Bennett Jones

Class Actions: Looking Forward 2023

Table of Contents

Introduction 1

The Ontario Court of Appeal Confirms the Narrow Confines of the Tort of Intrusion Upon Seclusion in Privacy Class Actions 2

Ontario's Dismissal for Delay Regime—the Year in Review 4

Securities Class Actions Round-Up 7

Developments in General Causation Methodologies for Class Certification 11

The Lack of Present Injuries and Reliable Scientific Evidence Proves Fatal in North American Pharmaceutical Impurity Litigation 13

Discontinuance of a Class Action: A New Approach to Multijurisdictional National Settlements in Québec? 16

Authors 18

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Meet Our Team

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Introduction

Alexander Payne, Gannon Beaulne, Cheryl Woodin and Mike Eizenga

In our 2023 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 actions appeals in which plaintiffs sought, unsuccessfully, to expand the tort of intrusion upon seclusion.

Next, we canvass the various approaches of Ontario courts to the new dismissal for delay regime—which evolved considerably over the course of 2022.

We then provide an overview of a series of securities class actions, which include a decision clarifying the circumstances in which a common law misrepresentation claim may surmount a historical hurdle commonly faced by plaintiffs—the individual issues overwhelm the common issues. The securities class actions round-up also summarizes a class action in which plaintiffs unsuccessfully sought to backdate regulatory requirements, alleging, effectively, that defendants ought to have been conducting themselves in accordance with those regulations and standards before they came into effect.

We then turn to recent decisions in which courts have evaluated the role and specificity of a methodology for proving general causation in product liability cases, particularly the requirement for suitably tailored methodology where an array of harms are alleged.

In a similar vein, we discuss decisions in Canada and the United States regarding the recent proliferation of class actions regarding alleged impurities (particularly nitrosamines) in pharmaceutical products.

Finally, we discuss a potential new approach to multijurisdictional national settlements in Québec.

Our Class Actions group continued to drive results for clients in the most high-profile, high-stakes 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, and practice group co-chair, Mike Eizenga, won Class Action Litigator of the Year for the fifth time in the last seven years.

Co-chair Cheryl Woodin was also awarded top marks by *Chambers and Partners* in product liability litigation, with other practice group members also receiving recognition and distinction for their expertise in the field.

We also recently expanded our national reach by opening a new office in Montréal, enabling us to further serve class actions and competition clients in all Canadian jurisdictions where they may face litigation.

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The Ontario Court of Appeal Confirms the Narrow Confines of the Tort of Intrusion Upon Seclusion in Privacy Class Actions

Sakina Babwani, Nina Butz and Mehak Kawatra

2022 continued to be positive for institutional clients involved in privacy breach class actions, with the Ontario Court of Appeal refusing to expand the tort of intrusion upon seclusion to impose liability on institutions whose databases were hacked by unauthorized third parties.

Plaintiffs claiming damages in privacy breach class actions have struggled to achieve certification due to the absence of losses beyond everyday inconveniences.

Accordingly, plaintiffs often relied on the tort of intrusion upon seclusion, which does not require proof of a compensable loss. However, some plaintiffs asked the court to extend the tort to apply to not only to the third-party hackers, but also to the database defendants who collected and stored the data in the first place.

In late 2021, the Divisional Court refused to extend the tort, finding that it could not apply to database defendants because they did not commit the “central element” of the tort—the intrusion.

In November 2022, the Ontario Court of Appeal endorsed the Divisional Court’s approach in three appeals heard in tandem: *Owsianik v. Equifax Canada Co.* [*Owsianik*], *Obodo v. Trans Union of Canada Inc.* [*Obodo*], and *Winder v. Marriott International Inc.* [*Winder*]. Bennett Jones acted for Marriott and affiliated entities in *Winder.*

In each of the three cases, the defendants had collected and stored personal information of their customers for commercial purposes. The plaintiffs alleged that the defendants' failure to take adequate steps to protect personal information had allowed third-party hackers to access and/or use that information. There was no allegation that the defendants themselves had improperly used or disclosed the personal information.

In *Owsianik*, the plaintiffs argued that they had properly alleged the tort of intrusion upon seclusion because they pleaded that the defendants acted recklessly in storing the information. The Court of Appeal, however, found that unless the defendants' conduct amounted to an unlawful intrusion of the plaintiffs' privacy, the "state of mind" requirement of the tort could not be satisfied and the tort could not apply.

Similarly, in *Winder*, the Court rejected the plaintiffs' argument that Marriott became an intruder when it allegedly failed in its duty to protect the privacy of its customers. In *Winder*, the plaintiffs had willingly disclosed information to Marriott for purposes relating to the operations of Marriott's facilities. No facts were pleaded that could support the allegation that Marriott had disclosed personal information to unauthorized persons, or caused the information to be disclosed. The plaintiffs instead asserted that their consent had been provided based on Marriott's representation that the information

would be held confidentially, and because Marriott allegedly knowingly or recklessly failed to meet those representations, consent was vitiated. That assertion was found to have no merit.

In *Obodo*, the plaintiffs argued that the defendant was an "enabler" and urged the Court to impose the equivalent of the doctrine of vicarious liability upon Trans Union to hold it accountable for the actions of the hacker. But, for the doctrine of vicarious liability to apply, an employer-employee relationship had to exist between the hacker and Trans Union. In the absence of such a relationship, Trans Union was not liable for the tort of intrusion upon seclusion.

