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Looking Forward: Class Actions in 2019



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Letter from the Co-Chairs	1
Standard for Certification in Competition Class Actions Under Scrutiny	3
How Agreements to Arbitrate Are Influencing Access to Class Action Procedure	4
Large-Scale Data Breach Class Actions Anticipated	5
Shifting Evidentiary Requirements in Product Liability Class Actions	7
Third-Party Funding on the Rise	8
The Role of Breach of Statute and Public Law in Class Actions	9
Automobile Class Actions	9
Class Actions Against Public Authorities.....	9
Breaches of Public International Law Norms.....	9



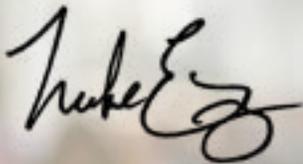
Letter from the Co-Chairs

For the last six years, the Bennett Jones Class Actions Practice Group has published an annual year-in-review—our attempt to recap some highlights in class action litigation over the last year and make some soft predictions about where the practice and the law are headed in the coming year. Though class actions have been a mainstay in Ontario for almost 30 years, the practice is still developing and maturing, with new issues arising every day and new law from our appellate courts and the Supreme Court of Canada on some fundamental issues.

In this year's edition, we start with a look at competition and antitrust class actions, an area that will surely be upended when the Supreme Court of Canada releases its decision in *Godfrey v Toshiba Corporation*. Then, we turn to the intersection between arbitration clauses and class actions, an issue that has been the subject of two appeals this year alone. Next we survey privacy law class actions—the Starwood database security incident is but the latest example of companies and governments grappling with class actions following privacy breaches. From a more ground-up level, we discuss the evidentiary standard in product liability class actions—despite being described as “quintessential” class actions, our courts still grapple with whether to certify these cases.

We also discuss the court's response to third-party funding agreements—with the rise of more domestic funders and creative arrangements, we expect the courts to continue to scrutinize these agreements. Finally, we end with a discussion of class actions built on statutory breach as well as public law class actions, which are some of the most complex class actions and, as a result, generate some of the most interesting decisions.

We would be remiss not to highlight some of our group's achievements this year: Cheryl Woodin was named *Benchmark Litigation's* 2018 Class Action Lawyer of the Year; the practice group and several of its members ranked highly from Chambers and Partners; our lawyers appeared in several landmark cases in the Supreme Court of Canada (*Godfrey v Toshiba Corporation* and *Wellman v TELUS Corporation*) and the Court of Appeal for Ontario (*Das v George Weston Limited*, *Lavender v Miller Bernstein LLP* and *Shah v LG Chem Ltd.*); and we co-authored *Class Actions in Canada*, a new edition of the leading casebook on class actions and we continue to co-author *Class Actions Law and Practice*, which has been a leading loose-leaf service for 20 years.



Michael A. Eizenga L.S.M.
Partner and Co-Leader of Class Actions
Bennett Jones LLP



Cheryl M. Woodin
Partner and Co-Leader of Class Actions
Bennett Jones LLP



Standard for Certification in Competition Class Actions Under Scrutiny

The primary battleground in recent competition law class action cases has been how to implement a 2013 trilogy of price-fixing decisions from the Supreme Court of Canada. Much of the contested ground may be settled in 2019, when the Supreme Court decides a follow-on appeal argued in December 2018.

The 2013 trilogy held that purchasers of products with prices inflated in contravention of the federal *Competition Act* may assert a cause of action even if they bought the product directly from an alleged wrongdoer or indirectly from a subsequent market intermediary. Price-fixing class actions have proliferated as a result, since most potential Canadian class members are indirect purchasers and would not otherwise have a claim (the allegedly price-fixed good is often just one component in a finished product manufactured abroad).

The main controversy since 2013 has been applying the Supreme Court's standard for certification of indirect purchaser claims. Lower courts have applied the standard to facilitate such claims, which appears to conflict with other accepted principles. For example, although the purpose of a common issues trial is to make class-wide determinations, certification of indirect purchaser claims currently requires only a basis in fact that *some* indirect purchasers (whether within Canada or abroad) were apt to have been harmed, with

no requirement to distinguish which ones. If plaintiffs prove at trial that some unidentified indirect purchasers were harmed, then under the current orthodoxy *all* indirect purchasers can recover under the aggregate damages provisions of class proceedings legislation. The result is to permit claims brought within a class action that would not be legally viable if advanced individually.

