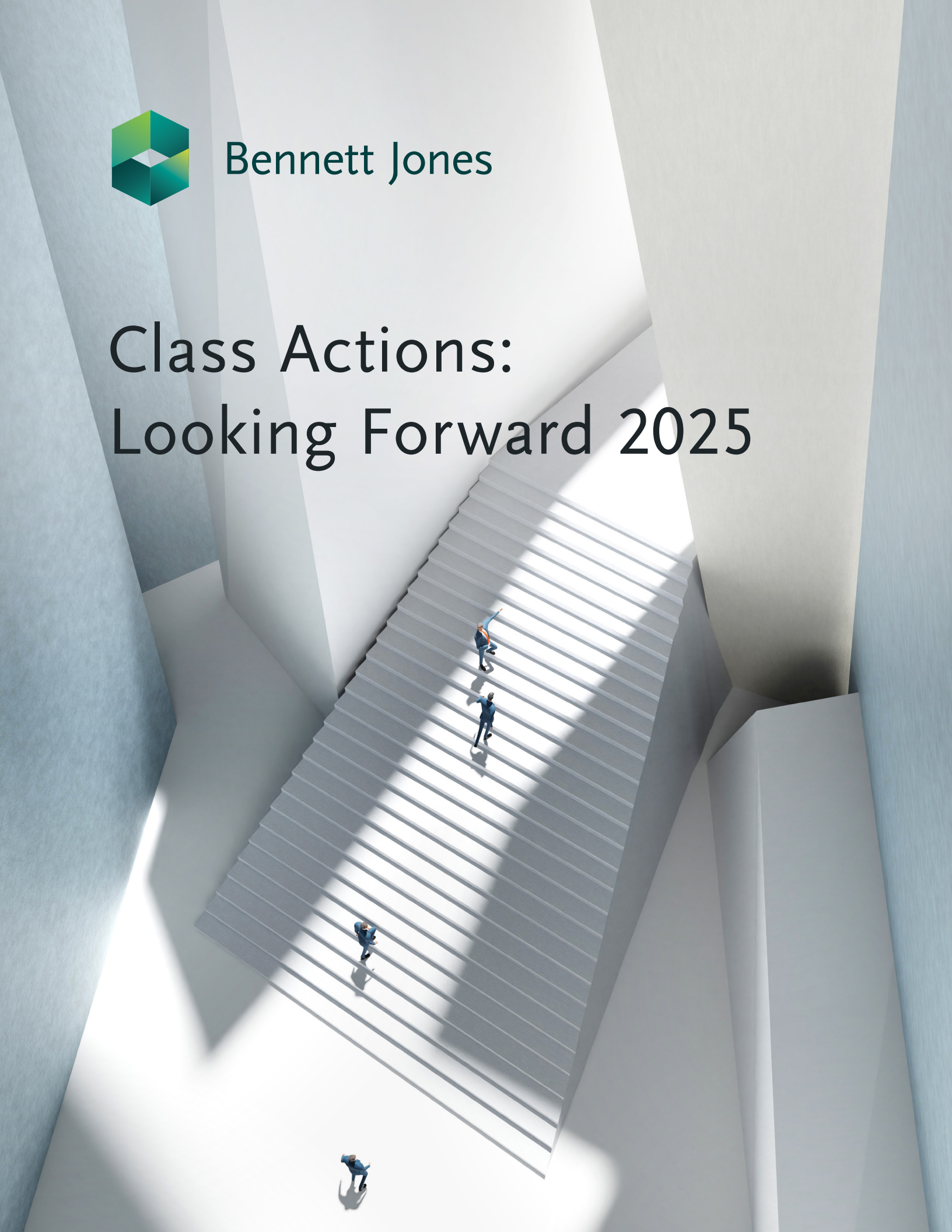
Bennett Jones

Class Actions: Looking Forward 2025



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Whether you are a lawyer, business owner or simply interested in staying current on Canada's class actions landscape, we encourage you to update your subscription preferences with us to receive our insights and analysis delivered directly to your inbox.

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Meet Our Team

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Introduction

Mehak Kawatra

In our 2025 edition of *Looking Forward*, we provide a snapshot of notable legal developments that we expect to influence class actions procedure and related strategy across Canada. Drawing on our national practice across Canada, this year's edition identifies key trends and learnings that will shape class actions in 2025 and beyond.

We begin with developments of national significance. First, we discuss the amendments to the *Competition Act* which, effective June 2025, could open the door to a novel quasi-class action scheme entitling private plaintiffs to seek financial remedies from the Competition Tribunal for certain anti-competitive conduct. Then, we reflect on the Supreme Court of Canada's recent hearing of the appeal in *Lundin Mining Corporation v Dov Markowich*, the result of which may redefine the scope of "material change" under securities law, impacting the nature and frequency of securities class actions in Canada. Finally, we discuss a Supreme Court of Canada decision which paves the way for national multi-Crown class actions in Canada.

Next, we explore notable cases from Ontario and British Columbia that address issues that are relevant Canada-wide. We reflect on the Ontario Court of Appeal's recent affirmation of the two-step test for the certification of common issues and how courts (including non-Ontario courts) will need to respond to the corresponding evidentiary requirements of this two-step test. We then revisit the topic of database defendants' liability[1]—an issue previously laid to rest in the context of Ontario's common law tort of intrusion upon seclusion but newly revived by the British Columbia Court of Appeal, pursuant to the statutory-equivalent tort codified in provincial privacy legislation.

Finally, we highlight Ontario, Quebec and British Columbia decisions which show the courts narrowing or streamlining class actions cases where possible. Here, we begin with two decisions from the Ontario Court of Appeal regarding the court's appetite to dismiss languishing class actions on account of delay. We then turn to another Ontario Court of Appeal holding that plaintiffs' need to show compensable loss to certify tort claims, before discussing the Quebec Court of Appeal's encouragement to authorization judges to dispose of meritless claims against defendants early in the litigation. In our final piece, we conclude with two British Columbia Supreme Court decisions demonstrating the courts' willingness to meaningfully engage with—and even reject, where appropriate—expert methodology providing some basis in fact for causation at certification.

Bennett Jones' Class Action Litigation group continues to achieve successes for its clients, including in high-stakes, complex cases across a range of issues, including product liability, competition, securities litigation and privacy. Bennett Jones was awarded Class Action Law Firm of the Year in 2024 by *Chambers Canada*, and the firm's class actions group remains highly ranked for dispute resolution by *Chambers Canada, Chambers Global, the Legal 500 Canada* and the *Canadian Legal Lexpert Directory*. Our practice group members continue to be recognized leaders, with our co-chairs Michael A. Eizenga and Emrys Davis having won *Benchmark's* Class Action Litigator of the Year six times and *Benchmark's* Competition Litigator of the Year in 2023 respectively. The Co-Chair of our National Litigation Practice, Cheryl Woodin, was also named *Benchmark's* Class Action Litigator of the Year in 2024.

