August 06, 2024

2023 was a momentous year for class actions in Ontario. In this article, BLG's leading Class Actions team provides an overview of key developments and trends from 2023, and how they are already manifesting in 2024.

Newly filed class actions by category

Key legal developments of 2023

Amendments to the *Class Proceedings Act*: Raising the bar for preferability criteria

In 2023, the new preferability criteria from the Ontario *Class Proceedings Act, 1992* (CPA) were interpreted for the first time.

Back in 2020, the legislature amended the preferability test under section 5(1)(d) of the CPA. This change adopted the predominance and superiority test from the U.S. Federal Rules of Civil Procedure, which requires a plaintiff to demonstrate the proposed class proceeding is "superior" to other means of relief, and that the common issues must "predominate" over individual issues. This is a stricter threshold than before.

In *Banman v. Ontario*, a proposed class action brought on behalf of patients who received certain psychiatric treatment while detained at the St. Thomas Psychiatric Hospital, the Ontario Superior Court of Justice interpreted the new preferability criteria for the first time.

The motions judge found that the "predominance" test requires a more rigorous assessment of the advantages and disadvantages of a class action as it relates to judicial economy, behaviour modification, and access to justice. Through this lens, a motions judge must determine:

- whether the design of the class action is manageable;
- whether there are reasonable alternatives;
- whether the common issues predominate over the individual issues; and
- whether the proposed class action is better than the alternatives.

In *Banman*, a systemic institutional abuse case, the new criteria were met. Read more about this case.

Banman was followed in *Grozelle v. Corby Spirit and Wine Limited*, a proposed class action alleging that ethanol emissions from whisky aging warehouses caused mold to grow on nearby properties. *Grozelle* was not certified, because the potential for common issues was overwhelmed by the individual issues that would remain. Specifically, the variance in ethanol emissions and humidity in the nearby geographic area would require individual class members to each adduce expert evidence specific to their property.

Guidance on the test for "material change" under the *Securities Act*

Two Ontario Court of Appeal decisions clarified what constitutes a material change that would trigger disclosure requirements under Ontario's *Securities Act*. This is a crucial requirement for actions under section 138.3(4) of the *Securities Act*, which are often brought as class actions.

In *Markowich v. Lundin* and *Peters v. SNC-Lavalin Group Inc.*, the Court of Appeal laid out a two-step analysis to determine whether a material change has occurred. The first step is to consider whether there has been a change in risk in an organization's business, operations, or capital. Second, the court will consider whether the change would reasonably be expected to have a significant effect on the market price or value of the issuer's securities.

The materiality or magnitude of the change is considered at the second stage of the analysis only. In addition, the meaning of "change" is fact-specific but does not include external circumstances – particularly where they are anticipated or inherent risks to a business's operations – that do not result in a change to the business, operations, or capital.

In *Lundin*, a rockslide and resulting pit wall instability at a mine was held to be a material change, satisfying the cause of action criterion for certification.[1] But in *SNC Lavalin*, a phone call with the Public Prosecutions Service of Canada, in which SNC was advised that it would not be invited to negotiate a remediation agreement, was held to not be a material change, and the appeal was dismissed. Read more about these cases.

Top 3 trends of 2023

1. Mandatory dismissal for delay

Another 2020 amendment to the *CPA* introduced section 29.1, which allows a defendant to move for mandatory dismissal for delay of an action unless certain steps have been taken to move the action towards certification within a one-year period. The new provision was first interpreted by courts in 2022, but in 2023, the courts re-emphasized the mandatory nature of this new rule.

In *Tataryn v. Diamond & Diamond Lawyers LLP*, the court held that the language of s. 29.1 is mandatory, despite previous debate in the case law, and that an action must be dismissed if it is clear that none of the identified steps are taken in time.

In addition, the court emphasized that there is substantial public interest in s. 29.1, since the cost of lengthy lawsuits takes a toll on the economy. Therefore, a defendant cannot waive their right to seek dismissal for delay simply by bringing a series of pre-certification motions and waiting to bring a motion for dismissal for delay.

2. Early dismissal

In 2023, defendants have seen much success in dismissing claims at an early stage or successfully resisting certification. Courts are strictly scrutinizing the evidence put forward to support plaintiffs' claims and have been dismissing actions where it is plain and obvious that they will fail.

For example, in *Gabien v Apotex*, a personal injury action arising from the opioid crisis, the Superior Court found it was plain and obvious that no reasonable causes of action were raised against a group of distributor defendants pursuant to section 5(1)(a), as there was a lack of material facts pleaded that connected the distributor defendants to the plaintiff's allegations.

