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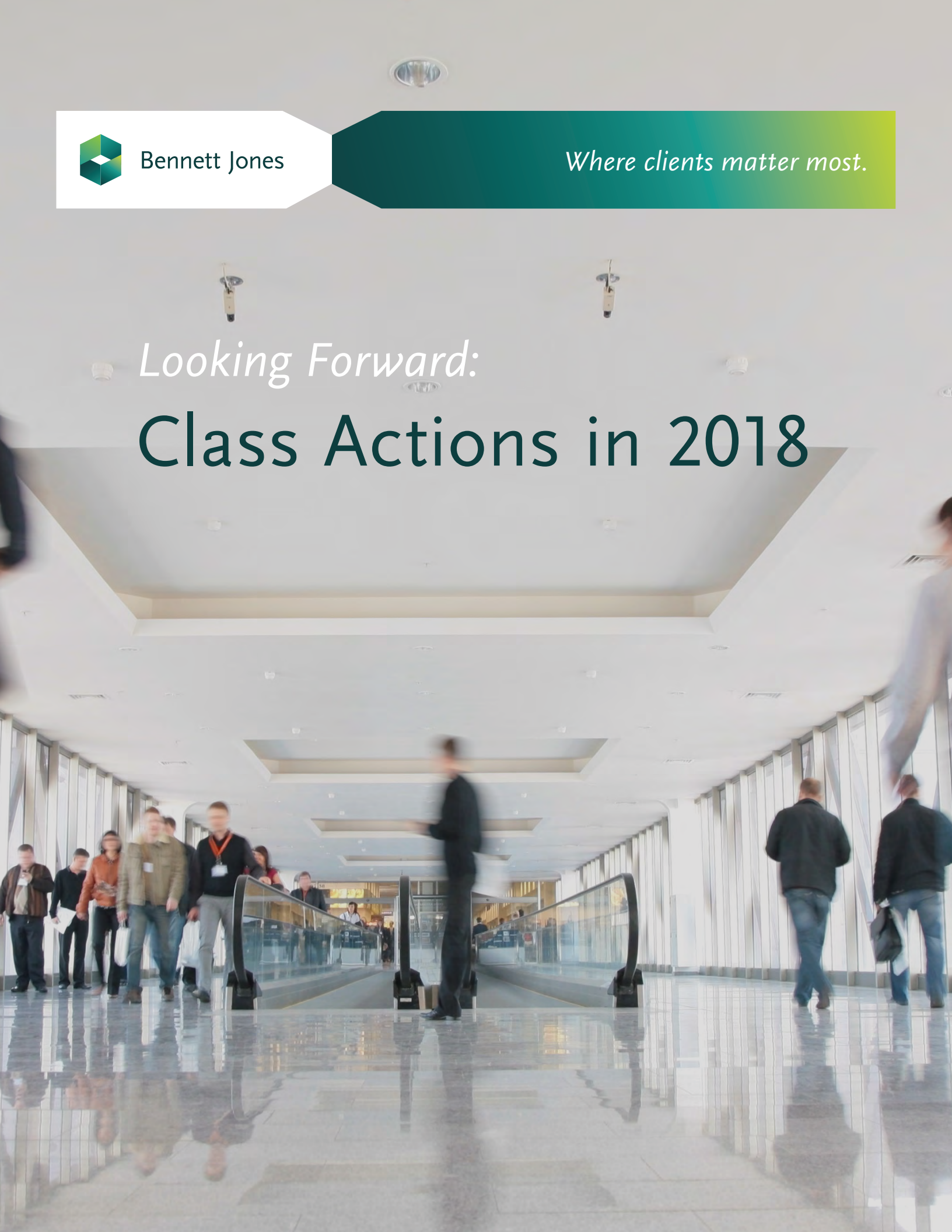
Looking Forward:

