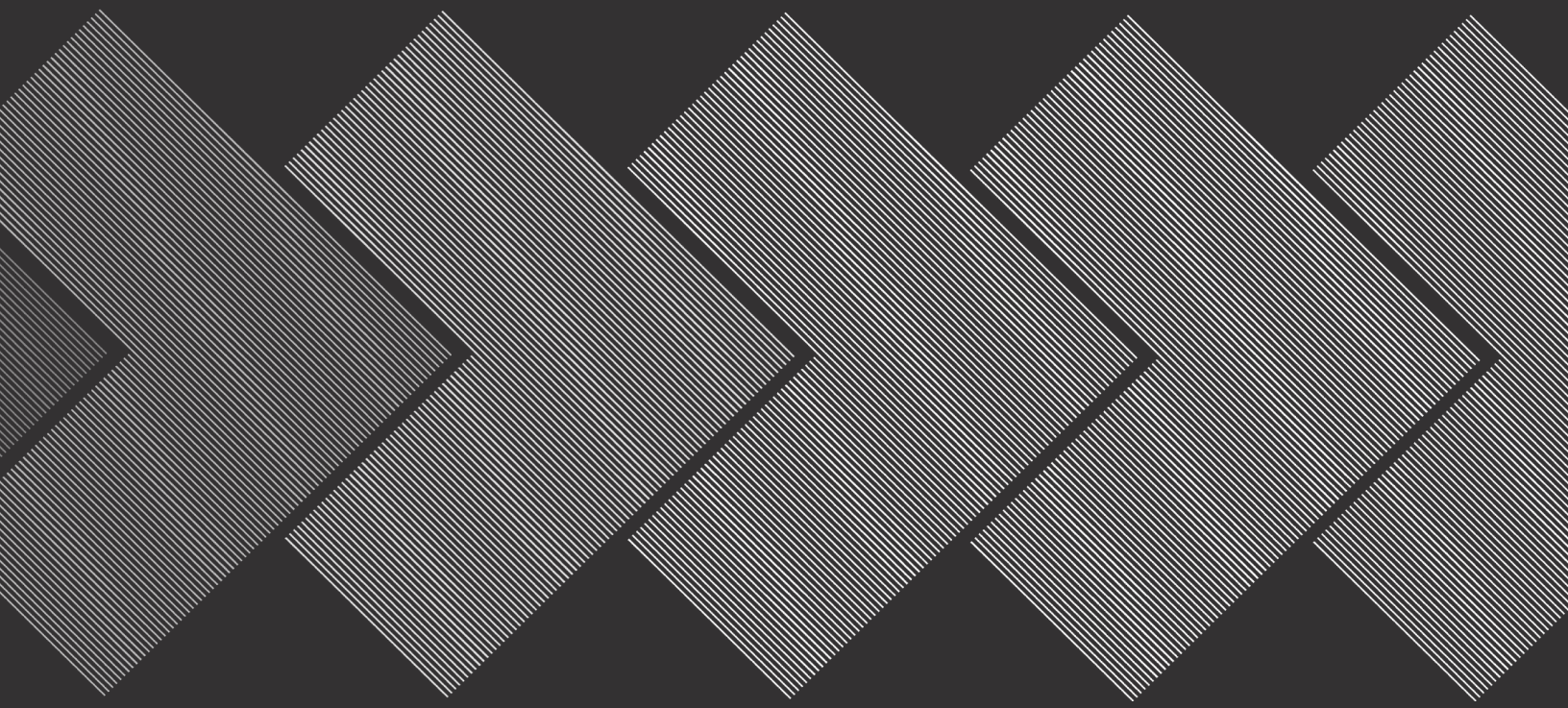
2024 Class Actions Wrap-Up: Top 10 Cases Across Canada



Lenczner Slaght

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Introduction

2024 was another noteworthy year for class actions in Ontario and across the country. Below, we highlight our top 10 class action decisions of 2024. These decisions reflect the most significant developments of the last year, and we expect they will set the tone for 2025.

Our Class Actions Wrap-Up covers a broad range of topics including product liability, healthcare, privacy, securities, and employment law, and delves into various legislation and statutes including the interpretation of the 2022 amendments to the Ontario *Class Proceedings Act*, the interpretation of the residency requirement under the British Columbia *Class Proceedings Act*, and the constitutionality of the British Columbia *Opioid Damages and Health Care Costs Recovery Act*.