The recent appeal to the Supreme Court also addressed two related issues: first, whether purchasers of similar products with no connection to the defendants may also assert a cause of action on the theory that price-fixing reduces competition and increases prices across the whole market; and second, whether the civil cause of action provided by the *Competition Act* precludes recovery under inconsistent common law claims. Among other differences, punitive damages are available at common law but not for a statutory claim.

Any decision on these issues will have significant consequences for manufacturers' potential antitrust exposure, and perhaps more importantly, for the potential for significant post-certification litigation, if the certification standard remains set at a low level. The Supreme Court is also likely to address broad legal principles such as whether legislatures or the courts are the appropriate bodies to resolve these types of issues.



How Agreements to Arbitrate Are Influencing Access to Class Action Procedure

In 2018, several Canadian decisions grappled with the interplay between class proceedings and arbitration clauses within services agreements. The classification of parties to an arbitration agreement will have particularly important implications for whether an action may proceed by class action and what statutory framework will ultimately dictate the rights of a proposed class. These issues were considered in both *TELUS v Wellman* and *Heller v Uber Technologies Inc.*

In *TELUS v Wellman*, the issue is whether non-consumer claims governed by an arbitration clause ought to be stayed. The representative plaintiff claimed that TELUS overcharged customers by rounding up calls to the next minute and failed to disclose the practice. TELUS' standard form contracts include a mandatory arbitration clause. While TELUS conceded that the effect of section 7(2) of the Ontario *Consumer Protection Act* is that claims regarding consumer contracts can proceed in court, it argued that the non-consumer claims ought to be stayed.

In November 2018, the Supreme Court of Canada considered whether a partial stay of a proposed class proceeding involving both consumer and business customer claims should be granted under section 7(5) of the Ontario *Arbitration Act*, which provides for a partial stay where matters affected by an agreement to arbitrate can be separated. Both the motions judge and the Court of Appeal refused to grant a stay, holding that all the claims of TELUS' customers should be grouped into the class.

At the appeal hearing, the Supreme Court was concerned with the interpretation of standard form service contracts, and the interpretation of the *Arbitration Act*. We anticipate these will be core issues in the Supreme Court's decision to be

released in 2019, and that the decision will significantly affect the interplay of arbitration clauses and class actions going forward.

In *Heller v Uber Technologies Inc.*, the Court of Appeal's first decision of 2019, the Court departed from the modern paradigm of arbitration clauses as presumptively enforceable. Heller commenced a proposed class action on behalf of Uber drivers in Ontario, alleging that Uber failed to classify him and his fellow drivers as employees. He argued Uber had deprived all class members of their mandatory entitlements under Ontario's *Employment Standards Act, 2000*. Uber moved to stay the class proceeding based on an arbitration clause in the contracts between Uber and the potential class members, which required all disputes to be resolved by arbitration in the Netherlands.

The Court of Appeal held that the drivers were properly employees and that the arbitration clause should not be enforced in the proposed class action because: (a) doing so would defeat certain provisions of the *Employment Standards Act, 2000*; and (b) the clause itself is unconscionable at common law.

Given the *TELUS* and *Heller* decisions, Canadian courts will likely be asked to grapple with and clarify the effect of arbitration agreements on proposed class proceedings, particularly where concerns of unequal bargaining power support resort to class actions. Though decided in different contexts, both *TELUS* and *Heller* considered arbitration agreements in standard form contracts and how they interact with the right to proceed as a class. We are likely to receive more clarity on how agreements to arbitrate may affect claimants' access to class action procedure writ large in 2019.

Large-Scale Data Breach Class Actions Anticipated

Your data was probably stolen in 2018—and if it was not, it probably will be in 2019. Data breaches in 2018 were high-profile, large-scale, and crossed different industries, including Saks and Lord & Taylor (5 million), Facebook (29 million), Google+ (52.5 million), Cambridge Analytica (87 million), MyHeritage (92 million), Quora (100 million), MyFitnessPal (150 million), and Marriott Starwood (500 million). These data breaches are likely to continue to result in large-scale class actions across Canada in 2019 because of two important developments.

First, November 2018 saw the coming into force of Canada's mandatory breach reporting under the *Personal Information Protection and Electronic Documents Act*. In it, corporations that have had a breach of their security safeguards that result in a “real risk of significant harm” must notify the affected individuals and the Office of the Privacy Commissioner. Corporations must also keep records of all breaches involving personal information for at least two years. This is the first federally-mandated notification regime; previously only Alberta legislation required notification. The increase of notification may be a contributing factor to an increased number of privacy class actions as consumers pursue their grievances in court in 2019.