Class Actions in 2018



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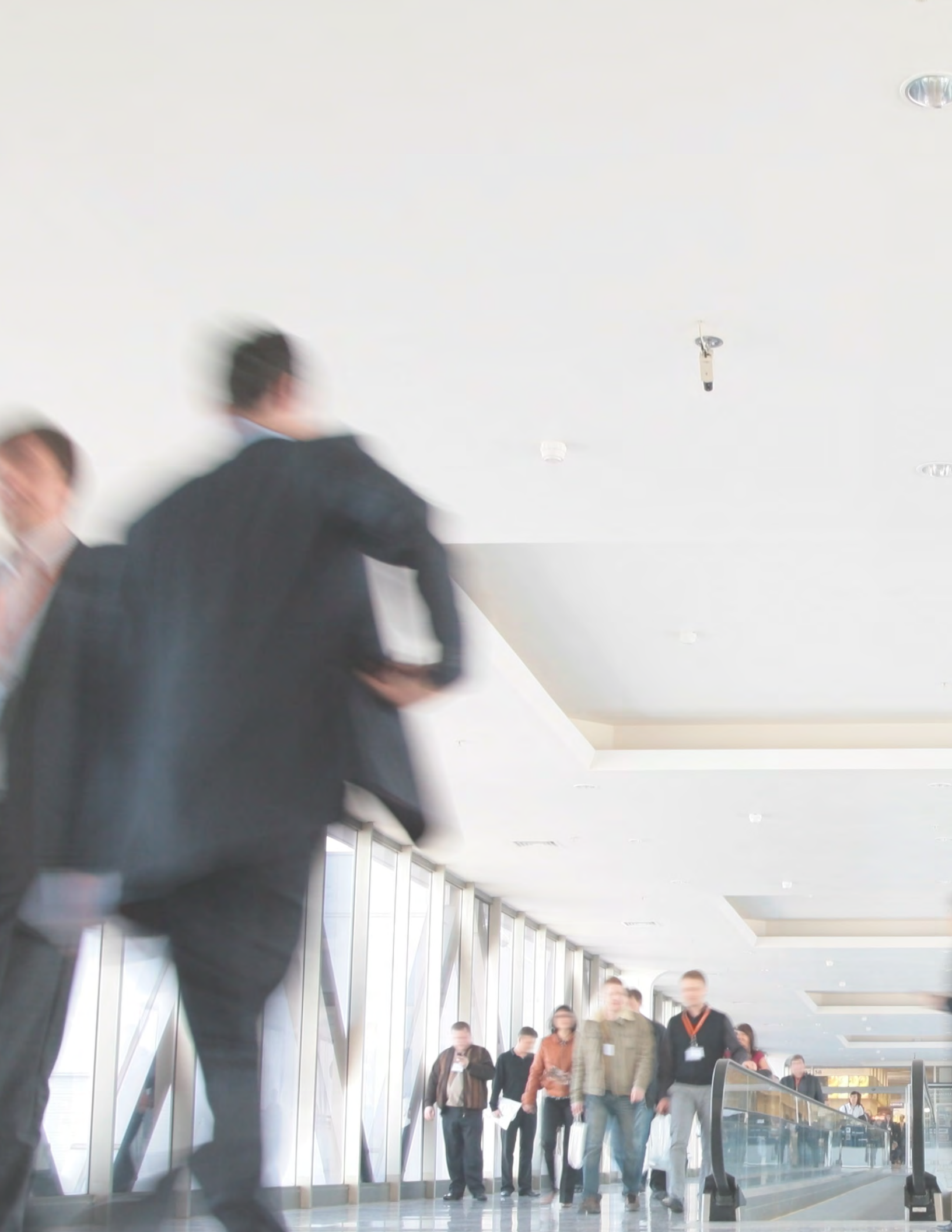


