what costs are required to avoid injury.

Warranty Claims

The Court in *Carter* also refused to certify the plaintiffs' claims for breach of express warranty and breach of the implied warranties under consumer protection legislation across Canada, highlighting the difficulty of certifying those claims.

The breach of express warranty claim was found to be flawed because the plaintiffs sought to recover damages for alleged design defects that occurred outside the terms of the express warranty, rather than for defects in materials or workmanship that arose within the terms of the warranty. The breach of implied warranty claim was flawed because there was no privity of contract between Ford and the plaintiffs, since express warranties are contracts for the supply of services rather than goods.

The Court held that both types of warranty claims lacked commonality because of their inherent variability. In addition, the breach of implied warranty claims lacked commonality because of variable provincial legislative regimes.

Carter illustrates the challenges when seeking the certification of breach of warranty claims, whether due to inherent variability in those claims or the unwillingness of courts to expand express warranty protections beyond their terms or to work around privity requirements. Going forward, we expect that Canadian courts will continue to carefully scrutinize requests in class actions to certify warranty claims.

Diverging Approaches to the Certification of Class Actions

Emrys Davis, Mia Laity, and Peter Douglas

Last year, we reported on the amendments to Ontario's *Class Proceedings Act, 1992* (CPA) that took effect on October 1, 2020. One of the most significant amendments to the CPA was the introduction of a higher standard for class certification in Ontario, requiring that a proposed class action be a superior way to determine the rights or entitlement to relief of class members, and that questions of fact or law common to the class members predominate over the individual issues. We predicted this would make Ontario a less attractive forum for class action plaintiffs.

While courts in Ontario have yet to interpret and apply the new standard, the effects of these stricter certification requirements may already be starting to appear. Data from the Canadian Bar Association's Class Actions Database indicates that there were 53 class actions started in Ontario in 2020, while only 32 were started in 2021. We predict that this trend is likely to continue in 2022 given recent case law interpreting other CPA amendments. Taken together, these decisions suggest that Ontario is becoming more defendant-friendly compared to certain other provinces.

Courts Begin Applying Ontario's CPA Amendments

In *Dufault v Toronto Dominion Bank*, the Ontario Superior Court of Justice provided the first interpretation of newly enacted section 4.1 of the CPA, determining that defendants have the right to bring a motion to dismiss or narrow the scope of a class action before certification has been decided. This departs from the historical rule in many Canadian class action jurisdictions that there is no presumptive right to bring pre-certification motions.

Another significant amendment was newly enacted section 29.1 of the CPA. That section states that a proposed class action will be automatically dismissed for delay unless the plaintiffs file a "final and complete" certification motion record within a year of starting the proceeding, or unless the parties have agreed on, or the court has established, a timetable for advancing the proceeding. In *Bourque v Insight Productions*, the Ontario Superior Court of Justice provided the first application of this section, finding that the Court has no discretion and must dismiss a class action when no condition in section 29.1 is met. This rule is unique to Ontario, and will force Ontario-based class actions to move at a faster pace than in other jurisdictions in Canada.

Going forward, we expect to see plaintiffs continue to start class claims in "plaintiff-friendly" jurisdictions when possible, rather than proceeding in Ontario where there is a tougher certification standard, an accelerated certification process, and a greater risk of determinative pre-certification motions by defendants.

Uneven Interpretations of "Some Basis in Fact"

The "some basis in fact" evidentiary standard imposed on plaintiffs at the certification stage is designed to ensure that certification is a meaningful screening mechanism, not a mere "speed bump." Interpretations of that standard remained somewhat uneven across jurisdictions in 2021, with some courts taking a liberal approach to what qualifies and others undertaking a more rigorous and reasoned analysis of the evidence.