In short, the facts of this trilogy of cases were distinguishable from the facts of Court of Appeal's landmark 2012 decision in *Jones v. Tsige* [*Jones*], where the Court established the tort of intrusion upon seclusion because, among other things, the defendant had continually accessed the private banking records of the plaintiff without her consent. There, the defendant 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.

In the trilogy of privacy appeals, however, the defendants' allegedly negligent storage of information did not amount to an invasion of the plaintiffs' privacy interests.

The Court of Appeal held that to expand the tort of intrusion upon seclusion to apply to database defendants would create a broad and undesirable basis for liability in intentional torts, by imposing liability on database defendants for the conduct of unknown third parties. Doing so would not be a permissible "incremental development" in the common law but would instead be a "gigantic step in a very different direction". The court noted that the facts of the database defendant cases simply did not "cry out for a remedy" in the same manner as the facts of *Jones*, including because the plaintiffs in database defendant cases had recourse under existing causes of action grounded in both statute and common law.

Looking Forward

While leave to the Supreme Court of Canada from the Court of Appeal's decisions remains pending, as the law in Ontario currently stands, plaintiffs seeking damages against database defendants have limited recourse to the tort of intrusion upon seclusion in the absence of a connection between the database defendant and the hacker.

That said, businesses that collect personal information of others must continue to maintain secure databases and avoid other grounds of liability that arise from a breach of those informational databases, as the tort of intrusion upon seclusion is but one piece of the potential liability puzzle. For instance, the Court of Appeal commented that database defendants could still be liable for damages flowing from negligence or breaches of contractual or statutory duties, where plaintiffs have suffered compensable harm.

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Ontario's Dismissal for Delay Regime—the Year in Review

Alexander Payne and Gannon Beaulne

Early 2022 decisions interpreting Ontario's new mandatory dismissal for delay regime were glad tidings for defendants, suggesting the regime would be strictly applied. However, over the course of 2022, the pendulum swung in the other direction, with an increasingly flexible approach being applied.

The more recent approach of Ontario courts suggests that the dismissal for delay regime is not the dipositive blunt instrument that defendants may have hoped it would be.

Overview of Dismissal for Delay Regime

The dismissal for delay regime now applies to all Ontario class actions. The *Class Proceedings Act* (the Act) states that the court *shall*, on motion, dismiss a proposed class proceeding for delay, unless by the first anniversary of when the proceeding was commenced:

1. the representative plaintiff has filed a final and complete certification motion;
2. the parties have agreed writing to a timetable for service of the certification record, or for the completion of one or more other steps required to advance the proceeding, and have filed the timetable with the court;
3. the court has established a timetable for service of the certification record, or for completion of one or more other steps required to advance the proceeding; or
4. any other steps, occurrences or circumstances specified by the regulations have taken place (of which there are currently none).

The First Two Decisions—a Strict Application

The first decision interpreting the dismissal for delay regime was *Borque v. Insight Productions Ltd.* [*Borque*], a proposed class action alleging employee misclassification by television production companies.

On the motion for dismissal for delay, Justice Belobaba found that because none of the steps contemplated by s. 29.1(a) to (d) had been taken, he had no discretion not to dismiss. Justice Belobaba emphasized the mandatory language of the Act, finding, simply, that: "s. 29.1 of the CPA means what it says."

The second dismissal for delay decision was rendered in *Lamarche v. Pacific Telescope Corp.* [*Lamarche*], a proposed class action regarding alleging price-fixing by telescope manufacturers.

Justice Gomery's approach tracked that of Justice Belobaba. Justice Gomery rejected novel arguments why the proceeding should not be dismissed for delay, including the arguments that (1) the class action was meritorious (Justice Gomery found this was "irrelevant"), and (2) s. 29.1 creates hardship for plaintiffs in class proceedings involving foreign defendants (Justice Gomery found "class counsel... must live with the section as enacted").

The Next Four Decisions—an Increasingly Flexible Approach

The next four section dismissal for delay decisions diverged from the strict approaches taken in *Borque* and *Lamarche*, suggesting an increasingly flexible approach to the regime.

In *St. Louis v. Canadian National Railway Company* [*St. Louis*], Justice Gordon presided over a dismissal for delay motion heard in 2022. In *St. Louis*, the parties had attended at a case conference on October 13, 2017. At that case conference, a second case conference was scheduled for mid-June 2018.

When considering whether to dismiss for delay, Justice Gordon ultimately found that the scheduling of the mid-June 2018 case conference met the requirements of section 29.1(c), being a timetable set by the Court for the completion of one or more steps to advance the proceeding. Justice Gordon commented that "[i]t is to be noted that s. 29.1 (1)(c) does not require the actual advancement of the action or that the parties proceed with scheduled steps. It only requires the court to have established a timetable for a single step required to advance the proceeding."

Justice Gordon further commented *in obiter* that the plaintiffs "were not sitting entirely still" and were making efforts to have environmental studies conducted. Those efforts were hampered by COVID-19. This "not entirely sitting still" theme seems to have been picked up in subsequent decisions.