Introduction

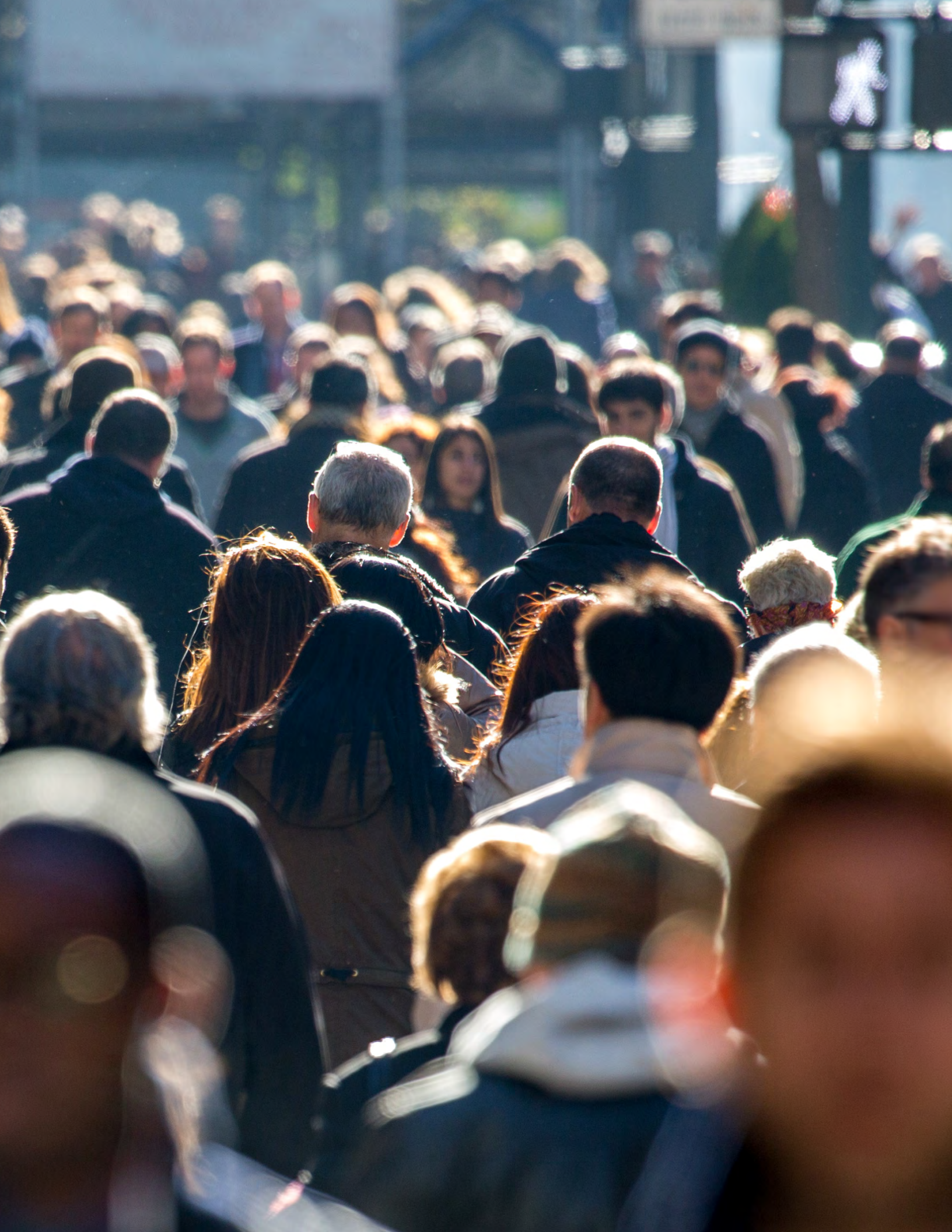
The past year saw another flurry of Canadian class action activity. Courts across the country rendered significant decisions that should give companies doing business in Canada cause for both concern and optimism. While the risk of facing a Canadian class action expands, new tools are emerging to deal with claims and limit exposure. The need for comprehensive yet practical strategies to avoid and defend complex Canadian class actions has never been greater.

Bennett Jones continues to be involved in some of the most significant class actions in Canada. Our practice group has earned its reputation as a nationwide leader. By coupling unsurpassed depth and breadth of experience with our unparalleled knowledge of procedure, we remain committed to helping clients defend all stages of high-stakes class proceedings and achieving results aligned with business priorities.