In *McCorquodale v RBC Global Asset Management Inc*, the British Columbia Supreme Court held that the plaintiffs' expert analysis provided enough support for the existence of common issues, even though that analysis was based on general comparisons and heavily disputed assumptions. The Court found that the plaintiffs' claim met the commonality requirement for certification, despite the defendants' arguments that the plaintiffs had produced no evidence of a methodology to determine loss on a class-wide basis and there was no examination of individual decisions made by the defendants that could alter the scope of any damages suffered. The Court accepted that examining the defendants' individual decisions would not have changed the overall impact of the impugned conduct.

In *Spring v Goodyear Canada Inc*, the Court of Appeal of Alberta overturned a lower court decision granting certification of a claim against Goodyear Tires relating to an alleged manufacturing defect causing tire failure due to tread separation. The key issue on appeal was whether there was commonality among class members—specifically, whether there was some basis in fact for a defect. The only direct evidence led by the representative plaintiff was the recall notice, which only applied to a subset of tires covered by the claim, and did not establish the cause of tread separation. No evidence was produced to show that tread separation was a common problem for all 51 types of Goodyear tires, or that Goodyear had been dishonest in setting the recall notice's scope.

The Court of Appeal in *Goodyear* found that, since the representative plaintiff could not identify a "common" defect, the test for showing some basis in fact for commonality among class members was not met. It also found that the allegations of intentional misconduct by Goodyear should not be certified given the lack of evidence showing some basis in fact on this point.

Certification Denied in Landmark Competition Decision

In *Jensen v Samsung Electronics Co Ltd*, the Federal Court struck the plaintiffs' claim at certification, at the same time deciding that the plaintiffs had not shown some basis in fact for the alleged illegal agreement among the defendants.

In a lengthy and well-reasoned decision, Justice Gascon highlighted the importance of proper pleadings in an alleged conspiracy case, and refused to allow the plaintiffs to avoid the rigours of pleadings standards by parroting the language of the *Competition Act* and relevant torts rather than pleading material facts. Justice Gascon added his voice to the judicial chorus endorsing the two-step test for proving some basis in fact for the common issues: the plaintiff must show some basis in fact that (i) the issue exists, and (ii) it is common among the class members. In *Jensen*, Justice Gascon concluded that the plaintiffs had shown no basis in fact for an agreement among the defendants and refused to certify their case.

Jensen may signal the next area of focus for courts and parties in competition class actions, particularly when plaintiffs pursue claims in circumstances of disputed liability. Up until now, disputes at the certification stage have largely focused on the complexities associated with proving damages on a common basis. *Jensen* suggests that courts may look more closely at the underlying premise of the plaintiffs' case to confirm that some basis in fact exists for the common issues.

Navigating Multijurisdictional Class Actions

Keely Cameron and Alicia Yowart

Parallel class actions, filed in different Canadian jurisdictions under different provincial class action statutes, erode the efficiency that class actions are meant to facilitate, and risk duplicative proceedings and conflicting judicial decisions.

To address these challenges and manage scarce judicial resources, courts in recent years have increasingly shifted towards encouraging national coordination and communication to adjudicate overlapping cases.

Courts have also granted pre-certification stays of overlapping or duplicative proceedings to help manage strained judicial resources, among other aims.

The 2021 decisions of *Britton v Ford Motor Company of Canada* and *Ravvin v Canada Bread Company Ltd* illustrate how Alberta courts are using these tools to manage parallel class actions.

Interjurisdictional Cooperation

In recent years, and particularly since the COVID-19 pandemic began, class actions judges and counsel have sought out opportunities to improve coordination and communication among courts and parties facing overlapping class actions in multiple Canadian jurisdictions. In some cases, law firms have taken the lead by organizing consortiums to coordinate national litigation. In other cases, courts have coordinated actions directly.

In *Winder v Marriott International Inc*, the defendants faced overlapping class actions in British Columbia, Alberta, Ontario, Quebec, and Nova Scotia. The defendant moved in each jurisdiction simultaneously to determine how many actions it should have to defend. With the parties' consent, the case management judges in each action adopted the *Canadian Bar Association's Canadian Judicial Protocol for the Management of Multijurisdictional Class Actions and the Provision of Class Action Notice*. The parties agreed that the judges could speak with each other and that a multijurisdictional joint hearing would be held, with the participation of five superior courts spanning four different time zones.