In *Lubus v. Wayland Group Corp.* [*Lubus*], a proposed class proceeding arising out of alleged misrepresentations made by a cannabis company and its underwriters, the dismissal for delay analysis turned on whether either the steps in section 29.1(b) or (c) had been met. In assessing whether to dismiss, Justice Morgan stated that "context counts", and found that his decision to *decline* to schedule *any* step in the proceeding until the plaintiffs resolved the issues raised by their decision to commence multiple proceedings with the same allegations—which the plaintiffs did do—provided "room to conclude" that the terms of section 29.1(c) had been met.

In *D'Haene v. BMW Canada Inc.*, Justice Perell considered a motion for dismissal for delay in one of a cluster of six national proposed class actions against 12 groups of car manufacturers. Two of the manufacturers sought dismissal. Justice Perell noted that the moving manufacturers had advanced "a straightforward argument" that none of the criteria of section 29.1 had been met, and accordingly, the action as against them must be dismissed for delay.

However, while Justice Perell found that he was required to dismiss the action, he held he could do so on terms. In particular, the dismissal order would be set aside if the representative plaintiffs filed a final and complete certification record in 30 days, which he described as a "Phoenix Order."

Justice Perell explained that a Phoenix Order was appropriate because "there is a great deal of procedural gamesmanship and opportunism and very little actual procedural prejudice" to the two defendants, which had "been active participants in activities in the immediate action, and from time to time they have been engaged in activities that have affected all six" actions.

There is also at least one instance of a Judge proactively deeming that his order constituted a section 29.1 step. In *Buis v. Keurig Canada Inc.*, Justice MacLeod presided over a case conference in a proposed Ontario class proceeding, with overlapping proposed class proceedings in Federal Court and in British Columbia.

In order to permit time for the carriage dispute to be resolved, Justice MacLeod ordered and directed the

plaintiff to serve its certification record on a date "to be fixed by" the Court. Arguably contrary to earlier section 29.1 decisions that indicated the "timetable" contemplated by the section 29.1 steps required some specificity (but consistent with the ruling in *Lubus*) Justice MacLeod ordered that his "date to be fixed by" timetable "shall be deemed to comply with s. 29.1(c) of the Act".

Looking Forward

The jurisprudence developed over the course of 2022 evidences a range of approaches taken by Ontario Superior Court judges to the interpretation and application of section 29.1.

However, Justice Belobaba's comment in *Borque* that "compliance is easy" has proven increasingly accurate. The current state of the law suggests that defendants may face real challenges on a dismissal for delay motion unless (1) the plaintiff concedes, or (2) the plaintiff has taken no steps whatsoever since the launching of the action. The presence of *some* action by plaintiffs was a common factor in the decisions rendered in the latter part of 2022 refusing (or effectively refusing) to dismiss for delay.

It remains to be seen whether an Ontario appellate court will render a decision in 2023 that solidifies the approach to motions under section 29.1, and if so, the flexibility of that approach.

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Securities Class Actions Round-Up

Douglas Fenton, Marshall Torgov and Josephine Bulat

In an active year in securities class actions, Canadian courts have provided new guidance and clarity in a number of important areas. Below we briefly review a number of significant decisions in Canadian securities class actions from the past year.

The Balancing Act Between Class Actions and Insolvency Proceedings

The Quebec Superior Court in *Arrangement relatif à Xebec Adsorption Inc.* refused to lift the stay of proceedings issued under the *Companies Creditor Arrangement Act* (CCAA) in respect of the debtor company, Xebec, to allow a class action to be advanced. The decision reinforces that since class proceedings are only a procedural mechanism, they ought to be treated no differently than other types of litigation in insolvency proceedings.

Two shareholders instituted a class action against Xebec's underwriters and five of its directors, pursuant to the Quebec Civil Code and Quebec *Securities Act*. The shareholders claimed that Xebec misrepresented its revenue forecast which, after a correction was announced, caused the share price to plummet.

The Quebec Court affirmed that stays should only be lifted in circumstances where "to do so is consistent with the goals of the stay." The "overriding consideration" is the impact of proceedings on the CCAA process and whether the proceedings would seriously impair the debtor's ability to focus on negotiating an arrangement.

In applying these principles, the Quebec Court rejected the shareholders' request, which demonstrates that class action proceedings are no different than other types of litigation insofar as limiting the scope or lifting stays of proceedings pursuant to the CCAA. Xebec's efforts were better served focusing on the restructuring. This would benefit creditors, shareholders and other stakeholders, which was more valuable, at that time, than proceeding with the class action.

Understanding the Potential Scope of a "Material Change"

In a pair of cases, *Markowich v. Lundin Mining Corporation* and *Peters v. SNC-Lavalin*, the Court of Appeal for Ontario endorsed a broad interpretation of the concept of a "material change" in securities law.

In *Markowich v. Lundin Mining Corporation*, the issue was whether a significant rock-slide at an open-pit mine constituted a "material change" in the company's "business, operations, or capital." Following the rock-slide, there was some interruption in mining operations. A month after the incident, Lundin issued a press release advising of the rock-slide and, separately, providing updated production data. Following the press release, Lundin's share price declined by 16 percent.