In the pages that follow, we look forward to the Canadian class action landscape in 2018. We address heightened risk factors for companies that do business in Canada and abroad. Companies are more likely than ever to face global class actions brought in Canadian jurisdictions by foreign claimants. Plaintiffs are increasingly seeking aggregate damages and finding receptive audiences in Canadian courts. Technological and political forces are fueling a rise of class actions in hot button areas of cybersecurity, workers' rights and the environment. We anticipate these trends will continue into next year.

Still, there is good news for companies doing business in Canada. Defendants are using existing tools more effectively and pushing to develop new tools capable of blunting even aggressive plaintiffs' counsel tactics. While third parties may still fund class claims, enhanced judicial scrutiny of funding arrangements appears likely to provide meaningful limitations on those arrangements. Increasing resort to mass tort claims create opportunities to avoid certain drawbacks of class actions. So too do direct-to-consumer settlements, which provide companies with the chance to rebuild (and even strengthen) consumer relations while avoiding or minimizing protracted class proceedings.

One thing is clear: creativity will be key as class actions march forward in 2018 and beyond. We look forward to assisting our clients meet this challenge.



Global Classes and Foreign Law

In 2017, class action plaintiffs found success in private international law. As we predicted last year, the Ontario Court of Appeal delivered a significant jurisdiction decision in *Airia Brands Inc v Air Canada*. Ontario courts can now take jurisdiction over class members known as "absent foreign claimants": individuals who are not Canadian, do not live or work here, and who have not consented to a Canadian court's jurisdiction. This is true even where any later judgment may be unenforceable outside of Canada.

Jurisdiction over absent foreign claimants can be taken where:

- a real and substantial connection exists between the subject matter of the dispute and Ontario;
- there are common issues between the claims of the representative plaintiff and the absent foreign claimants; and
- the procedural safeguards of adequacy of representation, adequacy of notice, and the right to opt-out are provided.

Airia Brands opens the door for the certification of global classes in Canada, even where only some class members have a claim with a Canadian component. Unless reversed by the Supreme Court of Canada, we anticipate that plaintiffs will soon test the boundaries of *Airia Brands* by attempting to certify global classes in circumstances increasingly detached from business in Canada.

The certification of global classes may also lead to more questions about applying foreign laws in Canada. On this note, in April 2018, the Ontario Court of Appeal will hear the appeal of the decision denying certification in the class action arising from the collapse of the Rana Plaza garment factory in Bangladesh. Although the claim was brought within the two-year limitation period in Ontario, it was brought outside the one-year limitation period in Bangladesh. The lower court applied Bangladeshi law in holding that the plaintiffs' claims were limitations barred and disclosed no viable cause of action. The Court of Appeal's decision may provide guidance on proving foreign law in Canadian class actions (including before or at the certification motion) and how such findings should be reviewed on appeal. While the courts' willingness to assume jurisdiction over foreign claimants may be expanding, this does not mean plaintiffs can avoid the application of their own domestic laws.

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Aggregate Damages

Aggregate damages are a potentially powerful tool for class action plaintiffs. Where available, they eliminate the need for tedious and costly individual damages assessments, providing a simplified path to class-wide recovery. In turn, companies doing business in Canada may be exposed to significant damages awards otherwise unlikely to materialize with individual damages assessments.

It has now been two years since the Ontario Court of Appeal gave a full-throated endorsement of aggregate damages in *Ramdath v George Brown College*, holding that "aggregate damages are essential to the continuing viability of the class action" and "should be more the routine than the exception." As we predicted, *Ramdath* led plaintiffs to tailor their claims hoping to achieve aggregate damages awards. In 2017, this approach paid dividends for plaintiffs.

The certified class in *Trillium Motor World Ltd v Cassels Brock & Blackwell LLP* comprised General Motors dealers that accepted payouts from General Motors to wind-up their dealerships during the 2009 financial crisis. Having established that the dealers lost the chance to collectively negotiate a better deal due to a conflict preventing the defendant law firm that advised them from providing better advice, the plaintiffs sought aggregate damages.