Second, the Ontario Superior Court's 2018 decision in *Agnew-Americanano v Equifax Canada* suggests that an organization could be liable for the tort of intrusion upon seclusion. The Court held that if “viable”, the tort “provides a broader claim which opens up a defendant's exposure” and will not require any proof of harm.

The tort of intrusion upon seclusion, first recognized in 2012 as a valid cause of action in *Jones v Tsige*, has three elements: (1) the defendant's conduct be intentional or reckless; (2) the defendant must have invaded the plaintiff's private affairs or concerns without lawful justification; and (3) a reasonable person would regard the invasion as highly offensive, causing distress, humiliation, or anguish. Since *Tsige*, courts have gradually considered whether the tort can be extended to institutions who allegedly have not protected personal information adequately. In *Condon v Canada*, for example, one of the first class actions to be certified based on the tort, the plaintiffs alleged that the Canadian government had committed the intrusion by disclosing the personal information of the defendants in an unlawful way (i.e., by losing a USB key).

In *Agnew*, the Court held there is a “viable argument” that a failure to protect privacy by the institution that suffered a breach could attract liability for the tort of intrusion upon seclusion; the claim is not “fanciful or frivolous” nor does it contain a “glaring deficiency”. The Court analogized the situation to that of a landlord who recklessly permits a peephole to be installed without the consent or knowledge of a tenant. While no decision on the merits has yet been rendered, it seems likely that plaintiffs will continue to bring similar claims in 2019.

“Data breaches in 2018 were high-profile, large-scale, and crossed different industries...”



Shifting Evidentiary Requirements in Product Liability Class Actions

Canadian courts continue to struggle with the evidentiary requirements for a plaintiff to certify a product liability class action. In 2019, appellate courts will likely reconsider the obligation historically imposed on plaintiffs to demonstrate that a defect exists.

Class certification is procedural and does not involve assessing the merits of a plaintiff's case. The plaintiff is required only to demonstrate "some basis in fact" for each of the certification requirements, other than the existence of a cause of action, a purely legal issue based on the plaintiff's pleading. One of the certification requirements is the "common issue" requirement. In evaluating whether a common issue exists, courts have historically applied a two-step test that requires the plaintiff to demonstrate some basis in fact that: (a) the impugned issue exists; and (b) the issue is common across the class.

The two-step common issue test has been similarly applied in product liability class actions arising from allegedly negligent design. In this type of action, the plaintiff must demonstrate some basis that: (a) the design feature exists; and (b) the feature is common to all impugned products.

The requirement to demonstrate the first branch of the test (that the issue exists) was considered in *Kalra v Mercedes Benz*, where Justice Belobaba asserted that "it is time to retire the two-step approach" and concluded that a plaintiff need only demonstrate that the alleged defect is common to all

impugned products. But Justice Belobaba's approach was later rejected by Ontario's Divisional Court in *Batten v Boehringer Ingelheim (Canada) Ltd.*, another product liability class action.

In 2018, Justice Perell made clear in *Kuiper v Cook (Canada) Inc.* that the two-step test is alive and well. In a proposed class action alleging that inferior vena cava filters were defectively designed, among other things, Justice Perell found that the plaintiffs failed to show that the proposed common issues regarding design negligence existed, and ultimately refused to certify the matter as a class action.

While plaintiffs continue to advocate for the one-step test supported by Justice Belobaba because it sets a lower bar for the common issue requirement, proponents of maintaining the two-step test argue that plaintiffs cannot adequately demonstrate commonality without the issue existing across the class. For instance, in a negligent design case, if a plaintiff can only demonstrate that the impugned features constitutes a defect for some products but not others, the defect issue appears to lack the commonality required for class certification.

Appellate courts are scheduled to consider the two-step common issue test in 2019. Any clarity may have a particular effect on product liability class actions arising from allegedly negligent design.



Third-Party Funding on the Rise

Last year, we noted the expanded use of third-party funding arrangements in Canadian civil litigation and anticipated the expanded use of such arrangements in Canadian class actions. We continue to expect the same in 2019.

As predicted, the use of third-party funding in Canadian class actions, in which a third-party funds the cost of prosecuting an action for a share of any funds ultimately recovered, increased in 2018. Canadian courts increasingly approved third-party funding agreements with limited objection as long as key terms mimicked the increasingly standard set of terms for such arrangements. Courts have nonetheless kept a watchful eye over non-standard terms, most of which seek to permit a third-party funder to receive more than the standard 10 percent of any recovery or provide it with inappropriate control over the litigation.