The plaintiff, on behalf of the putative class, advanced a claim under s. 138.3 of the Ontario *Securities Act*, alleging a misrepresentation in Lundin's public disclosure documents. The plaintiff argued that Lundin had breached s. 75 of the *Securities Act*, which requires a company to disclose any "material change" in its "business, operations or capital" within ten days of the relevant event.

At first instance, the motion judge concluded that while the rock-slide was "material", it did not constitute a "change" in Lundin's "business, operations, or capital." On the motion judge's interpretation of the *Securities Act*, a material change required that the event at issue result in a "different position, course or direction to a company's business, operations or capital." The motion judge found that the rock-slide was not a material change because there was no evidence that the rock-slide posed any threat to the company's economic viability, interrupted the company's ability to carry out its mining operations at large, or changed the fundamental nature of its business. The motion judge also relied on evidence suggesting that rock-slides were a relatively common occurrence in open-pit mines. On this basis, the motion judge denied leave to assert a secondary market misrepresentation claim under s. 138.3 of the *Securities Act*.

The Court of Appeal allowed the appeal. It held that the motion judge had adopted an unduly restrictive interpretation of the term "material change" for the purpose of a motion for leave under s. 138.3 of the *Securities Act*, which requires only that the applicant put forward a "plausible interpretation" of the statute.

Properly interpreted, the test to determine whether an event is a "material change" encompasses two distinct elements: (a) whether there was a "change" in the issuer's "business, operations or capital"; and (b) whether the change was "material."

The motion judge's interpretation improperly conflated these two components. The assessment of whether a "change" has occurred does not focus on the magnitude or materiality of the change. It requires a qualitative assessment, focusing on whether the change was "external to the company as opposed to whether the change was in the business, operations or capital of the company."

The Court of Appeal grounded its interpretation in the different standards in the *Securities Act* applying to the disclosure of a "material change" (which must be disclosed "forthwith") and a "material fact" (which need not be disclosed immediately). The principal policy objective underpinning the distinction is to relieve issuers of the burden of continually updating the market on external factors outside of the company's control. As a result, a change external to the issuer that may affect the issuer's share price but that does not result in the change in the business, operations or capital of an issuer cannot qualify as a material change.

The Court of Appeal concluded that the term "material change" must be interpreted broadly, particularly in the context of a leave application under s. 138.3 of the *Securities Act*. There was at least a plausible basis to conclude that the plaintiff would ultimately succeed in establishing that the rock-slide was a "change" in the company's operations, as there was evidence that mining operations were interrupted for a period of time.

The Court of Appeal expanded on this interpretation in the companion case *Peters v. SNC-Lavalin*, which was released at the same time as *Markowich*. The issue in that case was whether a September 2018 phone call in which the Public Prosecution Service of Canada ("PPSC") advised that it would not invite SNC-Lavalin to negotiate a remediation agreement in connection with a pending prosecution was a "material change" for the purpose of the *Securities Act*.

The motion judge held that the September 2018 phone call was not a "change" in the company's "business, operations or capital." SNC-Lavalin had previously disclosed that it faced prosecution (with potentially catastrophic consequences). While SNC-Lavalin hoped to negotiate a remediation agreement, there was no guarantee that this could be achieved, nor had SNC-Lavalin suggested it was certain.

Importantly, following the September 2018 phone call, SNC-Lavalin continued to be invited by the PPSC to provide submissions on why a remediation agreement was appropriate in the circumstances. It still remained possible for SNC-Lavalin to negotiate a remediation agreement. As a result, while a change in "business risk" could constitute a "change" in a company's "business, operations and capital", the September 2018 phone call did not change SNC-Lavalin's business risk. It continued to face the threat of criminal prosecution, and its ability to negotiate a remediation agreement remained uncertain. Notably, when the PPSC formally advised that a remediation agreement would not be negotiated one month later, SNC-Lavalin immediately issues a press-release disclosing the development.

In affirming this result, the Court of Appeal endorsed the motion judge's broad interpretation of what could constitute a "change" in the "business, operations and capital" of an issuer. It affirmed that the meaning of "change" is "fact specific" and that there is no single "bright-line test." Depending on the circumstances, a "change" in a company's "business, operations or capital" could embrace the development of new products; developments affecting the company's resources, technology, products or market; developments affecting significant contract or litigation; and other developments connected to the business and affairs of the issuer that would be reasonably expected to significantly impact the market price or value of a security. The only substantive limit on the concept of a "change" is the requirement that the change must be in the "business, operations or capital" of the issuer, as opposed to an external development.

Common Law Claims *May* Be Suitable for Class Actions

Canadian courts have frequently refused to certify common law misrepresentation claims, as such claims require individual class members to prove reliance on the alleged misrepresentation, and that the misrepresentation in fact caused them to suffer a loss. These individual issues risk "overwhelming the common issues." As a result, Canadian courts have generally only been willing to certify certain aspects of common law misrepresentation claims where statutory misrepresentation claims under applicable securities legislation (which do not require a class member to prove reliance) have also been certified.

This approach was recently affirmed in *Poirier v. Silver Wheaton Corp. et al*, where the Court dismissed the plaintiff's motion to certify both common law and statutory claims under the *Securities Act*. In declining to certify the common law misrepresentation and negligence claims, the Court found "a class action [was] not the preferable procedure to resolve the common law claims" because the claims would require individualized inquiries into reliance, causation and damages.