The Ontario Court of Appeal agreed with the plaintiffs. It held that "the collective nature of the class members' loss of chance claim drives the aggregate damages analysis" and agreed with the lower court that "to deny the Class Members the aggregate approach would amount to the denial of a remedy. [...] An individualized approach to damages would not only be unfair to the individuals who would have banded together, it would be misguided given the nature of their action."

The Ontario Superior Court of Justice went even further in *Daniells v McLellan*. There, the plaintiff claimed on behalf of hospital patients whose personal health information had been improperly accessed. While accepting that any resulting damages would normally be individually assessed in such a case, the Court certified aggregate damages on the basis that part of the class' total damages might be assessed in the aggregate even though individual assessments may later be necessary for the remainder.

While the *Daniells* decision sets the high-water mark and seems likely to be challenged, it nonetheless reflects the continuing trend towards aggregate damages arising from *Ramdath*. We anticipate that the limits of the trend may receive further judicial consideration in 2018. There remains real issues about the extent to which the tailoring of cases towards aggregate damages creates unacceptable unfairness to defendants (including by preventing the scrutiny of valid individual issues) and about the appropriate balance between defendants' rights and access to justice. Notably, the court in *Kalra v Mercedes* recently affirmed that the aggregate damages tool has some clear limits. Aggregate damages cannot be used to establish liability and, if liability has not been established, aggregate damages cannot be certified as a common issue.

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Third-Party Funding

The use of third-party funding arrangements is expanding in Canadian civil litigation. These arrangements involve third parties funding the cost of prosecuting an action in exchange for a share of any funds ultimately recovered. Motivated by access to justice concerns, Canadian courts have demonstrated an increased willingness to permit such arrangements including in class actions where the cost of prosecuting the action is often significant.

At the same time, Canadian courts have also increased their scrutiny of plaintiffs' counsel fees having particular regard to the risks undertaken by plaintiffs' counsel in conducting the litigation. Plaintiffs' counsel are being asked to justify their fees based on value added, to ensure that class member recovery is not inappropriately compromised. Similar scrutiny is now extending to underlying third-party funding arrangements, which potentially involve even further erosion of class member recovery.

In 2017, the Ontario Superior Court of Justice imposed active court supervision of a third-party funding arrangement in a class proceeding in *Houle v St Jude Medical Inc*. The Court refused to approve the arrangement, finding that the fee structure was unfair because the third-party funder was to receive an uncapped and high-percentage share of any recovery. It instead proposed and conditionally approved an alternative arrangement allowing the funder to receive a guaranteed 10 percent of any recovery, with court approval required for anything more. The Court's stated rationale was to avoid the overcompensation of the funder and corresponding protection of the class members.

Houle provides welcome relief for companies doing business in Canada. It confirms that neither plaintiffs' counsel nor third-party funders are entitled to a blank cheque. Funders may be less inclined to fund novel or difficult claims, particularly knowing potential returns are likely to face public judicial scrutiny. In turn, the business case for plaintiffs' counsel may be limited in some instances. Still, we anticipate that both plaintiffs' counsel and defendant companies will have more to say about third-party litigation funding as we move into 2018.