1. See Nina Butz and Mehak Kawatra, "Judicial Economy, Access to Justice and Certainty in the Law: The Supreme Court of Canada's Denial of Leave to Appeal in the Intrusion Upon Seclusion Trilogy" in Bennett Jones LLP, *Class Actions: Looking Forward 2024*.

Competition Act Amendments Open Door to Quasi Class Actions

Emrys Davis and Mercy Liu

Since 2022, the Government of Canada has substantially amended the *Competition Act* each year for three successive years. Among the many changes are a collection of related amendments which aim to expand access to the Competition Tribunal to private litigants. New remedies become available in June 2025 and will create significant financial incentives for private plaintiffs to litigate at the Tribunal, including in a quasi-class action on behalf of all persons affected by the respondent's alleged anti-competitive conduct. Beginning in June 2025, we anticipate plaintiffs will file new cases—at first perhaps only a trickle rather than a flood—as they test the procedural rules that the Tribunal will apply to these cases.

The First Wave—2022 Amendments

The first wave of amendments to the *Competition Act* was proposed as part of Bill C-19 in April 2022 and received royal assent on June 23, 2022.

Bill C-19 introduced the right for private parties to seek leave to make an application under section 79 of the *Competition Act* (the abuse of dominance provisions).

The Tribunal clarified the test for leave in *JAMP Pharma Corporation v Janssen Inc.*, 2024 Comp Trib 8. It confirmed that leave may be granted where only a part of the applicant's business is directly and substantially affected by the alleged conduct. However, for leave to be granted, applicants must still lead "credible, cogent and objective evidence" going beyond "mere possibility". In ultimately denying leave in *JAMP*, the Tribunal appears to have maintained a reasonably high threshold for leave that may challenge private plaintiffs.

The Third Wave—2024 Amendments

Although private rights of action were not addressed in the second wave of amendments which received royal asset on December 15, 2023, they would regain focus during the final wave of amendments to the *Competition Act*, which was proposed as part of Bill C-59 in November 2023 and received royal assent on June 20, 2024. Many of Bill C-59's *Competition Act* amendments are subject to a one-year delay such that they will come into force on June 20, 2025.

As it had in 2022, Parliament again expanded the categories of conduct now subject to review by the Tribunal on the application of a private plaintiff. Beginning on June 20, 2025, private parties will be able to seek leave to bring a case for alleged violations of section 90.1, the *Act's* civil anti-competitive agreements provision, and section 74.01, the civil misleading advertising provisions of the *Act*.

Perhaps most importantly, for the first time, private parties will also be able to seek a financial award as the Tribunal may order a payment from the respondent in an amount not exceeding the "value of the benefit derived from the conduct that is the subject of the order." This award may be distributed to the applicant and "any other person affected by the conduct," effectively introducing a novel quasi-class action scheme in which a single plaintiff can secure a financial award for many others.

Despite creating financial incentives to advance quasi-class actions at the Tribunal, the *Act* remains silent on the ordinary procedural protections and requirements that class action proceedings are otherwise subject to

in Canada. These include class certification, a court-supervised settlement approval process, class-wide release for defendants and court approval of plaintiffs' legal fees. How the Tribunal will deal with these procedural issues has been a topic of much debate. Some suggest that the Tribunal will adopt some or all the procedural rules that Canada's Federal Court applies. Nevertheless, what procedural rules and processes the Tribunal eventually applies remains to be seen.

Looking Forward

The expanded rights of private access and accompanying financial incentives promise to radically reshape competition enforcement in Canada. They have also created a significant new category of potential cases for plaintiffs-side class action lawyers who may use the new private access to the Tribunal to pursue many categories of anti-competitive conduct that they have not been able to prosecute under the existing class action framework. We expect plaintiffs to file some of the first test cases as early as late June 2025 as they begin to explore and develop the new Tribunal private access regime.

Supreme Court of Canada to Decide Scope of "Material Change" With Far-Reaching Consequences for Securities Class Actions

Douglas Fenton, Marshall Torgov, Josephine Bulat and Kanwar Brar

The Supreme Court of Canada (SCC) is set to issue its decision in *Lundin Mining Corporation v Dov Markowich* (*Markowich*). This highly anticipated SCC decision regarding disclosure obligations could alter the landscape for securities-based class actions by allowing more investors to meet the leave test, subjecting public issuers to increased litigation.

Below is a summary of the key arguments made by the parties during the SCC appeal hearing, and the points to which the SCC paid close attention to during oral argument.

The Decisions Below

In the 2023 edition of Bennett Jones' *Class Actions: Looking Forward*, we reviewed the Court of Appeal's decision.

In summary, the issue was whether a significant rockslide at a mine owned by Lundin Mining constituted a "material change" in the company's "business, operations or capital". Following the rockslide, there was an interruption to the operations of the mine. Lundin Mining issued a press release approximately one month after the incident, advising the public of the rockslide and, separately, providing updated data on the mine's productivity. Lundin Mining's share price declined shortly thereafter.

The plaintiff, a minority shareholder of Lundin Mining, advanced a claim under section 138.3(4) of the Ontario *Securities Act*, which requires a company to disclose any "material change" in its "business, operations or capital" within ten days of the impugned event. Leave is required to pursue the claim. The test for leave under section 138.8(1) of the *Securities Act* requires that there is a "reasonable possibility" that the action will be resolved at trial in the plaintiff's favour.

The Superior Court concluded that while the rockslide was "material" it did not constitute a "change" in Lundin Mining's "business, operations or capital" such that its disclosure was required. The plaintiff could not succeed in showing that the rockslide was a "material change" and the Court denied leave to bring the action.

The Court of Appeal overturned the Superior Court's decision, concluding that the term "material change" must be interpreted broadly, particularly in the context of a leave application under section 138.8(1) of the *Securities Act*, which only requires that the plaintiff put forward a reasonable possibility of success based on a "plausible interpretation" of the statute.

Leave to Appeal Granted

On March 28, 2024, the SCC granted Lundin Mining's application for leave to appeal.

The SCC Hearing

The parties appeared before the full panel of the SCC judges on January 15, 2025.

Lundin Mining's Arguments

The core of Lundin Mining's argument was that the Court of Appeal erred by establishing a novel, two-part test for determining what constituted "material change". Lundin Mining defended the lower Court's interpretation at first instance, arguing that the Superior Court correctly recognized the distinction between "material fact" and "material change", as well as the fact-specific nature for determining what constitutes a "material change".

Lundin Mining also argued that the distinction between "material fact" and "material change" should not turn solely on whether the change was external to the company (i.e., a change outside of the company's control).