However, the British Columbia Court of Appeal recently came to a different conclusion in *0116064 BC Ltd. v. Alio Gold Inc*, in respect of common law misrepresentation claims brought in connection with a corporate acquisition completed by way of plan of arrangement.

The appellant was a shareholder in a company called Rye Patch Gold Corp. The defendant, Alio Gold, acquired all of the outstanding shares of Rye Patch (including the plaintiff's shares) in exchange for shares in Alio Gold by way of a plan of arrangement. The plan of arrangement was approved by the British Columbia Supreme Court, following a shareholders' vote.

The plaintiff commenced a putative class action, alleging that Alio Gold had overstated its production forecasts in the information circular prepared in connection with the transaction, alleging that the Rye Patch shareholders had not received fair value for their shares.

The motion judge declined to certify the common law misrepresentation claims as a class proceeding, finding the individual issues of reliance, causation and damages would overwhelm any common issues.

On appeal, the appellant argued that where the alleged misrepresentation and loss arises out of a transaction "imposed upon all shareholders" as a result of a plan of arrangement, reliance and causation do not create individual issues in the same way that they may in other circumstances.

The British Columbia Court of Appeal agreed. It distinguished the case from a "typical" common law misrepresentation claim because the case concerned "essentially one transaction"—the exchange of shares with Alio Gold under the plan of arrangement. In this context, establishing reliance on the alleged misrepresentations did not require individualized inquiries: the shareholders that had voted in favor of the transaction could be presumed to have relied on the information circular prepared by Alio Gold; the shareholders that had not voted in favor of the transaction were nonetheless also required to exchange their shares for shares of Alio Gold under the terms of the arrangement.

Evolving Regulatory Schemes Do Not Ground Liability for Past Conduct

When a regulator decides to prohibit a particular practice, that does not mean the regulated entity is liable for the practice *prior* to prohibition.

This common sense proposition animates the decision in F*rayce v. BMO Investorline* [*Frayce*], where the Ontario Superior Court of Justice refused to certify a class proceeding brought by aggrieved investors to address the controversial practice of "trailing commissions" paid by mutual fund managers to discount brokers.

After some 20 years of industry debate, in June 2022, a prohibition on mutual funds paying trailing commissions to discount brokers came into force. The plaintiffs brought a motion for certification of their class action, arguing that the practice was illegal *before* the formal prohibition, such that the defendants should be held liable for their pre-prohibition conduct.

The Court, however, found that the plaintiffs did not satisfy the requirement for "some evidence of illegality" as they had not identified any statutory or legal basis for their pre-prohibition claims. Nor could the plaintiffs have found a retrospective cause of action based on a *change* in the regulatory scheme: the fact that a regulator has decided to prohibit specific conduct does not render the conduct illegal pre-prohibition.

Looking Forward

In 2023, we expect to see an expansion of securities class action proceedings into new areas—including crypto assets.

Canadian securities regulators have recently issued enhanced guidance on their proposed approach to the regulation of crypto assets. This new guidance—coupled with increased investment in crypto assets by retail and institutional investors, and the collapse of the cryptocurrency trading platform FTX—will likely result in a proliferation of securities law related claims. Already in 2023, three of the eight new securities class actions filings in Canada related to crypto assets.

In this context, the Court's caution in *Frayce* will remain a critical point: an evolving regulatory scheme will not operate to create liability for past conduct. A plaintiff must ground their case in the regulatory regime existing at the time of the impugned conduct.

Developments in General Causation Methodologies for Class Certification

Ethan Schiff and Julien Sicco

In product liability class actions, general causation (i.e., a product's propensity to cause alleged injuries) is often a threshold issue to establish liability (if general causation cannot be established, no class member's claim is viable). This concept is distinct from and precedes specific causation (i.e., whether the product caused a particular injury). Because specific causation often cannot be determined in common, to certify a class action, plaintiffs may need evidence of a methodology to prove general causation.

Over the previous year, courts delivered two cases relevant to (1) the circumstances in which a plaintiff will need to give evidence of a methodology for determining general causation, and (2) the requisite contents of such a methodology.

When Is a Methodology to Establish General Causation Required for Certification?

In *Hyundai Auto Canada Corp v. Engen* [*Engen*], the Alberta Court of Appeal upheld certification of a class action alleging that sunroofs in six vehicle models were susceptible to spontaneous shattering. On appeal, the defendants argued that the plaintiff failed to provide evidence of a methodology to establish that a particular defect can cause the alleged spontaneous sunroof shattering. The Alberta Court of Appeal rejected this argument, in part, because the court held that no such methodology was required.

Engen's approach may be contrasted with that of the British Columbia Court of Appeal's 2018 decision in N&C *Transportation v. Navistar International Corporation* [*Navistar*], where the Court stressed that, at certification, there must be "some methodology capable of proving that a common defect caused a common impact". The Court there concluded that the plaintiffs' evidence was sufficient to determine if the specific exhaust control system at issue could cause the alleged various performance and operational issues, including, among other things, engine overheating, fuel pump leakage, recalculating valve damage, fan hub damage and soot buildup in the particulate matter traps.