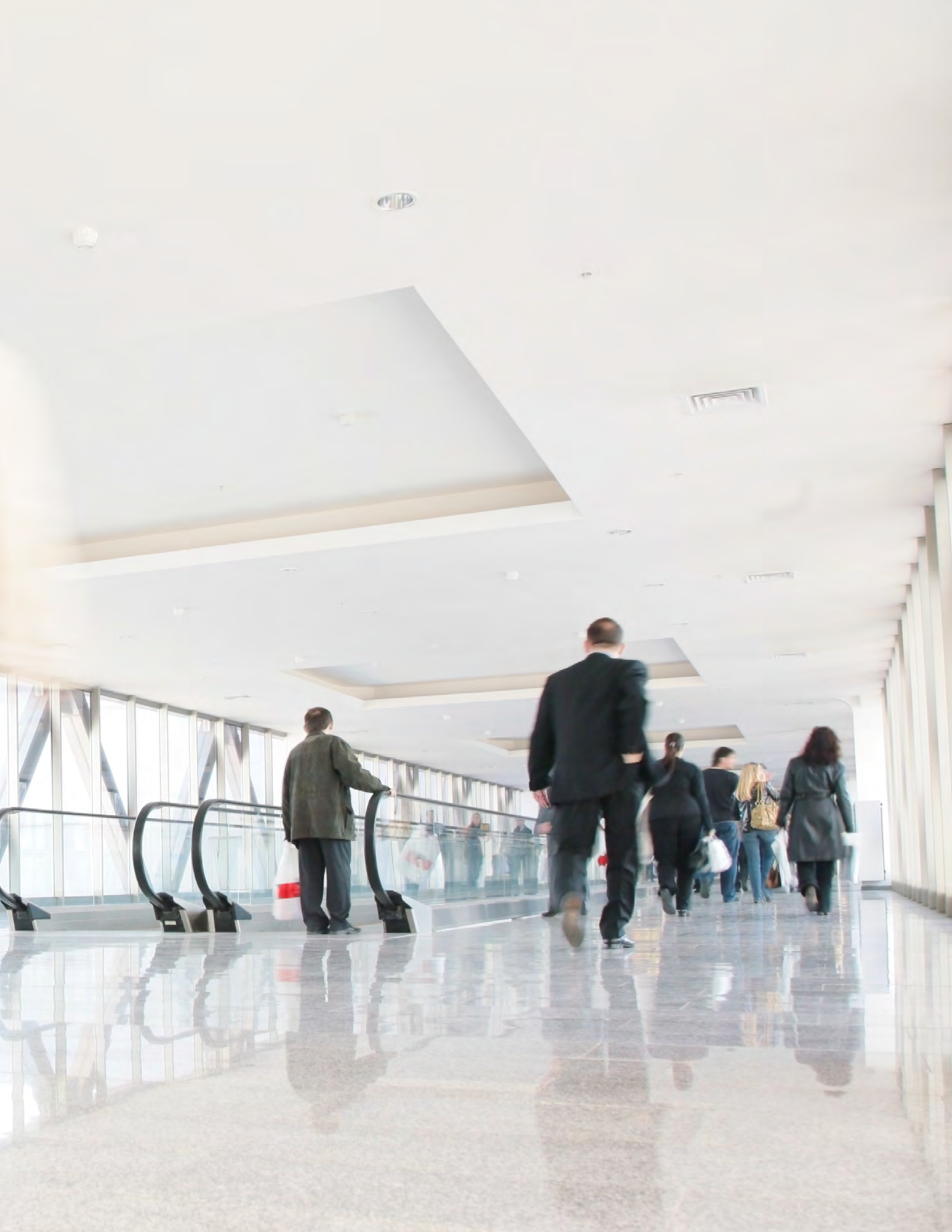
Class Actions in Québec

Class actions arising from the same subject matter are frequently brought in multiple Canadian provinces. Defendants are forced to defend themselves on multiple fronts. While each province's class action regime has unique features, Québec has long presented particularly distinct challenges for class action defendants.

In 2017, the Québec Court of Appeal confirmed the province's "flexible, liberal, and generous" approach to class "authorization" (akin to certification in other provinces) in *Asselin c Desjardins Cabinet de services financiers inc*. The Court confirmed that plaintiffs require only an "arguable case" for class authorization. The facts alleged at the authorization stage will be taken to be true unless they appear unlikely or obviously inaccurate. The burden of proof is one of "logic, not evidence", with the actual weighing of evidence to come at a later date.

The Court was clear that the criteria for class authorization in Québec are less stringent and more flexible than in Canadian common law jurisdictions.

There are other distinct features of the Québec class action regime. As we reported last year, stays of proceedings remain available in Québec in appropriate circumstances despite the January 2016 introduction of Article 577 of Québec's Code of Civil Procedure. Article 577 requires Québec courts to protect the rights and interests of Québec residents in multi-jurisdictional class actions when stays are sought in the province. Yet various Article 577 decisions indicate that stays remain available provided the court is satisfied the rights and interests of Québec residents are protected. We anticipate this approach will continue in 2018.