3. Forum selection

With Ontario courts applying more stringent analyses for class certification, plaintiffs are opting to file in other jurisdictions with more favourable class action legislation, like British Columbia. We expect to see this trend continue in 2024, particularly for product liability actions, because of British Columbia's no costs regime and lower threshold for certification. However, we are still seeing a steady stream of securities, *Charter*, and crown liability filings in Ontario.

Top 3 things to watch for in 2024

1. COVID-19 cases

Courts have begun to issue decisions on certification motions for COVID-19 class actions. For example, in *Pugliese v Chartwell*, over 300 Ontario long term care homes were implicated in eight proposed class proceedings, as part of the plaintiffs' allegations of systemic negligence relating to the homes' response to the outbreak of the COVID-19 pandemic.

The court held that systemic negligence must move from the top down, and not from the bottom up (*i.e.*, one person's failure to adhere to otherwise reasonable policies), or sideways through corporate structures. Further, the court held that there must be at least one representative plaintiff for each corporate defendant, but not a separate plaintiff for each component part of a corporate enterprise. Thus, six class actions against corporate-owned long term care homes were certified, while two others against municipality-owned and various independently owned homes were dismissed, for lack of a common representative plaintiff.

Although new filings of COVID-19 actions have slowed, they have not completely stopped. In addition, even those cases that have been dismissed on certification might be re-filed due to the tolling of limitation periods.

2. Ontario's new *Consumer Protection Act, 2023*

This new legislation received Royal Assent on December 6, 2023. Although yet to take effect, the new *Consumer Protection Act, 2023* will have no transition period, and the regulatory sections suggest it will have retroactive effect on consumer contracts. We previously broke down these key changes and what they will mean for businesses, and we will continue to monitor the implementation of the legislation.

3. Appellate opinions interpreting amendments to the *Class Proceedings Act*

As lower courts have begun to interpret and apply recent changes to the CPA, we expect that some of these decisions will make their way to the appellate level for further clarification. Particularly with respect to section 29.1, where there are conflicting interpretations about the scope of the court's discretion regarding mandatory dismissal for delay.

Takeaways

- Ontario courts are applying rigorous scrutiny to claims. Not only have amendments to the *Class Proceedings Act* introduced stricter thresholds for preferability, and mandatory dismissal for delay, but courts will expect plaintiffs to adduce cogent evidence that support plausible causes of action.
- Although this scrutiny is good news for defendants, business should remain alert and ready to defend or mitigate class action risk. Throughout 2023, several claims involving issues ranging from product liability to *Charter* claims were filed based on potential class-wide liability. And although recent trends suggest Defendants can get claims dismissed at an early stage or successfully resist certification, quick and proactive mitigation measures (like a recall, voluntary compensation program, apology, etc.) should not be discounted.

Where to learn more

- BLG's Ontario Class Actions 2022 Year-End Review
- BLG's Ontario Class Actions 2021 Year-End Review
- BLG's Recent client bulletins on class actions
- BLG's Summary of Canadian Class Action Procedure and Developments
- BLG's Class Actions service page

The fine print

The graphs at the top were compiled based upon information gleaned from searching legal research databases and monitoring the CBA Class Actions Database and new class actions filings in the Ontario Superior Court of Justice in Toronto. In addition to Toronto filings, the Court office captures most, but not all, filings outside of Toronto. In "counting" the number of new class actions, we have eliminated duplicates. We have also assigned each class action to a single category of claim, based on the dominant allegations in the pleading. There is a certain arbitrariness to this determination. Overall, these methods are imperfect but, in our view, gather sufficient data to provide a sense of 2023 trends.

BLG is grateful for the assistance of articling student Hanna Rioseco, BLG associates Callum Hutchinson and Rob Stefanelli, practice strategy and growth specialist Marthe Angama, and rounds clerks, Janice Francis and Larry White.

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Footnote

[1] Leave to appeal the *Lundin* decision has been granted by the Supreme Court of Canada.

By: Callum Hutchinson, Robert Stefanelli, Glenn Zakaib, Edona C. Vila, Hanna Rioseco

Services: Class Action Defence, Disputes, Securities Disputes, Health Law

Key Contacts

Markus Kremer
PARTNER

Toronto
MKremer@blg.com
416.367.6658

Michelle T. Maniago
PARTNER

Vancouver
MManiago@blg.com
604.640.4139

Caitlin Sainsbury
PARTNER

Toronto
CSainsbury@blg.com
416.367.6438

Karine Chênevert
PARTNER AND NATIONAL CO-LEADER, CLASS ACTIONS GROUP

Montréal
KChenevert@blg.com
514.954.3180

Brad Dixon
PARTNER AND NATIONAL CO-LEADER, CLASS ACTIONS GROUP

Vancouver
BDixon@blg.com
604.640.4111