The parties ultimately agreed to proceed with one national class action in Ontario and to stay overlapping proceedings in other jurisdictions. Justice Perell nonetheless released a decision in late 2020 to "memorialize what was a remarkably successful collaboration of five superior courts from across the country that furthers access to justice and the fair and efficient administration of justice across the country."

In 2021, in *Britton v Ford Motor Company of Canada*, the Alberta Court of Queen's Bench picked up on the apparent inclination of some courts to coordinate, as encouraged in *Winder v Marriott International Inc*, and requested submissions from the parties on facilitating a joint discussion with the Saskatchewan Court of Queen's Bench, as both courts faced nearly identical proceedings.

Pre-Certification Stays

Pre-certification stays of proceedings are an important mechanism to help courts manage multijurisdictional class actions. Parties can request a stay before a claim has been certified as a class action. When faced with a multijurisdictional class action, a party can argue that there is already an overlapping class action in another province, and so the new action should be stayed.

In deciding whether to stay the action, courts may consider many factors, including the parties' location, time limitations, the progression of other actions, the similarity of the issues, and potential prejudice or hardship resulting from a stay.

In its 2021 decision in *Ravvin v Canada Bread Company Ltd*, the Alberta Court of Appeal reiterated that duplicative national class actions should be avoided if they do not serve a legitimate purpose. A legitimate purpose might involve the engagement of differing facts or law, or if separate proceedings are needed to further the objectives of class actions: judicial economy, access to justice, and behaviour modification. Without a legitimate purpose, duplicative proceedings impose unnecessary costs and burdens on courts in Canada, and require a national, coordinated approach.

Recently, the Saskatchewan Court of Queen's Bench in *Piett v Global Learning Group Inc* dismissed a class action, underscoring that overlapping proceedings can lead to complications, greater expense, delay, inefficiency, and the risk of conflicting decisions. In contrast, the Ontario Superior Court of Justice in *Workman Optometry v Aviva Insurance* declined a stay request, finding there was no injustice or prejudice in the circumstances in permitting overlapping actions to continue.

The Supreme Court of Canada has yet to weigh in on the issue of overlapping class actions, having denied leave on cases that raise these issues. This denial may be a sign that the Supreme Court supports superior courts' continued cooperation to manage overlapping matters.

The ability to stay overlapping, multijurisdictional class actions is essential to preserving judicial efficiency and protecting scarce judicial resources. In 2022 and beyond, the management of overlapping class actions across provincial lines will be increasingly important as courts navigate the backlog of existing cases and influx of new matters relating to the COVID-19 pandemic.

The Need to Prove Compensable Losses in Privacy Class Actions

Ranjan Agarwal, Nina Butz, and Mehak Kawatra

Recent developments in the privacy class actions space favour businesses facing ongoing risks in maintaining the privacy of individuals' information collected for business use. While businesses must continue to adhere to statutory and common law privacy laws and policies, privacy breach class action decisions in 2021 show that institutional defendants have the upper hand if class members cannot prove compensable losses. Barring new developments in the appellate courts that permit the extended application of the tort of intrusion upon seclusion, which does not require proof of loss, privacy breaches must yield a quantifiable loss or harm beyond everyday inconveniences for plaintiffs to succeed.

In *Setoguchi v Uber*, Justice Rooke of the Alberta Court of Queen's Bench exercised the Court's gatekeeping function to deny certification in an action alleging a privacy breach caused by third-party "hackers" gaining unauthorized access to Uber's databases. Although the hackers accessed the personal information (names, addresses, and location data) of Uber's users, there was no evidence of real compensable harm suffered by class members that would be "at least arguable" later. Justice Rooke made it clear that a mere breach of privacy is not enough for certification; there must be "some evidence" or "some basis in fact" for compensable harms suffered by individuals whose privacy was breached.

