# Class Actions

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**What was the most interesting development of 2023, and why?**

Over the last few years, we have seen a pronounced willingness by courts to dispose of claims at an early stage, either through pre-certification motions to strike, at certification for failing to show a cause of action, or failing to show some basis in fact for the existence of a common issue. For example:

In *Dussiaume v Sandoz Canada Inc*, a proposed class action arising from alleged defective heartburn medication, the British Columbia Supreme Court heard an application to strike and for certification simultaneously. The claim was struck on the basis that at its core, the claim was one of increased risk of harm which is not compensable.

In *Setoguchi v Uber BV*, involving a data breach by a third party, the Alberta Court of Appeal upheld the certification judge's dismissal where a key element of a cause of action could not be shown.

In *Gebien v Apotex Inc*, a personal injury class action arising from the opioid crisis, the Ontario Superior Court of Justice dismissed certification as against opioid distributors because there are public policy reasons for why a distributor should not have to police the illegal trade of pharmaceuticals.

In *Frayce v BMO Investor Line Inc*, which was recently upheld by the Divisional Court, the class action was dismissed for failing to show some evidence of wrongdoing (in that case, that the payment of trailing commissions was illegal).

At least in the common law provinces, and particularly Ontario and British Columbia, these decisions and others confirm that judges have been rigorously exercising their gatekeeper function leading to the dismissal of numerous class actions.

**What's the primary takeaway for businesses from the past year?**

While many corporations scored significant victories in the past year, the plaintiffs' bar is inventive and alert. They remain ready to issue class proceedings where potential class-wide liability exists. Take, for example, the recent class action filings relating to defective allergy medication or the cantaloupe recall.

Given this environment, there is no question that class actions will remain a significant risk for businesses. Businesses should continue to expect to see the filing of class actions and to take appropriate measures to manage class action risk. For example, in response to consumer product defects, businesses should be ready to implement an effective recall program which has been found in the case law to be preferable to a class action. An effective recall program was a central fact in the dismissal of certification in *Larsen v ZF TRW Automotive Holdings Corp*. Businesses should also take comfort in the heightened scrutiny that proposed class proceedings are facing as we discussed above. Class actions can be disruptive and time-consuming for a business. A defense strategy with consideration of an early dismissal should not be overlooked.

**What's one trend you are expecting in 2024?**

In 2024, we expect to see continued growth of class action filings across the country. Where those filings will be made is something to keep an eye on. While Ontario was for many years the primary battleground for class proceedings, there has been, for strategic reasons, an uptick in filings in other provinces in the past few years or a preference to advance class proceedings in other provinces. In particular, in response to legislative amendments to the preferable procedure requirement (i.e., the superiority and predominance requirements) in Ontario, many defence counsel observed an uptick in class action filings in British Columbia, which is a no-cost jurisdiction.

However, in the wake of two recent Ontario decisions interpreting the amended preferable procedure requirement, we may see a resurgence of Ontario filings. In *Banman v Ontario*, an institutional negligence case, Justice Perell concluded that the new preferable procedure test certainly raises the bar; however, the test itself has not fundamentally changed. Justice Perell's views in *Banman* were then adopted by Justice Akbarali in *Grozelle v Corby Spirit and Wine Limited*, which dealt with mold damage caused by emissions from whisky aging warehouses.

Certainly, in the months to come, we will see more applications of the recalibrated preferable procedure test. Should subsequent decisions continue to follow the reasoning in *Banman*, the bar for certification in Ontario may not be the game changer that some thought these amendments would be.

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