Class Actions

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What were the most interesting developments of 2024, and why?

In our 2023 Snapshot, we highlighted the uptick of class actions being filed outside of Ontario and in particular, in British Columbia. This was in part due to a concern that the Ontario certification test had become harder to meet due to certain legislative amendments and the draw of litigating in a no-cost jurisdiction. Consistent with 2023, we noted that while the overall volume of class action lawsuits filed nationwide in 2024 remained steady, there was a significant increase in the number of filings in British Columbia. This reality raises the importance of examining the appropriateness of the jurisdiction selected by class counsel. As an example, the British Columbia Court of Appeal in *MM Fund v Excelsior Mining Corp*, which is a shareholder class action, refused to certify the class action because the representative plaintiff could not satisfy the residency requirements set out in class proceedings statute.

Back in Ontario, at long last, we now have closure on the two-step evidentiary test to satisfy the commonality requirement under section 5(1)(c) of the *Class Proceedings Act*. For years, there has been debate over whether it is necessary for the proposed representative plaintiff to only adduce some basis in fact that the common issue can be answered in common across the class (the one-step test) or whether it is also necessary to show that the proposed common issue actually exists (the two-step test). In *Lilleyman v Bumble Bee Foods LLC*, the Court of Appeal confirmed that to satisfy the commonality requirement, the proposed representative plaintiff must overcome the two-step test. The Court described this approach as "a matter of logic and common sense." With the clarity that this decision brings, we expect there will seldom be disputes over the evidentiary requirement in the future.

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

Businesses can take some comfort in the many developments in the case law in 2024. These changes indicate that judges are diligently fulfilling their gatekeeping roles, a task which has been facilitated by the clarity provided by various appellate decisions on recurring issues, such as:

1. The availability of pure economic loss;
2. The proper approach to dismissal for delay; and
3. The appropriate commonality requirement.

These appellate decisions have made it easier for judges to navigate these complex issues, ultimately benefiting businesses by ensuring a more predictable and fair legal environment.

Regardless of these developments, businesses should continue to take class action risks seriously. Class proceedings continue to be steadily filed year over year with many cases reaching settlements in the hundreds of millions to billions of dollars. While not rising to the level seen in the United States, Canadian courts have become very familiar with significant settlements and awards which are accompanied by significant class counsel fees. The latter continues to make it worthwhile for class counsel to spend the time and energy on investigating potential wrongdoings, developing coherent legal theories, and pursuing class actions to advance access to justice.

What's one trend you are expecting in 2025?

We anticipate a significant increase in class action activity this year due in large part to the developments in the case law that we saw in 2024.

In 2024, we saw a strong emphasis on the importance of an expeditious determination of civil proceedings including class actions. In *Barbiero v Pollack*, an appeal where we successfully acted for the respondent, the Court of Appeal had its eye on the contemporary needs of the civil justice system and upheld the dismissal of a class proceeding for delay under the Ontario Rules of Civil Procedure. Very recently, in *Tataryn v Diamond & Diamond Lawyers LLP*, the Court of Appeal upheld the dismissal of a class action for delay under section 29.1(1) of the *Class Proceedings Act*. Both of these cases lay out principles that will certainly be tested under different fact scenarios.

We could not conclude our remarks without highlighting the case recently argued at the Supreme Court of Canada, *Markowich v Lundin Mining Corporation*. Corporations are eagerly awaiting the decision which is expected to provide clarity to the definition of "material change" (that is, what is important enough to merit public disclosure) under the *Securities Act*. Lenczner Slaght represented the CFA Societies Canada Inc, one of the intervenors on this appeal. The Supreme Court of Canada's decision will impact the prevalence of future securities class actions.

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OUR CLASS ACTIONS EXPERTISE

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.