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Class actions in Canada: what to expect in 2021

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With this unprecedented year almost behind us, we are looking ahead to how the events of 2020 may shape the landscape for Canadian class action litigation in 2021 and beyond.

What to expect: in light of the end to waiver of tort and a rise in pandemic-related class actions, allegation of actual damages will be required in class actions.

As the novel coronavirus continues to wreak havoc on the health, wellbeing and livelihoods of Canadians, covid-related class action litigation has proliferated. Class actions have been commenced seeking compensation on behalf of various groups for death, illness, financial losses, services not received, and refunds not provided during the pandemic. Although provincial legislatures have proposed certain liability protections for defendants named in these class actions[1], we anticipate that as the harms of the pandemic crystallize, the number of related class actions will continue to rise.

One hurdle plaintiffs will face in having these claims certified or authorized is the impact of the Supreme Court of Canada's recent decision in *Atlantic Lottery Corp Inc. v Babstock*, 2020 SCC 19. The Supreme Court finally clarified that waiver of tort is not an independent cause of action and cannot be the sole basis on which a class action is certified[2]. To pass the certification or authorization, plaintiffs alleging that a defendant's negligent conduct caused harms relating to the virus will need to allege actual damage and not simply "exposure to an unreasonable risk."

What to expect: class certification in Ontario will be more onerous.

On October 1, 2020, the first comprehensive amendments to Ontario's class proceedings legislation since its adoption more than 25 years ago came into effect[3]. We expect these amendments to have a meaningful impact on class action law in 2021.

Arguably the most significant amendment is the introduction to the certification test of a preferable procedure threshold that adopts almost verbatim the predominance and superiority test set out in the rules for class action certification in the U.S. Federal Rules of Civil Procedure.

The amended test signals a more onerous test for certification. If Ontario courts follow the clear legislative intent to raise the bar for certification, there may be new grounds "to protect the defendant from being unjustifiably embroiled in complex and costly litigation[4]." This is clear from the experience in the United States where the predominance and superiority criteria have led courts to more frequently refuse certification.

What to expect: Opportunities are emerging to streamline multi-jurisdictional class actions, but the timing to streamline these claims remains uncertain.

Overlap among multi-jurisdictional class actions continues to be a vexing problem. Until relatively recently, defendants had few options to deal with the costs and inefficiencies of duplicative class actions seeking the same or similar relief in multiple provinces. Ontario, British Columbia, Alberta, and Saskatchewan have now adopted provisions to give courts these tools. These laws require courts to consider the existence of overlapping multi-jurisdictional class actions and whether it would be preferable to have some or all of the claims resolved in another jurisdiction.

A second tool to address the costs and inefficiencies of overlapping class actions is the Canadian Bar Association (CBA) Canadian Judicial Protocol for the Management of Multi-Jurisdictional Class Actions (the Protocol). The Protocol aims to minimize confusion and maximize communication between judges and lawyers involved in multi-jurisdictional class actions.

An important question raised is the stage at which the court should streamline the claims. From a defendant's perspective, it should be as early as possible to avoid expending resources dealing with multiple, costly certification motions in multiple provinces. While the case law is in its infancy, several courts have reached the opposite conclusion. Courts in British Columbia have interpreted the B.C. *CPA*[5] as providing that motions to stay an overlapping proceeding should be resolved at certification unless the defendant can demonstrate that the actions are completely duplicative[6]. By contrast, a decision of the Québec Superior Court granted a stay of a proposed Québec proceeding in favour of an overlapping claim in Saskatchewan in advance of certification, in part, on the basis of the Protocol[7].

We expect to see further developments in the year ahead. In Ontario, the courts seemed to be trending towards the British Columbia approach[8]. However, Ontario's amended *CPA* now expressly provides that this streamlining can be resolved in advance of certification[9]. The landscape may also shift in British Columbia where the Court of Appeal has granted leave to appeal to address the issue of sequencing motions to strike proposed class proceedings and motions for certification[10]. Finally, it is worth noting that the CBA National Task Force has been reconvened to consider updates to the Protocol. Further clarifications or amendments from legislatures, courts, and the Task Force will be worth watching for in 2021.

What to expect: In Québec, applications for authorization to institute a class action will not be read liberally.

In a split decision in *Desjardins Financial Services Firm Inc. v. Asselin*, 2020 SCC 30, the Supreme Court outlined the limits of Québec's liberal approach to discovering implied messages conveyed in an application for authorization. While authorization judges in Québec may "read between the lines" at authorization, they should not, according to the court, search "on a blank page" for allegations which do not exist.

For the Supreme Court majority, the expression "read between the lines," used by the Court of Appeal to discover the full message of an application for authorization, should not be understood as an invitation to the lower courts to search for allegations that are missing from an application or to rewrite causes of action—and therefore is not a departure from the applicable law. In dissent, three Supreme Court justices would have limited the role of the court at the authorization stage and proposed to more rigidly scrutinize the allegations of an application for authorization.

What to expect: Increased filings in British Columbia, Québec and

Finally, as Ontario becomes less class action friendly, we anticipate that other provinces may see an increased number of filings. In addition to the British Columbia courts' treatment of multi-jurisdictional class actions, British Columbia's no-costs and Québec's low-cost regimes may prove to be particularly attractive for plaintiffs. The Federal Court of Canada has also seen an uptick in claims commenced.

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[1] To date, Ontario, Nova Scotia and British Columbia have adopted such legislation. See our bulletin on the Ontario Legislation here.

[2] See our bulletin on the Court's decision in *Atlantic Lottery* here.

[3] *Class Proceedings Act, 1992*, SO 1992, c 6. Subject to specific exceptions, the new provisions only apply to proposed class proceedings commenced on or after the coming into force date.

[4] *Robertson v. Thomson Corp.* (1999), 43 O.R. (3d) 161 (Gen. Div.) Justice Sharpe held that the certification motion was a screening device to achieve this end. His guidance has arguably not been followed more recently.

[5] Section 4(3) of the British Columbia *Class Proceedings Act,* RSBC 1996, c 50.

[6] *Fantov v. Canada Bread Company, Limited*, 2019 BCCA 447.

[7] *Varnai c. Janssen Inc.*, 2019 QCCS 5090.

[8] See for example: *DALI 675 Pension Fund v. SNC Lavalin*, 2019 ONSC 6512.

[9] *Class Proceedings Act*, RSBC 1996, c 50, s. 4(3), (4).

[10] *British Columbia v. Apotex Inc*., 2020 BCCA 186.

To discuss these issues, please contact the author(s).