In his 2021 settlement approval decision in *Karasik v Yahoo! Inc*, Justice Perell of the Ontario Superior Court of Justice similarly recognized the importance of proof of compensable loss in privacy breach suits. After reviewing privacy class action case law, Justice Perell noted that corporate defendants like Yahoo enjoy stronger positions, considering the plaintiffs' inability to prove actual harm. As with *Setoguchi, Karasik* involved a "database defendant," meaning a privacy class action defendant whose databases were cyber-hacked by unauthorized third parties. In approving the settlement agreement in *Karasik* with few modifications, Justice Perell noted that, while the likelihood of certification is high in these types of cases, there had been no indication of success on the merits.

Justice Perell's observation was soon reinforced by the judgment on the merits of Justice Lucas in *Lamoureux c Investment Industry Regulatory Organization of Canada*, a Superior Court of Quebec decision rendered in 2021, shortly after *Karasik* was released. In *Lamoureux*, an Investment Industry Regulatory Organization of Canada (IIROC) employee lost a work-issued laptop containing sensitive and unencrypted personal and financial information belonging to thousands of Canadians. IIROC admitted its failure to protect the data adequately, but Justice Lucas still denied recovery to class members because, among other reasons, class counsel could not show sufficiently serious or compensable losses rising above everyday reasonable expenses or inconveniences.

With plaintiffs' success hinging on proof of compensable loss, it is no surprise that class counsel have since sought refuge under the tort of intrusion upon seclusion, a privacy tort for which proof of loss is not required. This cause of action is recognized in Ontario and, as set down by the Court of Appeal for Ontario in *Jones v Tsige*, is made out when the defendant intentionally or recklessly intruded, without lawful justification, on the private affairs or concerns of the plaintiff, such that a reasonable person would regard the invasion as highly offensive, causing distress, humiliation, or anguish.

Since proof of loss is not required under the tort, class counsel have sued database defendants for intrusion upon seclusion, arguing that the tort should apply, not only to hackers, but to the institutional defendants whose databases are accessed without authority or lawful justification. This argument emerged most notably in *Owsianik v Equifax Canada Co*, in which a majority of the Ontario Divisional Court rejected the extension of the tort to this context because a database defendant does not commit the intrusion that is the "central element" of the tort.

In the wake of the Divisional Court's ruling in *Equifax*, class counsel have suffered a series of losses arguing for the extended application of intrusion upon seclusion—most recently, in an early 2022 decision in *Winder v Marriott International Inc.*, in which Bennett Jones acted for the defendants. The Court of Appeal for Ontario will address the question of the tort's extension to database defendants later this year, with an appeal of *Marriott* and of the Divisional Court's ruling in *Equifax* set to be heard in 2022.

Ontario and British Columbia Lead a Sequencing Culture Shift

Megan Steeves and Renée Gagnon

For the past two decades, how best to achieve the fair and efficient management of class actions in Canada was routinely resolved by a one-size-fits-all approach: a presumption that certification should be the first motion heard in the case. Defendants seeking an exception to this general rule faced a heavy burden. As a result, defendants with strong positions on the merits were often locked into procedurally complex, financially burdensome litigation that, in many cases, took years to get through the certification stage.

The past two years have witnessed important developments affecting the sequencing of certification and other potentially dispositive motions in class actions. Those developments, mainly in Ontario and British Columbia, may signal a broader culture shift in Canada, away from the presumption that the certification motion should be heard first, and towards a more bespoke procedure designed for the case at hand.

In Ontario, legislative amendments introduced by the *Smarter and Stronger Justice Act, 2020* aimed to modernize and improve Ontario's justice system, including by amending Ontario's *Class Proceedings Act, 1992* (CPA) since it had not been substantively overhauled since its inception nearly three decades earlier. One significant change was the addition of section 4.1 reversing the presumption that certification should be the first motion heard in a class action.