Regarding the test for leave, Lundin Mining argued that the Court of Appeal did not properly apply the reasonable possibility test in connection with the leave requirements such that it effectively "lessened the burden on a plaintiff" and, as such, leave to proceed with the proposed class action should not have been granted.

The Plaintiff's Arguments

In response, the plaintiff's written submissions highlighted the lower Court's use of incorrect and overly restrictive statutory interpretations of "change", "business", "operations" and "capital." He argued, instead, in favour of the Court of Appeal's finding that "material change" is a flexible concept without a "bright line test", and that the expansive approach adopted by the Court of Appeal should be upheld.

The plaintiff also asserted that Lundin Mining's arguments pertaining to the internal versus external distinction regarding "material change" were irrelevant.

Finally, the plaintiff denied the suggestion that the Court of Appeal "lessened" the burden on plaintiffs seeking leave under section 138.3(4) and section 138.8(1) of the *Securities Act*. He argued that the process at the leave stage was meant to be a low standard without a rigid analysis. As such, leave to proceed with the class action was properly granted by the Court of Appeal.

Categories of Questions Asked by the Bench

During the parties' submissions, the panel posed approximately 80 questions, including relating to the following issues:

- **Distinguishing Material Change from Material Fact:** The distinction between "material change" and "material fact" was a key focus. The SCC asked Lundin Mining about the accessibility of public information versus private information (meaning information only known to the issuer). Indicating that a "material change" is based on private information whereas a "material fact" is based on public or private information, Justice Rowe probed whether Lundin Mining's submissions conflated the two definitions. Meanwhile, questions for the plaintiff centered on the factors that differentiate a "material change" from a "material fact".
- **Plausible Interpretation:** The SCC considered the "plausible interpretation" aspect of the leave to proceed test. This raised questions about whether the Court should adopt a single approach to interpretation, and whether such an approach would raise the threshold for granting leave. Additionally, the Court examined whether Lundin Mining's argument suggested that the test should focus on a plausible application of the facts, while the legal interpretation should be assessed on a correctness standard.
- **Contextualizing Disclosure:** The SCC also asked the plaintiff about how to strike the appropriate balance between protecting investors and placing burdensome disclosure obligations on issuers. The SCC was particularly interested in exploring the point at which internal discussions within a public company could rise to the threshold of becoming a "material change".

Looking Forward

At the time of publishing this review, the SCC continues to weigh the parties' arguments in connection with this important concept to Canadian securities legislation.

A decision by the SCC to broadly define "material change" may place more onerous obligations on issuers to disclose a wider range of activities within their operations, which could result in more plaintiffs meeting the leave test under the *Securities Act*, and consequently, an increase in securities-related class actions.

A more restrictive definition may place more onerous obligations on the public to review disclosure more closely.

Whatever the outcome, the decision is sure to affect the behavior of issuers, and the expectations and reliance placed on disclosure by the public.

Supreme Court Approves Constitutionality of Multi-Crown Class Action

Gannon Beaulne and Edward Hulshof

The Supreme Court of Canada (SCC) has endorsed the constitutionality of British Columbia (BC) legislation empowering the province to seek recovery of opioid epidemic healthcare costs in a proposed class action brought on behalf of multiple Canadian governments.

In *Sanis Health Inc v British Columbia*, 2024 SCC 40, a majority of the SCC held that constitutional territorial limits on provincial legislative competence did not prevent BC from creating a direct statutory cause of action that it can pursue in a proposed class action on behalf of the federal and other provincial governments, subject to the right to opt out of the proceeding.

In reaching that conclusion, the majority reflected on the benefits of national class actions in Canada—where no national procedural mechanism comparable to the multi-district litigation process in the United States exists—to simplify the aggregation, prosecution, and determination of claims spanning geographic boundaries. It is the SCC's strongest endorsement of the constitutionality of a national opt-out class action administered out of a single province.

While its effect on legislative agendas and healthcare-cost recovery litigation remains to be seen, *Sanis* may offer "proof of concept" for national multi-Crown class actions and encourage more ambitious legislative action going forward.

Background

In *Sanis*, BC commenced a proposed class action against 49 manufacturers, marketers and distributors of opioid products. It alleged that the defendants had falsely marketed their products as less addictive and less prone to abuse, tolerance and withdrawal than other pain medications.

Soon after, BC passed the *Opioid Damages and Health Care Costs Recovery Act*, SBC 2018, c 34 (*ORA*). The *ORA* creates a direct statutory cause of action permitting BC to pursue recovery of healthcare costs caused by an "opioid-related wrong" by bringing or continuing a proposed class action on behalf of a class of one or more of the federal government and other provinces.

The *ORA* introduces new evidentiary rules and other procedural mechanisms modeled on former legislation in BC that targeted tobacco healthcare costs, the constitutional validity of which the Supreme Court confirmed in *British Columbia v Imperial Tobacco Ltd*, 2005 SCC 49. For example, the *ORA* allows statistical evidence to prove causation, relieves the government from proving the cause of any given person's opioid-related injuries, and requires the court to presume that those people would not have used opioids without the actions of the defendants.

But the *ORA* then goes further. It empowers BC to sue for opioid-related wrongs on behalf of other Canadian governments under section 11(1).

Subsection (2) of the same provision recognizes the right of each class member to opt out of the proceeding under BC class actions legislation.

Once the *ORA* came into force, BC amended its claim to incorporate section 11. It proposed two subclasses of plaintiffs (a) for governments relying on common law and *Competition Act* causes of action, and (b) for governments with legislation directed at recovery of healthcare costs arising from the opioid epidemic.

Certain pharmaceutical companies challenged section 11 as *ultra vires* the legislature of BC, arguing that the provision deals with property and civil rights in other

provinces, taking the provision outside the province's legislative competence under section 92(13) of the *Constitution Act, 1867*.

Procedural Background

The BC Supreme Court dismissed the constitutional challenge. The court found that section 11 of the *ORA* is a "procedural mechanism" that facilitates claims by extraterritorial governments in the BC court, keeping it within the competence of the provincial legislature under its authority to legislate about the "Administration of Justice in the Province". The court also found that section 11 negates any concerns about trespassing on other governments' legislative sovereignty given their ability to choose whether to participate.

The BC Court of Appeal dismissed the appeal. It held that section 11 does not affect substantive rights. Rather, it is a "a bold step, if not an experiment" in the realm of national class actions which was *intra vires* the province.

The Supreme Court of Canada Decision

By a 6-1 majority, the Supreme Court of Canada dismissed the appeal.

Writing for the majority, Justice Karakatsanis applied the two-part framework established in *Imperial Tobacco*. That framework involves determining (a) the "main thrust, or dominant purpose or most important characteristic" of the law (its "pith and substance"), and (b) whether the challenged legislation respects territorial limits under the *Constitution Act, 1867*.