The Ontario Superior Court of Justice decision in *Houle v St Jude Medical Inc.* provides a notable example. The Court found that the proposed third-party funding agreement was unfair because it gave the funder an uncapped and high-percentage share of any recovery, and unilaterally varied the agreement to bring it in line with the Court's view of a fairer agreement.

On appeal to the Divisional Court, the plaintiffs and the third-party funder argued that the lower court had failed to give enough deference to their commercial decision, about which they had received independent advice before making. That said, the Divisional Court rejected the argument and upheld the lower court's reasoning. In doing so, the Divisional Court confirmed that courts are justified in scrutinizing third-party funding arrangements that do not follow the standard terms, with the underlying reasoning focusing strongly on concern for the vulnerability of class members.

Going forward, interested parties within class proceedings should expect push back on non-standard terms of third-party funding arrangements, and should be prepared to offer compelling reasons for how class members will be protected under any alternative proposal.

“Canadian courts increasingly approved third-party funding agreements with limited objection as long as key terms mimicked the increasingly standard set of terms for such arrangements.”

The Role of Breach of Statute and Public Law in Class Actions

It has been 36 years since the Supreme Court of Canada's decision in *Saskatchewan Wheat Pool*, which put to rest that a breach of statute, without more, is actionable as a tort—or so it seemed. Since then, parties have continued to argue civil liability for breach of statute, or other public law, particularly in class actions. In 2019, Canadian courts will continue to wrestle with the proper role of statutory or other public law breaches in class actions on several fronts.

Automobile Class Actions

Automobile recalls have spawned some of the most high-profile class actions in recent years, from the Toyota “unintended acceleration” suit to the ongoing Takata airbag litigation. With no personal injury, property damage or misrepresentation, these cases allege that the *Motor Vehicle Safety Act* (MVSA) provisions related to defects or recalls have been breached and plead consequent economic losses. Amendments to the MVSA in 2018 changed the landscape, giving the Minister of Transport broad powers to order the relief often sought in recall class actions, such as ordering the recall, repair or replacement of vehicles/equipment, while preserving any other rights at law. Provisions allowing for administrative monetary penalties for breaches of the MVSA are not yet in force. In 2019, courts will likely grapple with how the new MVSA and recall-related class actions are to co-exist.

Class Actions Against Public Authorities

Justice Stratas' 2015 decision in *Paradis Honey Ltd. v Canada (Minister of Agriculture and Agri-Food)*, set out (but did not apply) a framework for “monetary relief in public law”, which would permit class actions for damages against public authorities for breaches of statute or regulation in some circumstances. That said, in 2018, courts declined to adopt Justice Stratas' framework. For instance, in *Hughes v Liquor Control Board of Ontario*, Justice Perell decided it was not the case to “give birth” to what he called the “freshly-invented tort of ‘Misconduct by a Civil Authority’”. Whether 2019 will see the case that does “give birth” to Justice Stratas' proposed remedy remains to be seen.

Breaches of Public International Law Norms

In January 2019, the Supreme Court will hear an appeal in *Araya v Nevsun Resources Ltd.* (originally brought as a representative action), where it will be asked to decide whether alleged breaches of customary international law can ground a private civil cause of action in Canada against a Canadian corporation. If the answer is yes, the principle could create significant uncertainty for Canadian businesses operating abroad, and create potential grounds for a new type of proposed class actions.

“In 2019, Canadian courts will continue to wrestle with the proper role of statutory or other public law breaches in class actions on several fronts.”



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Key Contacts

Mike Eizenga

Partner, Co-Leader of Class Actions

416.777.4879

eizengam@bennettjones.com

Cheryl Woodin

Partner, Co-Leader of Class Actions

416.777.6550

woodinc@bennettjones.com

Ranjan Agarwal

Partner

416.777.6503

agarwalr@bennettjones.com

For more information on Bennett Jones Class Action Litigation services and lawyers, please visit

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Looking Forward: Class Actions in 2019, January 2019

Bennett Jones is an internationally recognized Canadian law firm founded and focused on principles of professional excellence, integrity, respect and independent thought. Our firm's leadership position is reflected in the law we practise, the groundbreaking work we do, the client relationships we have, and the quality of our people. In keeping with this standard, our Class Action Litigation Group is known for their unsurpassed depth and breadth of practical experience and litigation expertise, coupled with their unparalleled knowledge of procedure that informs every aspect of the defence of a class action.

Disclaimer

This update is not intended to provide legal advice, but to highlight matters of interest in this area of law. If you have questions or comments, please call one of the contacts listed.

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