Alternatives to Class Actions

Mass Tort Claims

Canadian plaintiffs' counsel have embraced methods of pursuing large-scale claims without relying on the class action framework in some circumstances. "Mass tort claims"—separate actions arising from the same subject matter—are familiar in the United States. There, procedures are in place for "multi-district litigation" (MDL) that allow civil actions pending in different jurisdictions involving one or more common questions of fact (i.e., mass torts) to be transferred to a single court for coordinated or consolidated pretrial proceedings.

In recent years, discussions of mass tort claims in Canada have focused on advantages for plaintiffs. The advancement of several separate but related claims can be attractive to plaintiffs, particularly where challenges are anticipated with demonstrating commonality across the proposed class or that a class action is the preferable procedure. Although Canada lacks the procedural streamlining of MDL, information and resources (such as expert reports) can often be shared amongst claimants to minimize time and expense. U.S. plaintiffs' counsel may also be prepared to share and coordinate with their Canadian counterparts. Since large-scale litigation often proceeds first in the United States, such coordination can give Canadian plaintiffs a head start.

Less discussed are the potential advantages of mass tort claims to defendants in Canada. To settle mass tort claims, defendants may make one payment as final compensation for a number of cases while at the same time benefiting from the opportunity to examine upfront the causation issues presented by individual cases. The time and expense of evaluating the merits of various separate cases is therefore avoided. Settling on a mass tort basis also allows defendants to avoid the public process of consenting to class certification for settlement purposes, which is required to resolve a class action. In addition, court approval of a mass tort settlement is not required. The parties can therefore negotiate satisfactory terms without the fear of judicial intervention. The result is potentially more room for creative settlements.

Mass tort claims have found traction in Canada. Product liability claims involving multiple models of products that make demonstrating class commonality difficult have been at the forefront. Looking forward, we anticipate that both plaintiffs and defendants may increasingly consider mass tort claims as an alternative to class actions.

Direct-to-Consumer Settlements

While intended to provide access to justice, class actions may actually delay justice where defendant companies readily admit liability. Procedural hurdles are numerous before class-wide settlements can be implemented: plaintiffs' counsel carriage fights, settlement negotiations, court approvals, opt-out periods, notice requirements and complex claims administration. These hurdles not only add time and expense but complicate companies' ability to return to business as usual.

Direct-to-consumer settlements are an emerging alternative. Negotiated directly between the company and consumers prior to class certification, such settlements may be attractive where liability cannot be seriously disputed or doing so does not make business sense. To be practical, it is usually necessary that consumers can be readily contacted and that the quantum of any settlement offer by the company is meaningful enough to motivate a response. Settlement offers directly to consumers appear generally permissible provided that full disclosure regarding the availability of class proceedings is made.

The primary downside of direct-to-consumer settlements for companies is the potential to fail to resolve all outstanding claims. There may be hold-outs, or locating every affected consumer may prove difficult. In such cases, settlement via the class action procedure may still be required to address outstanding consumers. Companies also often value the certainty provided by class-wide settlement and corresponding releases. If a class action has been commenced, leave from the court to end the action may also be required.

Still, direct-to-consumer settlements have meaningful advantages. They can be more straightforward and save time. In turn, the return to business as usual can be accelerated and legal expenses may be limited. Direct-to-consumer mechanisms also create meaningful touchpoints with consumers, providing companies with opportunities to rebuild fractured consumer relations. For consumers, the threat of a potential class action provides leverage to ensure meaningful recovery is achieved.

Given the mutual advantages and the broader trend towards early settlements, we anticipate seeing increased interest and experimentation with direct-to-consumer settlement negotiations in the year ahead.

Emerging Issues

Cybersecurity

Long a concern, high-profile cyberattacks have broken into the mainstream. The summer of 2017 saw the international ransomware attacks of WannaCry and Petya, followed by major data breaches of prominent institutions including Deloitte, the U.S. Securities and Exchange Commission, and the Appleby law firm, whose files were breached and circulated in the headline-grabbing Paradise Papers. Similar breaches occurred in Canada against Equifax, Yahoo! and Casino Rama.