Case Commentary

1. SANIS HEALTH INC V BRITISH COLUMBIA

Governments as Class Members: The Constitutionality of Section 11 of the *Opioid Damages and Health Care Costs Recovery Act*

In 2008, in response to the national opioid epidemic, the government of British Columbia commenced a class action to recover healthcare costs from manufacturers, marketers, and distributors of opioid products. The proposed class proceeding was brought on behalf of every affected province and territory in Canada.

After the case began, the British Columbia government passed the *Opioid Damages and Health Care Costs Recovery Act* (ORA). Section 11 of the ORA allowed the existing claim to be handled as a class action in British Columbia, representing all provincial and territorial governments in Canada. However, several defendants quickly challenged Section 11, arguing that it went beyond British Columbia's legal authority.

In *Sanis Health Inc v British Columbia*, perhaps the most significant decision of the year, the Supreme Court of Canada considered the constitutionality of section 11 of the ORA, and clarified important features of class proceedings in Canada by:

- Explicitly confirming the constitutional validity of national class proceedings for the first time;
- Clarifying that provinces can enact procedural mechanisms to facilitate class actions that include other governments, provided that they respect the legislative sovereignty of the other jurisdictions (e.g., through an opt-out mechanism); and
- Confirming that the existence of common issues between the representative plaintiff and members of the proposed class residing in different jurisdictions is enough to establish a "real and substantial connection" grounding one province's jurisdiction over the entire class.

While lower courts have repeatedly applied many of these principles, the SCC's decision removes lingering uncertainty on important jurisdictional and procedural issues in class actions.

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2. LILLEYMAN V BUMBLE BEE FOODS LLC

Commonality Under Section 5(1)(c): A One-Step or Two-Step Test?

For years, the class actions bar had been divided on whether the commonality requirement in determining certification is a one-step or two-step process. Proponents of the one-step test argue that a representative plaintiff must only show some basis in fact that the proposed common issue can be answered in common across the class. On the other side, proponents of the two-step test argue that the representative plaintiff must also show that the proposed common issue actually exists.

In *Lilleyman v Bumble Bee Foods LLC*, the Court of Appeal for Ontario answered the debate by diverting the focus away from the mechanics of a one-step or two-step analysis and, instead, focusing on the criteria that there must be "some basis in fact" that there are issues common to the class. In practice, this can be articulated as a two-step test that requires:

1. The pleadings raise a common issue across the class (i.e., the common issue can be answered in common across the class); and
2. The common issue satisfies "a minimal evidentiary standard" (i.e., the proposed common issue actually exists).

The minimal evidentiary standard, therefore, should not be understood as requiring proof of the claim, involving "weighing the merits of the claim" or resolving "conflicts in the evidence."

The Court of Appeal's endorsement of this test is rooted in one of the primary rationales and purposes of the certification process: to screen and deter frivolous and unfounded claims. As aptly stated by Justice Monahan:

> "Certification of a claim that is unable to satisfy such a minimal evidentiary standard would undermine judicial economy, and in the process indirectly impair access to justice for other arguably meritorious claims."

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Lilleyman v Bumble Bee Foods LLC, 2024 ONCA 606 at para 74

3. PALMER V TEVA CANADA LIMITED

Product Liability Litigation: Actual Damage Versus Risk of Harm

In *Palmer v Teva Canada Limited*, the Court of Appeal for Ontario examined a number of important principles, including:

1. The feasibility of product liability claims based on exposure to risk of harm;
2. The scope of recovery for pure economic losses; and
3. The recurring question of the appropriate test for common issues under the *Class Proceedings Act*.

Palmer involved a claim against various drug manufacturers for negligently manufacturing valsartan, a drug used to treat high blood pressure. The motion judge dismissed the certification motion, finding that the causes of action pleaded were not viable.

In a unanimous decision, the Court of Appeal for Ontario confirmed that:

1. An increased risk of harm did not rise to a level of proving actual damage, which is an essential element of negligence;
2. Damages for pure economic loss are inappropriate where there is no injury; and
3. The two-step test is the appropriate test for certifying common issues.