The appellant pharmaceutical companies argued that the purpose of section 11 is to create a cause of action for the Crown in right of BC as a representative plaintiff, which was not permitted because the Crown is not a person. The Court disagreed, finding that the Crown is a person capable of being a representative plaintiff under the BC *Class Proceedings Act*.

The majority viewed section 11 through the interpretive lens of "cooperative federalism". The provision facilitates cooperation among Crowns in collectively pursuing individual claims. The majority thus endorsed the intergovernmental cooperation and interjurisdictional comity needed to respond to the nationwide character of the opioid epidemic. That spirit of cooperation was evidenced by interventions in the appeal by other provinces in support of the BC position.

Echoing lower court findings, the majority accepted that the pith and substance of section 11 is providing a procedural mechanism for the administration of justice, within the meaning of section 92(14) of the *Constitution Act, 1867*. The majority also underscored previous class action case law about the validity of "opt-out" regimes as sufficient to safeguard class member autonomy. As a result, the majority described section 11 as "deal[ing] with the promotion of litigation efficiency by joining the claims of consenting Crowns into the single proceeding."

In dissent, Justice Côté reached different conclusions on the effects of the provision and its pith and substance. In her opinion, section 11 is about legislating property and civil rights, largely because it includes by default other provincial governments and the federal government in the proposed class. "By implementing such a regime, the legislature of British Columbia is seeking to preserve the substantive rights it has arrogated by automatically imposing a class action upon other governments. It is commencing an action without the consent of the other governments."

Looking Forward

Following the SCC's decision, the province's class action against the various opioid manufacturers was certified on January 22, 2025 (*British Columbia v Apotex Inc,* 2025 BCSC 92). The SCC's endorsement of the constitutionality of the *ORA*, while significant, overcomes only one of several challenges that the action will face at trial—or at an appeal of the certification decision. While the province will benefit from evidentiary advantages under the *ORA*, on application by the defendants, the court may order discovery of a statistically meaningful sample of health care records to help test the merits of the province's claims.

It is unclear whether other provinces will forgo claims under their respective statutes while the *Sanis* action progresses through the BC court system.

In any event, *Sanis* signals that provincial legislative frameworks for coordinated healthcare cost recovery litigation can survive constitutional challenges and provide a mechanism for addressing claims that transcend provincial borders.

Indeed, *Sanis* may open the door to other legislative initiatives. For example, former Bill 12 in BC (which is currently on pause and would have put in place the P*ublic Health Accountability and Cost Recovery Act*) may receive renewed interest after *Sanis*, and it has the potential to affect a broad range of parties, interests and industries going beyond tobacco and opioids.

Raising the "Low Bar": Plaintiffs Seek New Strategies to Prove Common Issues for Certification

Christine Viney, Ethan Schiff and Sidney Brejak

A plaintiff's obligation to establish "some basis in fact" for a common issue is acknowledged as a low bar. Several Canadian appellate courts have, however, confirmed a "two-step test" as the standard analytical framework. Under the two-step test, plaintiffs must not only show that the proposed common issues can be answered across the class, but must also establish, as a matter of fact, that the proposed issues exist. The two-step test stands in contrast to a one-step test that considers only if the proposed common issue can be answered across the class.

The added requirement of proving the existence of proposed common issues means plaintiffs need sufficient factual evidence at the certification stage. Looking forward, representative plaintiffs may pursue innovative strategies to gather the evidence needed to meet their evidentiary burden. One such avenue, considered below, involves requesting pre-certification discovery.

Background of the Two-Step Test

The tension between the one-step and two-step tests arose following the Supreme Court of Canada's decision in *Pro-Sys Consultants Ltd. v Microsoft Corporation*, 2013 SCC 57. There, Justice Rothstein said "to establish commonality, evidence that the acts alleged actually occurred is not required. Rather, the factual evidence required at this stage goes only to establishing whether these questions are common to all the class members." Plaintiffs have relied on this statement as establishing that proposed common issues do not need to have a basis in fact to allow certification.

In *Kalra v Mercedez Benz*, 2017 ONSC 3795, the Court interpreted *Pro-Sys* as establishing a one-step test for all common issues analysis, regardless of whether the plaintiff adduced evidence of the existence of the proposed common issues. Other Ontario courts maintained that some basis in fact for the existence of the common issue was required (see, for example, *Kuiper v Cook (Canada) Inc.*, 2020 ONSC 128). In *Jensen v Samsung Electronics Co*, 2023 FCA 89, the Federal Court of Appeal affirmed the two-step approach in 2023.

The debate in Ontario was settled by the Court of Appeal in *Lilleyman v Bumble Bee Foods LLC*, 2024 ONCA 606 (leave to Supreme Court of Canada denied March 27, 2025), a case alleging a conspiracy to price-fix canned tuna. In upholding the dismissal of certification, the Court of Appeal unanimously affirmed a test requiring evidence of the existence of the proposed common issues. Despite successful parallel antitrust actions in the United States, the plaintiffs failed to lead sufficient evidence that any conspiracy about canned tuna existed in Canada, precluding certification. The Court described its approach as "a matter of logic and common sense."

Pre-certification Evidence Gathering

One avenue for plaintiffs to secure the evidence needed to prove that a common issue exists is through a request for pre-certification discovery. Such a request was recently considered by the Alberta Court of King's Bench in *MacKenzie v The Calgary Board of Education*, 2024 ABKB 305.

The three representative plaintiffs in *MacKenzie* allege that they are victims of sexual and physical assaults committed by former teachers. In advance of the certification hearing, they sought documentary and oral discovery from the Calgary Board of Education, which they said was needed to establish some basis in fact that there was a "common issue". The defendants argued that the evidence sought went to the merits of the case and was not relevant for certification.

The Court concluded that although the information sought would be "valuable" to the plaintiffs at the certification stage, most of it was not necessary to "fairly determine" certification, which the Court described as an exercise in determining the "proper forum" for a merits determination. The Court identified two narrow exceptions relating to the tenure and activities of the alleged abusers.

In deciding that the requested pre-certification discovery was unnecessary, the Court cited concerns about delay, particularly because the certification hearing itself was scheduled to take place in less than three months. The Court held that it must weigh pre-certification disclosure obligations against the risk of undue delay, and this factor weighed against ordering early production. This consideration may encourage plaintiffs to take earlier steps to secure pre-certification disclosure.

Looking Forward

Plaintiffs may use pre-certification discovery among various strategies to secure the evidence needed to prove the existence of the common issues they are seeking to have certified. Looking forward, we expect courts to consider these strategies in light of the two-step test and to apply a balancing test that weighs the importance of the information the plaintiffs are trying to secure as part of a fair determination of whether there are common issues against other factors within each proposed class action.