Engen is consistent with *Navistar* in the context of the distinct characteristics of the underlying alleged defect and consequential harms. *Engen* engaged a relatively straightforward causal connection between an alleged defect and a single negative outcome (spontaneous sunroof shattering). By contrast, in *Navistar*, the causal connection between the exhaust control system and the multiple alleged operational and performance problems was not as obvious. *Engen* may indicate that, when a single defect in a product component is alleged to cause a single negative outcome to that component resulting in injury, no general causation methodology is required.

Circumstances engaging more variable defects and alleged failure modes may, however, trigger an obligation by plaintiffs to demonstrate the availability of a credible or plausible methodology to determine general causation.

What Degree of Specificity Is Required for a Methodology to Determine General Causation?

Courts often consider methodologies for determining general causation in cases alleging defects in pharmaceuticals. In *Price v. Lundbeck A/S* [*Price*] the Ontario Superior Court of Justice dismissed a motion to certify a class action about alleged birth defects resulting from the use of Celexa because the proposed methodology was not sufficiently tailored to the alleged negative outcomes.

The plaintiffs in *Price* alleged that Celexa is a teratogen (i.e., an agent that can, under reasonable circumstances of exposure, disturb the development of an embryo or fetus and cause congenital malformations). The plaintiffs further alleged that based on Celexa's teratogenicity, class members may suffer from hundreds of variable congenital malformations for which there is "no common etiology". In order to support these allegations, the plaintiffs in *Price* proposed a general causation methodology that would determine if Celexa is a teratogen, but would not determine if Celexa consumption can cause the alleged injuries (i.e., the specific congenital malformations).

The Court in *Price* concluded that the plaintiffs' proposed methodology was deficient because it would not establish if consumption of Celexa can cause any specific congenital malformations. In the Court's description, "'[t]eratogenicity' is not the harm suffered, but instead a term that relates to the possibility of hundreds of congenital malformations, only some of which (if any) might have been reasonably foreseeable." On this basis, the court declined to certify the proposed common issue.

The Court in *Price* warned against certifying cases based on "superficial commonality" such as the generalization of teratogenicity, as distinct from the specific harms alleged.

Looking Forward

Taken together, *Engen* and *Price* suggest that, for certification, proposed product liability class actions will require evidence of a methodology to prove general causation of the specific injuries alleged if the connection between the defendants' conduct and the class' resulting damage is unclear and/or if multiple negative outcomes are alleged.

As *Price* demonstrates, courts are likely to scrutinize the proposed methodology to ensure that it establishes commonality that is material to the alleged harms. A methodology that only demonstrates commonality in overly broad terms will not satisfy the certification requirements.

Litigants and their counsel facing product liability class actions should closely scrutinize the allegations of harm and consider the limitations of any evidence that the alleged harms flow from the underlying product defect. If common general causation can only be demonstrated on an illusory basis, certification may not be appropriate.

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The Lack of Present Injuries and Reliable Scientific Evidence Proves Fatal in North American Pharmaceutical Impurity Litigation

Cheryl Woodin and Tom Feore

After reports were made regarding the presence of nitrosamines in certain pharmaceutical products in 2018 and 2019, and subsequent precautionary regulatory action was taken, an avalanche of litigation commenced in Canada and the United States regarding alleged failures by drug manufacturers, wholesalers, distributors and retailers in respect of a host of pharmaceutical products, including Valsartan, Ranitidine and others.

Nitrosamines are a ubiquitous class of chemical compound widely found in low levels in drinking water, vegetables, meats, cheeses, alcoholic beverages and other sources.

The plaintiffs in these various cases generally asserted that the alleged that the presence of nitrosamines in pharmaceuticals either caused their cancer, or increased their risk of cancer.

In 2022, the Ontario Superior Court of Justice and the United States District Court Southern District of Florida each dismissed nitrosamine–related pharmaceutical class actions, regarding Valsartan and Ranitidine respectively. In May 2023, the British Columbia Supreme Court dismissed a similar nitrosamine-related pharmaceutical class action regarding Ranitidine.

The decisions of the Ontario Superior Court of Justice, the United States District Court for the Southern District of Florida, and the British Columbia Supreme Court generally focused on two core factors:

1. the lack of a present injury; and
2. the lack of scientific evidence that the relevant (1) pharmaceutical products, and (2) nitrosamines, caused or increased the risk of cancer (i.e., the lack of general causation).

The Lack of a Present Injury

In *Palmer v. Teva Canada Ltd.* [*Palmer*], the plaintiff's case focused on the presence of nitrosamines in Valsartan, which the plaintiff alleged were carcinogenic. The plaintiff sought, on behalf of the proposed class, damages for their alleged increased their risk of developing cancer, and their mental distress associated with that allegedly increased risk, among other things.

Notably, the plaintiff did not seek damages for class members who had actually been diagnosed with a cancer, which Justice Perell found "baffling."

The action was dismissed. Applying principles from the Supreme Court of Canada's landmark decisions in *1688782 Ontario Inc. v. Maple Leaf Foods Inc.* and *Atlantic Lottery Corporation v. Babstock* (where Bennett Jones acted for the appellant Atlantic Lottery Corporation), Justice Perell found that "negligence law does not recognize the risk of injury or harm or the increased risk of harm or injury as a compensable type of damages."