The Court's decision in *Palmer* is helpful appellate authority that negligence claims driven by mere risk of harm, of which there has been an uptick, will be difficult to certify in the future.

"The Court's decision in *Palmer v Teva Canada Limited* is helpful appellate authority that negligence claims driven by mere risk of harm, of which there has been an uptick, will be difficult to certify in the future."

4. FEHR V SUN LIFE ASSURANCE COMPANY OF CANADA

Rolling Limitation Periods: Continuous Breach Versus Continuous Loss

Fehr v Sun Life Assurance Company of Canada was an appeal arising from the dismissal of a motion for leave to add a common issue to a certified class proceeding and to particularize a cause of action underlying the proposed new common issue.

This class action brought against Sun Life arises from alleged misrepresentations and breaches relating to universal life insurance policies that both provided life insurance and acted as an investment vehicle. After certification, the class proposed adding a new common issue referred to as the "investment spread claim" which arose from the discovery that Sun Life improperly increased investment spreads that applied to certain policies, resulting in Sun Life taking a greater share of the investment profits. Sun Life argued that the investment spread claim was statute-barred and discoverable in 2016 from a repricing report.

Key issues raised on the appeal included:

1. Whether the limitations bar applied class-wide given that the 2016 knowledge was only available to seven of the individual plaintiffs and counsel at the time; and
2. Whether the conduct constituted a continuous breach such that a rolling limitation period applied.

The Court of Appeal for Ontario agreed that the new claim was statute barred on the basis that it was discoverable back in 2016 from relevant documents (e.g., the repricing report), rather than in 2022 as proposed by class counsel. Importantly, the Court of Appeal confirmed that:

1. The limitations bar correctly applied on a class-wide basis, given that the new claim was advanced on a class-wide basis, and that the knowledge of class counsel and representative plaintiffs can be imputed to the entire class; and
2. A rolling limitation period does not apply to a case such as this where the loss (and not the breach of contract) occurs on a continuous basis based on two historic and discrete breaches of contract.

"A rolling limitation period does not apply to a case such as *Fehr v Sun Life Assurance Company of Canada*, where the loss (and not the breach of contract) occurs on a continuous basis based on two historic and discrete breaches of contract."

5. MM FUND V EXCELSIOR MINING CORP

British Columbia: Not a Jurisdiction for All

Over the past two years, we have seen an uptick in class action filings outside of Ontario and in particular, in British Columbia. This shift was due in part to a concern that legislative amendments had made the test for certification in Ontario relatively more difficult to meet. The draw to British Columbia was even more enticing given the province's no-cost regime.

In light of this recent development, out-of-province counsel and litigants should be reminded of the need to thoroughly consider and examine the appropriateness of jurisdiction. Failure to do so can lead to the summary dismissal of the proceeding. For example, consider the following question:

- Can a mutual fund based in Toronto, Ontario, with a connection to British Columbia as a reporting issuer and registrant under the British Columbia Securities Commission, commence a class proceeding under the BC Class Proceedings?

This very question was considered in *MM Fund v Excelsior Mining Corp*, where the British Columbia Court of Appeal confirmed that only a British Columbia resident and class member may commence a class proceeding under section 2(1) of the British Columbia *Class Proceedings Act*. In doing so, the Court of Appeal affirmed a decision striking the certification application on the basis that the representative plaintiff could not satisfy the residency requirements.

In the case of corporate representative plaintiffs under the British Columbia *Class Proceedings Act*, the British Columbia Court of Appeal further clarified that residency is determined by the location where central management and control take place. In *MM Fund*, while the plaintiff was a registrant of the British Columbia Securities Commission, it was managed in Toronto, Ontario and maintained no registered office in British Columbia. The Court of Appeal affirmed the application judge's determination that MM Fund was not a resident of the province.

"In *MM Fund v Excelsior Mining Corp*, the British Columbia Court of Appeal confirmed that only a British Columbia resident and class member may commence a class proceeding under section 2(1) of the British Columbia *Class Proceedings Act*."

6. FRESCO V CANADIAN IMPERIAL BANK OF COMMERCE

Mega-Settlements: Where to Draw the Line on Class Counsel Fees?

