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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.

Class Actions

“While the evidentiary burden on certification is lower than it is at trial, rules of evidence continue to apply with equal veracity.”

What was the most interesting development of 2025, and why?

In 2025, the Ontario Court of Appeal continued the recent Canadian trend of emphasizing the importance of the class definition on certification.

In *Kinsley v Canada (Attorney General)*, the Ontario Court of Appeal overturned the motion judge's certification of a class action involving disability benefits for veterans. The plaintiff was required to amend the too-broad class definition as a condition of certification. The Court of Appeal refused to certify the class action, emphasizing three key points:

- The *Class Proceedings Act* does not contemplate conditional certification.
- The class definition impacts the other certification criteria.
- Conditional certifications create a variety of issues.

This case can be contrasted with the late 2024 decision *Ingram v Alberta*, where the Court similarly found the proposed class definition unworkable but adopted an alternate definition from the plaintiffs' reply brief and clarified that definition itself.

Together, these cases demonstrate the increased focus on workable class definitions at certification and highlight the uncertainty relating to the Court's ability to fix issues relating to that class definition.

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

Courts in 2025 emphasized the kinds of damages that are (and are not) compensable in product liability class actions. Notably, damages requiring individual trials, and pure economic loss damages, are not compensable.

In *Syngenta AG v Van Wijngaarden*, the British Columbia Court of Appeal addressed a negligence-based class action alleging that an agricultural product was toxic. The Court declined to certify a common issue of general damages because the plaintiffs could not prove that the defendants' negligence caused each class member's specific losses without individual trials. In making this finding, the Court emphasized that causes of action in negligence, which aim to compensate individuals for harms suffered, are different than causes of action in the Charter context, where damages may serve purposes beyond compensation.

In *North v Bayerische Motoren Werke AG*, the Ontario Court of Appeal reaffirmed that pure economic loss damages (i.e., damages that are unconnected to physical or mental injury to the plaintiff's property or person) are not recoverable at all. In *North*, the class members had paid to repair a defective chain assembly system in certain BMW vehicles. The Court found these losses were purely economic and would have been

compensable only if the repairs were necessary to avert danger. Accordingly, the Court refused to certify the relevant negligence causes of action.

What's one trend you are expecting in 2026?

In 2026, we expect courts to continue grappling with the evidence required to make out the "some basis in fact" standard for certification. This issue has been a consistent focus in recent years, including in 2025.

For example, in *Price v Smith & Wesson Corporation*, the Court of Appeal reaffirmed the low bar required to satisfy the "some basis in fact" standard on certification. The Court overturned the motion judge's refusal to certify certain causes of action in negligence because the motion judge held the plaintiff to too high an evidentiary standard, including by scrutinizing expert evidence and conducting its own research. By contrast, in *Syngenta*, the Court emphasized that despite the less onerous evidentiary standard on certification, the rules of evidence themselves are not relaxed. In particular, the Court reaffirmed that evidence must be relevant and not subject to an exclusionary rule to be admitted, and that the public record exception to the hearsay rule does not apply to all publicly available documents.

Judicial determinations on the evidence required at certification are crucial to success or failure at certification. 2025 taught us that, while the evidentiary burden on certification is lower than it is at trial, rules of evidence continue to apply with equal veracity. Only time will tell what we learn in 2026.