Legal Uncertainty for Database Defendants? Appeal Courts Assess Privacy Causes of Action With Varying Outcomes

Nina Butz and Miranda Cooper

The past year has introduced some uncertainty for institutional defendants facing privacy breach class actions in Canada. While Ontario's Court of Appeal has been consistent in its approach to class actions against "database defendants", two decisions of the British Columbia Court of Appeal suggest that plaintiffs may have more success recovering from such defendants in jurisdictions that have codified a breach of privacy cause of action, like British Columbia, as opposed to those that have recognized the tort of intrusion upon seclusion, like Ontario.

The term "database defendants" refers to organizations that collect and store personal information while carrying out a commercial purpose and whose databases are accessed by unauthorized third parties. Class actions brought against database defendants have become increasingly common. The earliest examples were brought in Ontario and pleaded the tort of intrusion upon seclusion.

Intrusion upon seclusion is a common law breach of privacy cause of action that aims to provide redress for moral and emotional harm suffered by plaintiffs whose privacy has been intentionally invaded. It was adopted by the Ontario Court of Appeal in its 2012 decision in *Jones v Tsige*. The tort of intrusion upon seclusion has the following three elements

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

Unlike most common law causes of action, the tort of intrusion upon seclusion does not require proof of pecuniary loss to justify a damages award. This feature of the tort makes it an appealing cause of action for plaintiffs suing for invasions of privacy.

The tort's availability for plaintiffs in this context was tested in three proposed privacy class actions that ultimately came before the Ontario Court of Appeal in (a) *Owsianik v Equifax Canada Co.*, (b) *Obodo v Trans Union of Canada Inc.*, and (c) *Winder v Marriott International Inc.* (collectively, the Trilogy).

As discussed in Bennett Jones' *Class Actions: Looking Forward 2024*, the Trilogy concerned attempts to hold database defendants liable for breaches by unauthorized third party-hackers. Central to the Ontario Court of Appeal's dismissal of all three of the Trilogy appeals was its finding that there was no conduct by the database defendants (as opposed to the actual hackers) that could amount to an intrusion into or an invasion of the plaintiffs' privacy. The Court found that holding the database defendants liable for the tortious conduct of unknown hackers would "create a new and very broad basis for a finding of liability for intentional torts."

The Supreme Court of Canada denied leave to appeal from each of the Trilogy decisions. The Ontario Court of Appeal affirmed the Trilogy in its 2024 decision in *Del Giudice v Thompson*, a parallel proceeding to the British Columbia case *Campbell v Capital One Financial Corporation*, 2024 BCCA 253 (*Capital One*), explored below.

In contrast, database defendants face a different landscape in British Columbia because of the province's *Privacy Act*. Section 1(1) of the British Columbia *Privacy Act* provides that "it is a tort, actionable without proof of damages, for a person, wilfully and without a claim of right, to violate the privacy of another." Broadly speaking, this cause of action is only available to residents of the province.

In two 2024 certification decisions, the British Columbia Court of Appeal addressed whether an alleged "reckless" failure by database defendants to protect customers' data could constitute a privacy violation under the British Columbia statute. While not decisively finding a cause of action against database defendants, the British Columbia Court of Appeal found in both cases that the plaintiff's *Privacy Act* allegations were not plain and obviously doomed to fail at the pleadings step of the certification test.

In *G.D. v South Coast British Columbia Transportation Authority*, 2024 BCCA 252 (*South Coast*), the British Columbia Court of Appeal found that it was at least arguable that a database defendant could be found to have wilfully violated the privacy of individuals whose personal information is stored under the British Columbia *Privacy Act*. In *Capital One*, the British Columbia Court of Appeal similarly held that the *Privacy Act* claims were not bound to fail (including those claims brought under the equivalent statutes in Saskatchewan and Newfoundland and Labrador).

In both *South Coast* and *Capital One*, the British Columbia Court of Appeal distinguished the intrusion upon seclusion analysis in the Trilogy from "wilful violation" under the British Columbia *Privacy Act*. The Court acknowledged in *Capital One* that the Trilogy could be useful in interpreting the scope of a "wilful violation" of privacy under the British Columbia *Privacy Act*. However, it also emphasized that the common law tort and statutory causes of action "are not mirror images of each other." However, the Court declined to determine whether the tort of intrusion upon seclusion also exists in British Columbia, which question has yet to be resolved by the province's judiciary.

The Ontario and British Columbia lines of decisions also diverge from a policy perspective. In the Trilogy, the Ontario Court of Appeal expressed significant concern with the potential consequences of a wide extension of the scope of intentional torts. On the other hand, the British Columbia Court of Appeal "see[s] the floodgates argument differently, and that is as a flood of unprotected personal information flowing out of the control of the persons whose information it is, and into the hands of bad actors, unless the law responds adequately." Nonetheless, it should be noted that the difference in policy perspective likely arises from the difference in the statutory regimes of British Columbia and Ontario.

Saskatchewan, Manitoba and Newfoundland and Labrador also have legislation that provides for a breach of privacy cause of action like British Columbia's. However, the Saskatchewan, Manitoba and Newfoundland and Labrador statutes expressly state that they are not in derogation of other rights such as those under the common law. This may impact whether or how intrusion upon seclusion is adopted to coexist with those provinces' statutory torts compared to British Columbia. For example, in *Welshman v Central Regional Health Authority*, the Supreme Court of Newfoundland and Labrador relied upon this very distinction in finding that the plaintiffs' claim under the tort of intrusion upon seclusion was certifiable.

Other provinces, including Nova Scotia and Manitoba, also appear to have recognized the common law tort. In the absence of a statutory cause of action for breach of privacy, Alberta courts have been reticent to recognize the tort of intrusion upon seclusion.

Looking Forward

As the British Columbia Court of Appeal recently noted in *InvestorCOM Inc v L'Anton*, "it is now recognized that the approach to data breaches in Canada may vary between provinces—including as between those that have a statutory breach of privacy tort and those that do not." As such, both the causes of action alleged against database defendants and the jurisdictions in which such class actions are commenced in Canada are likely to be impacted going forward.

Ontario courts have made clear that the tort of intrusion upon seclusion is not a viable cause of action in these circumstances, while British Columbia courts are approaching database defendants as potentially liable for "wilful violations" of privacy under the *Privacy Act*. This divergence is likely to exacerbate the existing trend toward commencing class actions in British Columbia, at least with respect to privacy class actions, and at least until a decision on the merits is made on the issue in the province.

How those jurisdictions with both the statutory and common law privacy tort will reconcile these two causes of action and approach database defendants in light of these appellate decisions remains to be seen.