In *Fresco v Canadian Imperial Bank of Commerce*, the Court of Appeal for Ontario addressed the appropriateness of a class counsel fee in the context of an overtime class action. At certification, the motion judge awarded class counsel fees of $25 million, which was $19 million less than class counsel had requested, on a "mega-settlement" of $153 million. The appeal was dismissed.

The Court of Appeal for Ontario recognized the importance of providing a real economic incentive for lawyers to take on class proceedings but reiterated that the test is whether the fees are fair and reasonable in the circumstances. In addition to affirming the decision below, the Court highlighted that class counsel should consider seeking the appointment of *amicus* (independent counsel appointed to assist the court by offering information, expertise or insight) for the purposes of fee approval motions, especially in cases involving mega-fund settlements and significant class counsel fees.

"In *Fresco v Canadian Imperial Bank of Commerce*, the Court of Appeal for Ontario addressed the appropriateness of a class counsel fee in the context of an overtime class action."

7. TATARYN V DIAMOND & DIAMOND LAWYERS LLP

Section 29.1(1): No Time to Wait (Kind of)

When Ontario enacted the October 2020 amendments to the *Class Proceedings Act*, much of the attention was directed at the purported changes to the certification test. However, another of the amendments, the enactment of section 29.1(1), deserves equal attention with its potential to expedite certification motions.

Section 29.1(1) requires the plaintiff to take one of the prescribed steps (e.g., filing the certification record or agreeing to a timetable) within one year from the day that the proceeding was commenced or risk facing a motion to dismiss for delay. Earlier this year, in *Tataryn v Diamond & Diamond Lawyers LLP*, the Court of Appeal for Ontario upheld the motion judge's decision dismissing the proceeding for delay contrary to section 29.1(1) of the *Class Proceedings Act*.

The procedural history of the case was aptly described by the motion judge: "The case has travelled a long and winding road, but every turn has led back to the pleadings door." At a high level, William Tataryn commenced this class proceeding in May 2018 through a Notice of Application. Following a couple of amendments, it was converted to an action in July 2020. Over the next 30 months, while the parties were busy with pleadings motions and further amendments to the pleadings, no substantive steps were taken to advance the proceeding toward certification. In fact, the certification motion record was only delivered in June 2023, 20 months after the section 29.1(1) deadline. Accordingly, in November 2023, the motion judge granted the section 29.1(1) motion dismissing the proceeding.

On appeal, the Court of Appeal for Ontario interpreted section 29.1(1) of the *Class Proceedings Act* for the first time. The Court concluded that, while there is no judicial discretion with respect to the one-year time parameter, a contextual approach is appropriate in addressing whether a timetable has been established for completion of one or more other steps required to advance the proceeding.

"In *Tataryn v Diamond & Diamond Lawyers LLP*, the Court of Appeal for Ontario upheld the motion judge's decision dismissing the proceeding for delay contrary to section 29.1(1) of the *Class Proceedings Act*."

8. BARBIERO V POLLACK

Rule 24.01: Enough Delay!

Barbiero v Pollack involved a class proceeding against Dr. Pollack in connection with allegedly unlawful injections of liquid silicone into patients. The case was certified as a class proceeding in December 2003 and made minimal progress over the next 21 years.

In 2024, Dr. Pollack successfully moved to have the class proceeding dismissed for delay under Rule 24.01 of the *Rules of Civil Procedure*. The Court of Appeal for Ontario upheld the dismissal of the case, citing the inordinate and inexcusable delay. The Court emphasized the necessity for timely resolution of civil litigation, including class proceedings, and underlined the need for a culture shift in the Ontario civil justice system that was identified by the Supreme Court of Canada in *Hryniak v Mauldin*. Importantly, the Court overturned its existing jurisprudence, finding that delay alone can cause prejudice that is sufficient to warrant dismissal.

"In *Barbiero v Pollack*, the Court emphasized the necessity for timely resolution of civil litigation, including class proceedings, and underlined the need for a culture shift in the Ontario civil justice system."