Section 4.1 only applies to class actions brought after October 1, 2020. Only one case has been decided under section 4.1 so far: *Dufault v Toronto Dominion Bank*. In this case, the Superior Court of Justice acknowledged that section 4.1 provides for a measure of judicial discretion that could lead to a variety of outcomes. Some judges may therefore interpret their discretion as unbounded and continue to rely on the reasons against allowing pre-certification motions relied on in past cases—for example, the added costs and delay of injecting a new appeal opportunity, or the need to discourage bifurcation and litigation by instalment. Indeed, this occurred in the Court's decision in *Strathdee v Johnson & Johnson Inc*. That decision was not under section 4.1 of the CPA, but the Court stated: "Nothing much is likely to change in the future because of s. 4.1 other than the rhetorical temperature of the case management conference to schedule motions." Other judges may take the provision as a strong legislative signal that motions that can narrow or dispose of a putative class action at an early stage should presumptively be heard.

Accepting the latter approach, Justice Belobaba in *Dufault* granted the defendant's motion to schedule a pre-certification summary judgment motion. He identified at least two "good reasons" why the Court might deny a request to schedule a pre-certification summary judgment motion under section 4.1 of the CPA: (i) the motion does not narrow or dispose of all or part of the litigation and appears to be a delay tactic; and (ii) although the motion could narrow or dispose of all or part of the litigation, the certification motion is close enough that it makes sense to hear the motions together. Finding that neither reason applied, Justice Belobaba granted the request and allowed the pre-certification motion.

In British Columbia, the apparent culture shift was triggered, not by a legislative change, but by the Court of Appeal's first decision weighing in on class action sequencing: *British Columbia v The Jean Coutu Group* (PJC) *Inc*. In a unanimous decision, the Court of Appeal outright rejected the presumption that certification motions should be the first motions heard in class actions. It held that cases propounding this approach were "wrongly decided and should not be followed." Rather, the Court held: "Each sequencing application must be determined in the context of the particular case before the court and the court's discretion ought to be exercised in a manner that facilitates and achieves judicial efficiency and the timely resolution of the dispute." On this basis, the Court allowed two defendants to proceed with their pre-certification jurisdictional challenges, having regard to the scope and complexity of the proceeding and to the prejudice to the defendants of not having the foundational question of jurisdiction considered at an early stage, including the considerable expense of remaining locked into lengthy, complex litigation.

Since *Jean Coutu*, the British Columbia Supreme Court has applied this reasoning in two sequencing decisions. In both cases, the Court allowed the defendants' preliminary motions to precede the certification motions. Key to both decisions was that the defendants' motions addressed discrete legal issues that could largely be parsed from the broader claim, and would significantly narrow the issues for trial, if not completely dispose of them.

Two competition class action decisions in 2021 show the wisdom of deciding motions to strike before certification in the right case. *In Mohr v National Hockey League* and *Latifi v The TDL Group Corp*, the Federal Court and British Columbia Supreme Court, respectively, struck plaintiffs' claims that the defendant employers had violated section 45 of the *Competition Act* by agreeing to fix employees' wages or refrain from hiring each other's employees. Both courts held that section 45 applies only to agreements with respect to the sale of a product or service, not agreements with respect to the purchase of a product or service. Because the defendant employers were alleged to compete for the purchase of employees' labour, their agreements could not violate section 45. These pre-certification dismissals saved the parties and the courts the additional burden of a full certification hearing for cases that were doomed in law.

The ultimate impact of these developments is yet to be determined. Class action judges and lawyers alike will be closely monitoring further developments in Ontario and British Columbia, as defence counsel are emboldened to propose dispositive pre-certification motions, and class counsel no doubt try to prevent them, relying on the arguments that worked for them in the past.

Although defence counsel will need to overcome residual skepticism flowing from concerns about the risk of added costs and delay and litigation by instalment, among other concerns, section 4.1 of the CPA in Ontario, and developments in the sequencing case law in both Ontario and British Columbia, suggest that 2022 could see defendants in Canadian class actions achieve unprecedented traction in putting potentially dispositive pre-certification motions on the books.

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