In respect of the claims for damages arising out of distress over the alleged increased risk of cancer,

Justice Perell found that such distress was no more than "present anxiety occasioned by the risk of future physical or psychological harm," which was similarly non-compensable.

In *Dussiaume v. Sandoz Canada Inc. et al.* [*Dussiaume*], Justice Wilkinson reached a similar conclusion in respect of similar claims. Despite the plaintiff's submissions to the contrary, she held that the plaintiff had failed to allege any "manifested" health effects or conditions. Rather, she held, the plaintiff's claim was in truth about the risk of developing cancer. As such, it was not compensable for the same reasons identified in *Palmer* and consistent with the Supreme Court of Canada's analysis in *Babstock*. Justice Wilkinson also rejected the plaintiff's claim that consuming Ranitidine resulted in changes to his body's cells and therefore resulted in a manifested injury; as she found it to be nothing more than "a potential future harm or increased risk of harm claim in different clothes."

On the plaintiff's claims of psychiatric injury over the Health Canada notices and the alleged increased risk of cancer, Justice Wilkinson applied *Palmer* to conclude that anxiety occasioned by the risk of developing cancer is simply "a harm one step removed" from the non-compensable risk of physical injury, and was therefore similarly non-compensable.

In so doing, Justice Wilkinson also articulated a principled basis for the rule regarding psychiatric injury: citing the Supreme Court's dictum in *Saadati v. Moorhead* that different kinds of injury—namely, physical on the one hand and psychiatric on the other—should be afforded "identical treatment", she determined that a claim for psychiatric injury based on an "apprehension of an abstraction (the increased risk of a diagnosis of cancer)" would "raise indeterminacy concerns, and would create a legal asymmetry between the availability of damages for a physical risk of harm and the availability of damages for mental harm flowing from a risk of harm."

The Lack of Scientific Evidence (No General Causation)

Palmer v. Teva Canada Ltd.

The absence of some basis in fact that the relevant product and nitrosamines cause cancer (i.e., general causation) was another focus in *Palmer*.

In *Palmer*, Justice Perell scrutinized the epidemiological evidence and found that statistics from certain studies and experiments that suggest exposure to certain nitrosamines increases the experience of cancer "are a necessary but not a sufficient basis" to establish carcinogenicity to humans. Justice Perell held that "[i]t is an axiom of epidemiology that statistical association does not equate to proof of a causative relationship."

Justice Perell also emphasized Health Canada's study on the alleged theoretical increased risk from Valsartan, which found that "the theoretical additional cancer risk in a worst case scenario, range between one additional cancer case in every 11,600 persons to one additional cancer case in every 93,400 persons (i.e., a theoretical increased risk of cancer between 0.0086% and 0.0011%). As Health Canada had previously stated, and as Justice Perell emphasized, this theoretical increased risk must be considered in the context of the existing lifetime risk of a 50:50 chance of developing cancer. Justice Perell provided "further contextualization", noting that the lifetime odds of dying in a motor vehicle accident are 0.91%.

Re: Zantac (Ranitidine) Products Liability Litigation

In *Re: Zantac (Ranitidine) Products Liability Litigation* [*Zantac*], Judge Rosenberg of the Southern District of Florida undertook a rigorous 314-page analysis of the plaintiffs' expert evidence regarding Ranitidine in a *Daubert* motion.

Judge Rosenberg ultimately found that that "the Plaintiffs' experts make analytical leaps that no

scientist outside of this litigation has made. And the leaps go too far."

Judge Rosenberg emphasized that there is "no widespread acceptance in the scientific community of an observable, statistically significant association between ranitidine and cancer", and "no published study or governmental finding that agrees with the Plaintiffs' experts—there is no published conclusion or finding, outside of this litigation, that concludes that ranitidine causes cancer of any kind."

In evaluating the United States Food and Drug Administration's (FDA's) testing results, which Judge Rosenberg found were "the only reliable testing", she concluded "the average amount of [nitrosamine impurities] in ranitidine at roughly equivalent or slightly higher than the FDA's daily limit which...equates to an infinitesimal unprovable risk of cancer."

Dussiaume v. Sandoz Canada Inc. et al.

In *Dussiaume*, in which Bennett Jones acted for Pharmascience Inc. and Laboratoire Riva Inc., the defendants brought a motion for summary judgment on the basis that there was no genuine issue for trial as to general causation, on the basis that the uncontroverted scientific evidence showed that there was no reliable association between Ranitidine and cancer, much less that Ranitidine could cause cancer. Justice Wilkinson agreed, and granted summary judgment in respect of all general and special damages claims on this basis.

Pointing to concessions by the plaintiff's experts in their reply reports that future studies would be needed in order to determine so much as a *possible* link between nitrosamines and/or Ranitidine on the one hand and cancer on the other, she noted that summary judgment cannot be defeated by vague references to what may be adduced in the future, and found that these were exactly what the plaintiff had provided.

Ultimately, Justice Wilkinson held that the "uncontroverted evidence" was that "neither ranitidine nor NDMA [a nitrosamine impurity] are reliably associated with increased cancer risk", and that there was an "absence of evidence that ranitidine or NDMA cause cancer in humans." She concluded that "there is no scientific support for the conclusion that ranitidine at therapeutic doses gives rise to mutagenicity or is carcinogenic".