The Ontario Court of Appeal Clarified When Class Actions Should Be Dismissed for Delay

Alex Payne and Adam Walji

Many class actions take several years to litigate. Some may take even longer, because they sit idle for months or—in some cases—decades. In late 2024 and in early 2025, the Ontario Court of Appeal issued two decisions clarifying how courts should deal with such lingering cases.

In *Tataryn*, the Court of Appeal held that a court has a degree of flexibility in determining whether to dismiss for delay under section 29.1 of the *Class Proceedings Act, 1992* (*CPA*).

In *Barbiero*, the Court of Appeal held that the passage of enough time constitutes sufficient prejudice meriting the dismissal of an action for delay under rule 24.01 of the *Rules of Civil Procedure* (*Rules*).

Taken together, the decisions suggest that class action defendants will face an uphill battle in having a class action dismissed for one year of delay under section 29.1 of the *CPA* absent exceptional circumstances, but the Court will be increasingly open to dismissing actions under the *Rules* where there are lengthier litigation delays.

Dismissal for Delay Under Section 29.1 of the *CPA*

Section 29.1 (and its equivalent provisions in other jurisdictions, such as section 41 of the *Class Proceedings Act*, RSPEI 1988, c C-9.01) states that the Court shall, on motion, dismiss an action for delay unless, within a year of the proceeding being commenced, one of certain steps is taken. Those steps include

1. the representative plaintiff filing a full and complete certification motion record,
2. the parties agreeing to a timetable for the delivery of the plaintiff's certification record, or for the completion of one or more steps required to advance the proceeding, and filing the timetable with the court, or
3. the Court setting a timetable for the delivery of the plaintiff's certification motion record, or for the completion of one or more steps required to advance the proceeding.

Certain early decisions applying section 29.1 took a strict approach, finding that judges had no discretion and dismissal was mandatory if none of the applicable steps had been taken.

As the case law developed, an increasingly flexible and contextual approach emerged, resulting in uncertainty about how section 29.1 would be applied.

Tataryn v Diamond & Diamond Lawyers LLP, 2025 ONCA 5

In *Tataryn*, the representative plaintiffs commenced a class proceeding in 2018, alleging that the defendant had breached, among other things, fiduciary duties regarding client referral practices and contingency fee arrangements, and consumer protection legislation.

In 2023, the defendant moved to dismiss the action for delay under section 29.1 of the *CPA*. The question before the Court was whether the Court had established a timetable for service of the representative plaintiff's motion record in the motion for certification or for completion of "one or more other steps required to advance the proceeding."

The Court clarified the analysis to be conducted under section 29.1, finding that

1. there is no judicial discretion in respect of the one-year deadline set out in section 29.1(1),
2. determining whether a timetable has been established will usually be straightforward, and
3. determining whether a timetable meets the criteria of "one or more steps required to advance the proceeding" requires a contextual approach—the case management judge should consider the "totality of the proceeding."

The Court confirmed that in applying the contextual approach, a motions judge may consider the conduct of the parties, including any "obstructionist" conduct and delay arising from motion scheduling, particularly given the current limited availability of motion dates.

The Court ultimately concluded, following a detailed review of the procedural history of the matter, that certain of the procedural steps relied upon by the appellants were "inconsequential" and that even applying a contextual approach, the appellants could not show that a timetable for completion of one or more other steps required to advance the proceeding had been established.

Dismissal for Delay under Rule 24.01 of the *Rules*

Rule 24.01 permits a defendant to move to have an action dismissed for delay where the plaintiff has failed to, among other things, set the action down for trial within six months following the close of pleadings.

It (and its equivalent provisions in other jurisdictions, such as Rule 167 of the *Federal Courts Rules*, SOR/98-106; Rule 22-7(7) of the *Supreme Court Civil Rules*, BC Reg 168/2009 and Rule 4.31 of the *Alberta Rules of Court*, Alta Reg 124/2010) provides defendants an alternate basis upon which to seek to dismiss a proposed class action for delay.

Barbiero v Pollack, 2024 ONCA 904

In *Barbiero*, the appellant sought to set aside the dismissal of a 21-year-old certified class proceeding involving allegations that the defendant physician had unlawfully injected Liquid Injectable Silicone or Grade Liquid Silicone into patients' lips and facial contours.

Prior to *Barbiero*, the analysis to be conducted under Rule 24.01 was set out in *Langenecker v Sauvé*, 2011 ONCA 803 (*Langenecker*).

Under the *Langenecker* approach, the existence of delay or the passage of time created a rebuttable presumption of prejudice to the defendant.

However, in *Barbiero*, the Court of Appeal of its own initiative held that the *Langenecker* approach is "out of step with the contemporary needs of the Ontario civil system," including because it focuses on justifying delay rather than achieving the most expeditious determination of civil proceedings.

The Court held that delay or the passage of time may, on its own, constitute sufficient prejudice to dismiss an action for delay.

In finding that the appellant's delay was inordinate, the Court highlighted that Rule 48.14(1) obliges the Registrar to dismiss an action for delay where it has not been set down for trial or terminated by the fifth anniversary of its commencement. *Barbiero*, in contrast, had not been set down for trial after about two decades.

Looking Forward

The *Tataryn* and *Barbiero* decisions pull in different directions to a certain extent—*Barbiero* emphasizes that defendants are prejudiced when actions are delayed, whereas, in some cases, *Tataryn* will provide judges with increased flexibility and discretion to refuse to dismiss for delay.

Tataryn may have a chilling effect on defendants moving to dismiss class actions for delay under section 29.1 of the *CPA* except in the clearest of circumstances, due

to the flexibility afforded to the Court in considering whether to dismiss for delay.

Barbiero is a helpful decision for defendants, which includes forceful language from the Court of Appeal. The *Barbiero* decision is a helpful reminder that dismissal for delay under the *Rules* may be a more appropriate avenue to pursue when seeking the dismissal of aging class actions.

Given the strength of the *Barbiero* precedent, there is a good chance that defendants bring motions for dismissal relying on *Barbiero* over the course of the next year, providing further insight into the answer to the million-dollar (or in some class actions, billion-dollar) question, how much delay is too much?

Court of Appeal Cuts Off Speculative Product Liability Claims

Thomas Feore and Ana Nizharadze

In 2024, Ontario's highest court affirmed the principle that a certifiable tort claim requires a plaintiff to provide some basis in fact for a present, materialized injury that is "sufficiently serious." A legally compensable injury is required—a mere risk of harm will simply not suffice.

In *Palmer v Teva Canada Ltd*, 2024 ONCA 220 (*Palmer*), the plaintiffs claimed damages arising from their ingestion and/or purchase of drug products containing nitrosamines—potentially carcinogenic compounds that create no present symptoms, but that may marginally increase future risk of cancer.