Still, the circumstances in which Canadian courts may hold organizations holding personal data liable for failing to protect that data remains unclear. Class actions launched to date have often alleged negligence for failing to protect consumer data. But these claims require analysis of the level of cybersecurity protections required of a "reasonable" company. The ever-increasing sophistication of cyberattacks seems likely to complicate this analysis. Will Canadian law require companies to erect defenses impenetrable to mastermind hackers and other cyber criminals?

The extent of damages available in cybersecurity class actions also remains to be seen. Not all compromised data is created equally. A disclosed credit score is distinct from a disclosed credit card number; a stolen business record is distinct from a stolen medical record. And so on. One avenue that plaintiffs may explore is the emerging invasion of privacy tort, which can result in inferred damages in cases lacking evidence of economic harm.

The proliferation of cyberattacks will continue in 2018. The attacks and resulting data breaches are likely to prove tempting to entrepreneurial plaintiffs' counsel. Aside from implementing preventive steps, companies doing business in Canada will have to cultivate strategies to avoid and, if necessary, defend class proceedings arising from cyberattacks and data breaches.

Employment Law

Employment issues, especially around unpaid overtime, continue to be lightning rods for Canadian class action litigation.

In 2017, certification was granted in several cases involving the alleged misclassification of independent contractors. Recently, the Ontario Superior Court eschewed the traditional "factors-focused" approach to defining employment relationships. Instead, a more holistic analysis was used that focused on the overarching question of whether contractors are truly carrying out business for themselves or for the company. This holistic approach appears primed to give rise to additional misclassification claims in 2018.

In truly Canadian fashion, misclassification actions are also being pursued against minor league hockey teams on behalf of their players. Two such actions were certified in 2017. They involve whether such players are exempt from statutory entitlements that apply to most other employees given their status as "student amateur athletes". The outcomes of the hockey actions may have significant implications for how amateur athletes in Canada are viewed under employment laws. The outcomes may also spill over into other industries, particularly those that rely on interns and other categories of workers exempt from legislated employment standards.

Looking forward, several other high-profile employment certification hearings are on the horizon in 2018, including the alleged misclassification of Goodlife Fitness employees and the wrongful dismissal of former Blackberry employees. These actions are part of the growing wave of employment class actions advancing against an increasingly employee-friendly backdrop of recent appellate decisions and legislative changes. We expect more will be on the way in the coming year.

The Environment

Environmental claims have historically been some of the most difficult for plaintiffs to certify, let alone prove. Limitation periods and the absence of common issues have proved fatal to both certification and recovery of damages at trial. As recently as 2017, the Ontario Superior Court of Justice took the unusual step of decertifying a class action arising from a flood based on new evidence that undermined the assertion of common issues.

Yet plaintiffs have forged ahead. Environmental claims have been certified, particularly where they arise from a single-incident mass environmental event. Such claims are less likely to face limitations issues, as the environmental impacts are often readily apparent and the cause of the event widely known.

The spill of 35,000 litres of jet fuel into Lemon Creek, British Columbia and the resulting evacuation of the area is an example. The British Columbia court certified an environmental class action as a result. It did so despite the breadth of the class, which included all individuals who owned, leased, rented or otherwise occupied land in the evacuation zone. The court justified the broad class by noting that the central issue was the cause of and responsibility for the spill, rather than the subjective harm it caused.

The trend of certifying claims arising from single-incident environmental events can also be seen in other provinces. In 2017, the Manitoba Court of Appeal certified an action alleging the government of Manitoba caused intense flooding by diverting water. Earlier, Ontario courts similarly certified actions arising from explosions at a propane facility, flooding and a fire in a recycling plant.

Environmental class actions therefore appear to have new life in Canada, particularly in response to single-incident events. Immediate rehabilitation efforts will provide a useful tool for companies in limiting exposure.

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For more information on Bennett Jones' Class Action Litigation services and lawyers, please visit **BennettJones.com/ClassActionLitigation.**

Looking Forward: Class Actions in 2018, November 2017

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.

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their perspective across sectors, industries and borders.

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