9. DEL GIUDICE V THOMPSON

No Substitute for a Cause of Action: $240 Billion Data Misappropriation Case Fails to Satisfy the Threshold Issue Requirement Under Section 5(1)(a) of the *Class Proceedings Act*

Del Giudice v Thompson was commenced as a $10.9 billion data breach case that was reconfigured into a $240 billion data misappropriation and misuse case. It arose following a data breach in March 2019 affecting approximately six million Canadians, whose data was collected by Capital One and stored with Amazon Web Services. Ms. Del Giudice and Mr. Wood (the appellants), sought to certify a class proceeding alleging that the data breach had exposed the credit card applicants' personal and confidential information. After a series of amendments, the proposed class alleged causes of action against the credit card companies related to data misappropriation and misuse, including intrusion upon seclusion, misappropriation of personality, negligence, and breaches of privacy statutes. The motion judge determined that the pleadings failed to disclose a cause of action, and struck out the claim without leave to amend.

The Court of Appeal for Ontario upheld the decision, agreeing that the appellants' claims were "doomed to fail". In doing so, the Court:

- Reinforced the stringent requirements for pleading viable causes of action. In this case, in the context of privacy torts and data misappropriation and misuse. The Court clarified that, notwithstanding the generous test on a pleadings motion, material facts must be pleaded to establish the causes of action; and
- Reaffirmed the discretionary nature of the motion judge's decision to strike pleadings without leave to amend, which is subject to deference. In upholding the motion judge's decision, the Court further noted that "[t[he appellants were given ample opportunity to advance a viable claim and are now out of runway".

"Notwithstanding the generous test on a pleadings motion, material facts must be pleaded to establish the causes of action."

10. SALT RIVER FIRST NATION #195 V TK'EMLÚPS TE SECWÉPEMC FIRST NATION

Opting in Late: A Balancing Test, Not a Complete Bar to Entry

In the underlying class proceeding (*Gottfriedson v Canada*), the representative plaintiffs sought compensation for loss of Indigenous culture, language, and social cohesion caused by the residential schools system. At the representative plaintiffs' request, the action proceeded on an opt-in basis. A settlement was reached in January 2023.

In *Salt River First Nation #195 v Tk'emlúps te Secwépemc First Nation*, the appellant, Salt River, claimed it was unaware of the class proceeding or the opt-in requirement until January 2023. It filed a motion to intervene in the settlement hearing and to join the class. The Associate Judge dismissed the motions.

By the time the appeal was heard, the action was at an end and the judge was *functus*, meaning that given that a final decision had been rendered in the matter, the judge had fulfilled their duties and no longer had authority to alter that decision. Despite identifying errors in the motion judge's reasoning, the Federal Court of Appeal held that it was unable to issue an executory order that would rectify the judgment and so dismissed the appeal. In doing so, the Court provided guidance on opt-in settlements that speak to the responsibilities of class counsel and settlement administration:

- Courts have broad discretion to advance the goals of class actions;
- Except where the judge is *functus*, there is no absolute bar on extending the opt-in period;
- Where a settlement amount is fixed, courts should apply a balancing test, considering factors such as prejudice to the parties and the reason for delay, in determining whether a potential class member should be allowed to join the class after the opt-in deadline;
- In deciding whether to extend the opt-in period, judges must also consider expressions of support and objections and communications with class members during litigation; and
- Potential class members should not be treated inconsistently or arbitrarily in allowing or denying them to join the class after the deadline.

"The Court in *Salt River First Nation #195 v Tk'emlúps te Secwépemc First Nation* provided guidance on opt-in settlements that speak to the responsibilities of class counsel and settlement administration."

Lenczner Slaght's Class Action Practice

A Canadian leader in class actions, Lenczner Slaght is one of the only firms in the country to have repeatedly litigated on behalf of defendants at the trial level. Our lawyers' class actions expertise has been sharpened through hands-on experience in a wide range of complex and technically demanding proceedings.

Our firm has defended many of Canada's most closely watched class action lawsuits over the past two decades.

It's that experience that has led to our lawyers being repeatedly recognized by various organizations as leaders in the class action bar.

Class Action Litigation Areas

Our nationally ranked litigators have represented Canadian and international clients across virtually every industry and across the spectrum of class action proceedings, including: antitrust and *Competition Act* matters; consumer claims; deceptive and unfair trade practices; employment disputes; environmental issues; financial services; health and medical malpractice; insurance matters; mass torts; misleading advertising; negligence claims; pensions and employee benefits; product liability; and securities and shareholder rights.

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