Largely affirming the lower court's decision, the Court held that the plaintiffs' claims for mental and economic injury were not certifiable to (a) in the case of mental injury, because the alleged mental injuries were not serious and prolonged and were not a foreseeable result of learning that one might have ingested nitrosamines, and (b) in the case of economic injury, because ingestion of nitrosamines presented no imminent harm. The decision is instructive for any personal injury action in which plaintiffs lacking a materialized physical injury pursue claims for mental injury or economic loss in the form of potential future medical costs.

The *Palmer* Decision

The plaintiffs, on behalf of the putative class members—individuals who had ingested or purchased the defendants' Valsartan products—argued that these products increased their risk of certain cancers, since the defendants' allegedly negligent manufacturing introduced potentially carcinogenic nitrosamine impurities. The defendants voluntarily recalled the contaminated lots of Valsartan. Recognizing that nitrosamines in these Valsartan products may marginally increase cancer risk, Health Canada issued numerous notices associated with the recalls, advising patients to continue taking their medication unless their physician or pharmacist directed otherwise.

The plaintiffs did not seek damages for bodily injury, since none of them had been diagnosed with cancer. Rather, the plaintiffs sought damages for mental distress from learning of their allegedly increased risk of developing cancer in the future, as described in Health Canada notices regarding the defendants' product recalls. The plaintiffs also sought to recover potential future medical costs, including monitoring for cancer.

The Court of Appeal's Analysis

The plaintiffs made three arguments on appeal, namely that the lower court

1. failed to consider that ingesting nitrosamines in Valsartan caused the plaintiffs to suffer "genotoxic injury" (that is, changes to their "internal bodily composition at a cellular or molecular level"),
2. wrongly concluded the plaintiffs' alleged mental distress was not compensable, and that present mental distress based on the apprehension of an increased risk of developing disease in the future cannot ground a viable claim, and
3. erred in requiring (and not finding) an "imminent" threat of physical harm as a pre-condition to recover future medical monitoring costs and other alleged economic loss.

The Court of Appeal rejected these arguments.

1. Physical Injury Must Be Real and "Perceptible"

Regarding "genotoxicity", the plaintiffs alleged that supposed "molecular changes" in their cells "caused by

negligent exposure to a toxin" constituted an actualized physical injury. As the Court of Appeal observed, however, these supposed "changes" did not occasion any symptoms—and therefore no compensable present harm. As the Court reiterated, a "physical change with no perceptible effect" upon one's health is not compensable in negligence.

2. Present Psychological Harm Based on Future Risk Could be Compensable, But Must Be Particularized, Significant and Reasonably Foreseeable

The Court of Appeal held that there could, in theory, be a cause of action for present psychological harm occasioned by learning of exposure to an increased risk of future disease: "[p]sychological distress caused by even a speculative concern of an increased risk is still [present] harm."

However, such harm must be "serious and prolonged" and rise above the "ordinary annoyances, anxieties and fears" of living in society as the Supreme Court outlined in both *Mustapha v Culligan of Canada Ltd.*, 2008 SCC 27, and *Saadati v Moorhead*, 2017 SCC 28. The psychological harm must be a reasonably foreseeable consequence of learning about the exposure, in a person of ordinary fortitude.

To this end, the Court of Appeal clarified that a plaintiff is required to particularize the alleged psychological harm in its pleading. A bare pleading of the legal test—that the alleged mental distress is "serious and prolonged" etc.—is not enough. Furthermore, the Court of Appeal found that for a person of ordinary fortitude, the notices issued by Health Canada would "assuage concern" more than they would prompt any "serious and prolonged" mental distress.

3. Imminent Underlying Harm is Required to Recover Pure Economic Loss

The Court of Appeal clarified that, to recover for pure economic loss, "imminent harm" must be so imminent as to be equivalent to present injury. It held that, without some indication that the defendants' Valsartan products presented an "imminent" harm, pure economic losses in the form of future medical costs were not compensable. Since Valsartan presented no imminent harm, the Court of Appeal refused to certify this claim.

The Court's rationale echoes the Ontario Superior Court's decision in *Rego v Bayerische Motoren Werke AG*, 2023 ONSC 5244 (*Rego*), in which the motion judge observed that the role of "imminent harm" is to "analogiz[e]" the costs of any "anticipatory repairs" to "physical injury to the plaintiff's person or property." In *Rego*—which decision has been appealed to the Court of Appeal for Ontario—the motion judge substantially narrowed the putative class of vehicle owners to solely those who either (a) incurred repair costs for actual damage caused by the defective engine at issue, or (b) incurred repair costs to avert an imminent breakdown in the engine.

Looking Forward

The Court of Appeal's decision in *Palmer* brings welcome coherence and clarity to the oft-discussed requirement that putative class actions based in tort claims require a present, materialized injury. The decision represents a definitive rebuke by an appellate court of efforts to circumvent this requirement in what are, at their core, speculative product liability claims based on potential personal injuries.

This decision (and the forthcoming decision from the Court of Appeal in *Rego*) may deter plaintiffs from bringing such speculative claims in the future.

Screening By the Authorizing Judge: Québec Court of Appeal Upholds the Principle of Partial Dismissal in *Salko c. Financière Banque Nationale inc.*

Francesca Taddeo and Louis-Gabriel Girard

On January 30, 2025, the Québec Court of Appeal rendered a judgment in *Salko c. Financière Banque Nationale inc.*, 2025 QCCA 74 (*Salko*) providing clarity on the application of the *Quebec Consumer Protection Act* (QCPA) and on the principles governing the partial authorization of class actions in Québec.

In *Salko*, the applicant sought to institute a class action against securities brokerage firms for the collection of conversion fees on foreign currency transactions made by putative class members, alleging that the defendants violated various provisions of the *Civil Code of Québec* (CCQ) and of the QCPA. While the applicant's civil claim regarding the defendants' alleged receipt of undue payments was authorized pursuant to sections 1491 and 1554 of the CCQ, the Superior Court refused to authorize the consumer claim on the grounds that the impugned transactions fell under section 6(a) QCPA, which provides that business practices and contracts regarding transactions governed by the Québec *Derivatives Act* and *Securities Act* (QSA) are exempt from the QCPA's application.

The Court of Appeal clarified that pure questions of law can (and should) be decided at the authorization stage even if the question being examined does not determine the entire claim but only a portion of it. The Court of Appeal thus took no issue with the lower court's authorization of the applicant's claim on the basis of the CCQ while dismissing authorization of the QCPA claim. Recognizing that both decisions turned on the same factual bases, the Court of Appeal, clarified that in assessing whether the authorization criteria are met under article 575 of the Quebec *Code of Civil Procedure* (CCP), it is appropriate for each distinct alleged cause of action to be assessed on a stand-alone basis with respect to whether the facts can justify the conclusions sought (i.e., 575(2) CCP) and whether the issues raised by the applicants do in fact constitute common questions (i.e., 575(1) CCP).