Taken together, *Palmer*, *Zantac* and *Dussiaume* demonstrate courts' skeptical approach to risk of harm claims, particularly where the science does not demonstrate any such increased risk.

Looking Forward

While appeals and litigation are still pending, defendants should be encouraged by these courts' early focus on whether the claims being advanced are tenable at law and founded on credible existing science to support a claim for injury. The decisions all reinforce the proposition that class proceedings cannot be used to end-run these conditions precedent to an actionable wrong.

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Discontinuance of a Class Action: A New Approach to Multijurisdictional National Settlements in Québec?

Pascale Dionne-Bourassa and Peter Douglas

As 2023 marks the opening of the Bennett Jones Montréal office, it is worthwhile to look at an interesting development in class action procedures in Québec.

Parallel class actions filed in multiple provincial jurisdictions are a common feature in Canadian class action litigation that often frustrate one of the very purposes of class proceedings to support judicial economy.

Courts across Canada aspire to find more efficient ways to navigate multijurisdictional class actions. National coordination and communication have been encouraged to reduce the strain that overlapping or duplicative class actions have on already scarce judicial resources.

As a result, we have seen a rise in the creation of national consortiums of plaintiff's counsel that organize various parallel class actions into common national litigation. The formation of national consortiums can improve the efficiency by which multijurisdictional class actions are resolved through the request for stays of proceedings in certain provincial jurisdictions while allowing for a national class to be represented in a single class action that moves forward.

While this spirit of cooperation and coordination has led to a number of increased efficiencies in the litigation of class proceedings, we have not yet seen this translate entirely into the settlement of national class actions. There has been an increase in the number of joint settlement approval hearings before multiple provincial courts, but it still remains common practice for the approval of a national class action settlement to be sought by both a provincial court in common law Canada and the Superior Court of Québec.

However, recent case law in Québec shows us a path to further efficiency in the way national class action settlements are approved and implemented.

In *Bourgeois v. Electronics Arts Inc. [Bourgeois]*, the Superior Court of Québec authorized the discontinuation of a proposed class action in Québec on the basis that a parallel class action was settled on behalf of a national class in British Columbia. In doing so, the Superior Court of Québec has demonstrated that Québec courts are willing to show deference to the decision of another provincial court that positively affects the rights of Québec residents.

In granting the discontinuance, the Superior Court of Québec referred to the Québec Court of Appeal's decision in *École communautaire Belz v. Bernard [École communautaire Belz]* which noted that such a discontinuance may be granted where: (1) the discontinuance does not harm the putative members of the proposed class and (2) it does not undermine the integrity of the justice system. Beyond this, the court is not to decide whether the discontinuance is opportune and does not have to evaluate the sufficiency of the reasons justifying it.

As the Court itself wrote in the *École communautaire Belz* case; "the judge must play his role in light of the principle that the parties, insofar as they respect the principles, objectives and rules of procedure and established deadlines, have control of their case."

In applying this standard and granting the discontinuance, the Superior Court of Québec held in *Bourgeois* that the terms of the proposed national settlement in British Columbia were not prejudicial to Québec residents as:

1. the settlement provided for the resolution of class members' claims on an equal basis;
2. notice was fairly provided to Québec residents through the wide dissemination of a bilingual settlement notice that was also published in the Québec Class Actions Registry; and
3. the settlement provided for a bilingual claims administrator based in Québec that residents of Québec would have access to. Further, the Superior Court noted that "granting the discontinuance would not undermine the integrity of the justice system but rather would promote the principles of both judicial economy and interprovincial comity."

Looking Forward

Allowing for national class settlements to be approved in a common law province without requiring the approval of a settlement in a parallel Québec class proceeding via the discontinuance option can lead to a more expedient and cost-effective settlement approval process.

In 2023 and beyond, it will be interesting to see the impact of the Superior Court of Québec's decision in *Bourgeois* and whether the certification and settlement of class actions becomes a single jurisdiction process provided the procedural due process of the settlement meets with Québec Court approval.

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Key Contacts and Authors

Mike Eizenga
416.777.4879
eizengam@bennettjones.com

Cheryl Woodin
416.777.6550
woodinc@bennettjones.com

Gannon Beaulne
416.777.4805
beaulneg@bennettjones.com

Alexander Payne
416.777.5512
paynea@bennettjones.com

Contributing Authors

Sakina Babwani
416.777.6122
babwanis@bennettjones.com

Nina Butz
416.777.5521
butzn@bennettjones.com

Pascale Dionne-Bourassa
514.985.4510
bourassap@bennettjones.com

Peter Douglas
416.777.7921
douglasp@bennettjones.com

Douglas Fenton
416.777.6084
fentond@bennettjones.com

Tom Feore
416.777.7905
feoret@bennettjones.com

Mehak Kawatra
416.777.7927
kawatram@bennettjones.com

Ethan Schiff
416.777.5513
schiffe@bennettjones.com

Julien Sicco
416.777.7802
siccoj@bennettjones.com

Marshall Torgov
416.777.7807
torgovm@bennettjones.com

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