POINT DE VUE

Ontario class actions 2022 year in review

Top 3 legal developments of 2022

1. No more intrusion upon seclusion claims in "hacking cases"

In a trilogy of cases, the Court of Appeal for Ontario has held that companies and other organizations that collect and store personal information of individuals in databases (Database Defendants) cannot be held liable under the tort of "intrusion upon seclusion" when cybercriminals illegally access or steal that information. Previously, plaintiffs commenced many such cases, and Ontario Courts certified some of them. The Court of Appeal recognized the intrusion upon seclusion tort in *Jones v. Tsige* in 2012, to address intentional or reckless invasions of privacy. While it is still possible to sue Database Defendants for negligence or breach of contract in some cases, class members advancing those claims will have to prove damages, rather than being able to claim the "symbolic damages" available for intrusion upon seclusion. This development makes these cases much more difficult to litigate and may explain the significant drop in new privacy class actions commenced in 2022, as compared to previous years. Read more about the Court of Appeal trilogy.

2. Reaffirmation of the need for a plaintiff with a claim against each defendant

There has been a long-standing debate in the Canadian jurisprudence over the "*Ragoonanan* principle." That principle, which applies in some but not all Canadian jurisdictions, requires a representative plaintiff to have a cause of action against each defendant in a class action. The principle is relevant in cases where class counsel sues numerous defendants who engage in the same practice or participate in the same industry. In *Vecchio Longo Consulting Services Inc. v. Aphria Inc.*, the Ontario Superior Court of Justice dismissed a securities class action as against a group of underwriters, on the basis that the representative plaintiff had purchased the relevant shares in the secondary market, and therefore had no claim against the underwriters who had underwritten the prospectus offering. The reaffirmed *Ragoonanan* principle provides defendants in Ontario class actions with a basis for opposing certification in cases where the representative plaintiff does not have a personal claim against them. Read more about the decision.

3. Judicial recognition that a recall program can be a preferable procedure

Courts rarely deny certification based on the "preferable procedure" criterion. The Ontario Superior Court of Justice did so in *Coles v. FCA Canada*. The defendant car manufacturer, in that case, had initiated recalls to replace defective air bag components at no cost to consumers. The Court found this recall to address "the crux, hub and nub, nuts and bolts, and pith and substance" of the proposed class action, and concluded that a class action was not preferable to the defendant's recall campaign when judged with reference to the purposes of a class action. The case illustrates that prompt, effective remedial action can sometimes foreclose a successful class action. Read more about the case.

Top 3 trends of 2022

1. A rebound year

After a slow year for new claims in 2021, by comparison 2022 saw a significant rebound. Plaintiffs issued almost twice as many claims as in the previous year, although total claims were still lower than in 2019 and 2020. This suggests a continuation of the overall trend towards plaintiffs issuing fewer new class actions in Ontario. This trend appears to be driven partly by class counsel choosing to initiate class actions in other Canadian jurisdictions, which may be perceived to be more plaintiff-friendly, and where costs awards against plaintiffs who are unsuccessful on certification motions are either more modest or non-existent.

2. Decline in competition law cases

2022 saw a significant drop in the number of new competition law cases commenced in Ontario. This appears to have been largely the result of plaintiffs choosing to commence such actions in the Federal Court, instead.

3. A good year for defendants

In 2022, defendants were successful on two-thirds of contested certification motions. This is a much higher proportion than in recent years. Defendants were also successful in three-quarters of appeals from certification decisions.

Top 3 things to watch for

1. COVID-19 cases

2022 saw a spike in new cases brought in respect of COVID-19 negligence claims and claims involving insurance coverage. We can expect to see more certification decisions involving COVID claims in 2023. It will be interesting to see how courts respond to these cases and the complicated causation issues they can raise.

2. Effect of Ontario amendments

Significant amendments to the *Ontario Class Proceedings Act* apply to cases commenced after Oct. 1, 2020. 2023 is the year in which we are likely to begin to see decisions interpreting the effect of those amendments – generally viewed as defendant-friendly – and whether they will have a significant effect on the outcome of certification motions.

3. Forum for competition claims

As noted above, 2021 saw fewer competition law cases commenced in Ontario Courts, and more in Federal Courts. Watch for class counsel possibly reverting to filing in Ontario in 2023, in the wake of a series of recent Federal Court decisions that denied certification to competition law cases.

Top 3 takeaways

1. Take a proactive approach

Sometimes, class actions are won or lost before the claim is commenced. If you know you have potential liability, seek advice from lawyers who specialize in defending class actions and ensure that you preserve and gather evidence that may be helpful to resisting certification and the claim on the merits. You should also consider whether appropriate remediation methods (like a recall, voluntary compensation program, apology, etc.) could reduce the likelihood that a class action will be successful. *The Coles v. FCA Canada* decision, discussed above, illustrates that courts may consider an appropriate remedial program to be a "preferable procedure" to a class action. In the right case, a carefully designed remedial program can save legal costs and preserve good will.

2. Defendants should keep fighting certification

Recent trends have shown that defendants can successfully resist certification if they adopt the right strategy and develop a proper evidentiary record. Successful strategies can include challenging the plaintiffs' ability to prove that class members have suffered damages. For example, in *Palmer v. Teva Canada Ltd.*, the Ontario Superior Court of Justice denied certification of a product liability claim because, while the plaintiff alleged an increased risk of harm from a drug, that harm had not yet materialized. Read more about that case.

3. Keep watching the hotspots

As always, companies and other organizations should continue to monitor trends in the types of class actions that plaintiffs are bringing and that are getting certified, and then pay particular attention to those areas of potential liability. This should include monitoring policies, procedures and governance structures that relate to those areas. Recently, securities, products liability, consumer protection and labour and employment claims have been the most common in Ontario. Companies and other organizations should consult legal counsel as soon as they identify issues or receive complaints that could form the basis of class actions, so they can consider remedial measures and start to prepare for litigation well in advance of a claim. To get a sense of where your risk lies, monitor and track complaints whether sent directly to you or expressed through social media.

Where to learn more

- 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 on the first page 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. Certificaton and appeal decisions are based solely on searches of legal research databases and will not have captured unreported decisions. Overall, these methods are imperfect but in our view gather sufficient data to provide a sense of ongoing 2021 trends. BLG is grateful for the assistance of Laura Thistle and Mark Muccilli, BLG associates who assisted while articling students, BLG associate Dishant Tuteja, who assisted both as a student and as an associate, former BLG associates Lance Spitzig and Tanvi Medhekar, and our rounds clerks, Janice Francis and Larry White.

Services : Actions collectives, Litiges

Key Contacts

Glenn Zakaib
Avocat-conseil principal

📍 Toronto

✉️ GZakaib@blg.com

📞 416.367.6664

Michelle T. Maniago
Associée

📍 Vancouver

✉️ MManiago@blg.com

📞 604.640.4139

Caitlin Sainsbury
Associée

📍 Toronto

✉️ CSainsbury@blg.com

📞 416.367.6438

Karine Chênevert
Associée et coprésidente du groupe Actions collectives

📍 Montréal

✉️ KChenevert@blg.com

📞 514.954.3180

Brad Dixon
Associé et co-président du groupe Actions collectives

📍 Vancouver

✉️ BDixon@blg.com

📞 604.640.4111