On the QCPA claim, the applicant argued that section 6(a) of the QCPA should be interpreted to only include "transactions governed by" the QSA. As such, the collection of the conversion fees, which occurred outside of the purchase and sale of the securities, should not qualify as a security transaction. The Court of Appeal rejected this interpretation of the QCPA. The Court held that the QCPA extends to all commercial practices and contracts between parties and not solely to securities transactions, and that the QCPA could not apply to the applicant's claim because the collection of the conversion fees cannot be isolated from the object of the contract (i.e., the transaction of buying and selling securities). To have these transactions fall under the scope of application of the QCPA would create a "dual jurisdiction," which the legislator unequivocally intended to avoid.

Looking Forward

This decision emphasizes the significance of considering the legislator's intent, the sound management of judicial resources and the fair and equitable resolution of disputes at the authorization stage. Defendants now have a clearer framework for narrowing the scope of class actions in Quebec at the certification stage when, as a matter of law, portions of the legal basis on which a claim is founded obviously warrant dismissal. We expect defendants to test the application and limits of these principles in authorization hearings in 2025 (and beyond).

British Columbia Grapples With Evidentiary Issues and the Requirement for a Workable Methodology

Ashley Paterson and Julien Sicco

The evidentiary burden on plaintiffs to have a case certified—i.e., the "some basis in fact" standard—has been described as a "low bar" in countless cases. Plaintiffs cite the "low bar" in trying to certify their cases, and defendants respond with their own favourable quotes from the case law, noting that this evidentiary burden is not "merely a speed bump" and that the evidence required to support certification must be subject to something more than "superficial scrutiny".

Last year, two cases in the Supreme Court of British Columbia provided clarity with respect to the evidentiary standards for certifying personal injury product liability cases.

In *Bosco v Mentor Worldwide LLC*, 2024 BCSC 1931 (*Bosco*), the Court refused to certify the plaintiffs' class action because the plaintiffs' evidence ought to be given little weight or was inadmissible (generally or for the specific purpose for which it was being used). By contrast, in *Ennis v Johnson & Johnson*, 2024 BCSC 1759 (*Ennis*), the Court certified the plaintiff's class action because the plaintiff's evidence was admissible and, though potentially flawed, capable of grounding a methodology to demonstrate the required causal link. Together, these cases shed light on what evidence will (or will not) support certification.

Bosco v Mentor Worldwide LLC

Bosco was a proposed class action brought on behalf of individuals in Canada that had been implanted with silicone breast implants allegedly containing "toxins" that caused connective tissue disorders and various autoimmune symptoms.

The defendants agreed to certify certain of the common issues but opposed certification of the remaining common issues on the basis that the plaintiffs had not produced any evidence to establish that the alleged toxins were present in sufficient quantities to cause adverse health effects. The Court agreed with the defendants and refused to certify the contested common issues.

The Court found that the plaintiffs' expert evidence was inadmissible because the plaintiffs' expert had opined on matters that were beyond the scope of his expertise. In particular, the expert's report discussed potential platinum toxicity in silicone implants and the need for further long-term studies even though the expert had not conducted any research on platinum, had not reviewed key documents from another expert's report, and was not aware of any data indicating that long-term exposure to platinum in implants leads to adverse health effects.

The Court also found that a document published by the FDA that provided non-binding recommendations on the format and content of labelling information for manufacturers of silicone breast implants, which Mentor argued was inadmissible hearsay, was only admissible as evidence that the FDA made these recommendations, and was not admissible as evidence that the alleged toxins could cause adverse health effects.

Finally, the Court found that the results of a hair element analysis of an anonymous individual who claimed to have developed the illness due to her implants were admissible but to be given little weight because they were not accompanied by expert evidence to confirm the reliability of the testing methods or to help with the interpretation of the test results.

Ennis v Johnson & Johnson

In *Ennis*, the plaintiff sought to certify a class action on behalf of individuals in Canada (excluding Quebec) who used talc powder and developed epithelial ovarian cancer. This was the plaintiff's second attempt to certify the case. The plaintiff had previously tried to certify a broader case on behalf of individuals with a variety of ovarian cancers, but the Court refused to certify it because the plaintiff had not produced sufficient evidence linking talc powder to those cancers. Despite this, the Court granted the plaintiff leave to obtain more evidence and to narrow the class accordingly.

The plaintiff returned to court in 2024 with a narrower class and more evidence to demonstrate a causal link between talc powder and epithelial ovarian cancer. Among other things, the plaintiff relied on expert evidence from Dr. Cramer (an epidemiologist and gynecologist from Harvard) to establish this causal link. In short, the plaintiff's reformulated certification application was successful. The Court found that her new evidence was sufficient to meet the "very low bar" necessary at certification.

In response to Dr. Cramer's evidence, the defendants pointed to their own expert evidence, which indicated that there were types of epithelial ovarian cancer that were not causally linked to talc powder. The defendants also argued that Dr. Cramer's proposed methodology for establishing the causal link would be dominated by individual issues, like personal histories and histological factors, rather than by common issues. However, the Court refused to weigh the conflicting expert evidence at the certification stage and instructed the plaintiff to rephrase the common question to exclude epithelial ovarian cancers that are not linked to talc.

The defendants also highlighted that Dr. Cramer's methodology did not use the benchmark odds ratio of 2.0 to show the alleged causal link (instead using an odds ratio of 1.29 that accounted for a wide range of individual factors), but the Court still held that, in theory, this methodology could establish a general association between talc powder and epithelial ovarian cancers. The Court was also persuaded by a screening assessment of talc published by Health Canada, which found that "inhaling loose talc powders and using certain products containing talc in the female genital area may be harmful to human health."

Looking Forward

The Supreme Court of British Columbia's decisions in *Bosco* and *Ennis* illustrate the importance of focused, sufficient and admissible evidence.

In *Bosco*, the Court refused to certify the plaintiffs' class action on the basis that there was insufficient evidence to establish that the alleged toxins were present in sufficient quantities to cause adverse health effects because the plaintiffs' evidence in this regard was either inadmissible or given limited weight. In *Ennis*, the Court certified the plaintiff's class action (albeit, on the second try) on the basis of admissible evidence that provided a workable methodology for establishing general causation on a class-wide basis.

Looking forward to 2025 and beyond, we expect the Supreme Court of British Columbia to continue its close look at the evidence filed in support of certification. The so-called "low bar" for certification is a bar nonetheless, and BCSC appears to be prepared to perform more than superficial scrutiny on the evidence filed in support of certification.

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