CLASS ACTIONS SEMINAR

HIGHLIGHTS
WINTER 2015

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It begins with service

Introduction

Welcome to this summary of the highlights from our second annual Class Action Seminar (Toronto, November 24, 2015).

We know your reading time for recent case law is short. It is our sincere hope that our annual seminar and the articles and bulletins that we produce throughout the year will provide you with timely, relevant and focused updates on the cases that are changing the landscape for Class Actions in Canada and better prepare you to assess risks and manage your exposure.

Our seminar once again offered crisp insights from our most experienced Class Actions Litigators and guest speakers on where exposures may be increasing or decreasing as a result of recent court decisions. We highlighted the cases to watch over the coming year at the Courts of Appeal, and offered guidance on where and how court decisions might impact business choices and strategies going forward.

This short overview of the key messages delivered during our seminar will serve as a reminder for those who were able to attend and as a brief summary of points delivered for those who were not able to join us. Copies of the presentation slides are available to download **here**.

If there is a Class Actions related topic or issue you would like us to cover in the future, either as part of our 2016 annual seminar or as a timely update during the year, please let me know. If you have any questions at all about how any recent cases might impact your options, please feel free to reach out to any member of our Class Actions team, including those referenced in this material.

Tim Buckley
National Practice Group Leader
Borden Ladner Gervais LLP, Class Actions Group

Tim Buckley
National Lead and Senior Editor
Toronto | 416.367.6169
tbuckley@blg.com

Developments in Worldwide Classes and Litigating on Behalf of Foreign Class Members

Can an Ontario court decide the rights of persons who are resident in another country, may never have come to Canada, and have taken no steps to participate in litigation here? Not according to the recent decision of Justice Leitch in *Airia Brands v. Air Canada,* 2015 ONSC 5332 *("Airia").*

The plaintiffs have alleged a global price-fixing conspiracy, and proposed to represent residents of over thirty countries who had shipped goods to Canada. Ontario's opt out class action regime raised a unique jurisdictional issue. In a traditional non-class action suit, there is no issue as to whether plaintiffs have consented to the jurisdiction of the Ontario court, because they will have personally commenced litigation here. An international class in a proposed class proceeding, however, will include persons who have taken no steps to indicate that they want their rights determined by what is, to them, a foreign court.

In *Airia*, the extensive expert evidence established that:

- An Ontario decision on the merits would be unenforceable in the proposed class members' countries (exposing the defendants to potential re-litigation and inconsistent judgments); and
- The "real and substantial connection" test usually applied by Canadian courts to decide whether they have jurisdiction over a dispute is a radical departure from international norms, which require a party either to be present within, or to have consented to, the jurisdiction where the case is litigated.

Justice Leitch concluded that the "real and substantial connection" test ought not to be applied to establish jurisdiction over absent foreign claimants, and jurisdiction over class members can only be established if they are present in Ontario or have consented in some way to the jurisdiction of Ontario courts.

Justice Leitch's decision staying the claims of absent foreign claimants is under appeal. In the meantime, it presents both benefits and drawbacks for Ontario defendants. For example, while it makes international class actions in Ontario far less attractive to class counsel, it may result in Canadian defendants being sued abroad more frequently.

Justice Leitch's recent decision regarding jurisdiction over absent foreign claimants and class members presents **both benefits and drawbacks for Ontario defendants**.

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AUTHORS

Markus Kremer
Toronto | 416.367.6658
mkremer@blg.com

Heather Pessione
Toronto | 416.367.6589
hpessione@blg.com

Claims for Breach of Statute – Is the end in sight?

In any highly-regulated business environment, the unintentional breach of statutory provisions is an ever present risk. Recent cases dealing with the limitations of remedies for breach of statute suggest that the tide may have turned in favour of defendants, limiting claims to the remedies provided for in the statutes where the legislation amounts to a comprehensive code. This should assist defendants in resisting claims for disgorgement of profits, where claimants cannot, or choose not to, prove any individual loss.

These developments are important to risk assessment for defendants for the following reasons:

- In certain cases it will be more difficult now for plaintiffs to obtain certification.
- The risk presented by claims for disgorgement of profits and punitive damages may be lessened.
- Plaintiffs may have to be prepared to prove individual damages before recovery can be obtained.
- Shorter limitation periods may apply.

There has been much judicial activity on this subject of late in B.C. and Ontario, not all of it consistent. Some courts have been reluctant to strike certain common law claims and it remains to be seen how far the courts will go in construing statutory remedies as exhaustive of the relief available. With so much uncertainty, we expect to see the issue eventually reach the Supreme Court of Canada for clarification.

While recent **decisions suggest the tide may have turned in favour of defendants**, especially in Ontario, much uncertainty still exists around the remedies for breach of statute, making risk assessment and mitigation very difficult.

AUTHOR

Brad Dixon
Vancouver | 604.640.4111
bdixon@blg.com

Common Issues Trials – Reflections from the Trenches

François Grondin and Michael Smith spoke of the challenges facing defendants in class actions merits trials, drawing on their own personal recent experiences. They explained that the defendants are often battling a fictional plaintiff that is an amalgam of the cherry-picked best qualities of a few plaintiffs selected by class counsel, or, the best qualities simply assumed or inferred to exist by the trial judge. They also shared their impression that notwithstanding the clear rule to the contrary, substantive rights are often being affected by the class actions legislation, despite ample cautions from the Supreme Court of Canada and courts across the country that this is merely a procedural vehicle.

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AUTHORS

François Grondin
Montréal | 514.954.3153
fgrondin@blg.com

Michael Smith
Toronto | 416.367.6234
mcsmith@blg.com

Class Actions in Québec

In 2015, the Court of Appeal of Québec was called upon to review a number of decisions of the First Instance in which a Class Certification was denied. In most of those cases, the Superior Court concluded that Petitioners had failed to demonstrate the existence of a Group. The Court of Appeal first confirmed that in fact a Petitioner has the obligation to demonstrate the existence of a Group, failing which Certification will be denied. However, the Court of Appeal also indicated that in some cases, the existence of a Group can be inferred from the facts. More particularly, in false representation cases, the Court of Appeal concluded that the existence of a Group was presumed. Therefore, if the Group is presumed, all the Petitioner is required to demonstrate is that he has an arguable case to submit. Considering the threshold for the Courts to accept same, we can expect that there will be a new trend of cases based on the false or misrepresentation basis.

Also, the new *Code of Civil Procedure of Québec (Book VI, Title III)* is expected to come into force on January 1st, 2016. Although the authorization process for class actions remains essentially the same, the legislator introduced a few major changes to the existing rules:

- Corporations as class members: the abandonment of the "50 or less employees" rule;
- A judgment authorizing a class action will become appealable with leave of a judge of the Court of Appeal, under the new rules, whereas it could not be appealed under the existing ones. Procedural fairness is, however, not achieved completely, despite this improvement, since the right to appeal remains asymmetrical, as a judgment denying authorization may be appealed as of right by the petitioner;
- Multi-jurisdictional class actions: preserving the rights and interests of Québec residents and codification of the approach already adopted by the Québec courts on this issue.

The Court of Appeal recently indicated that in some cases, **the existence of a Group can be inferred from the facts**, particularly in false representation cases. We can expect there will be a new trend of cases based on the false or misrepresentation basis.

AUTHORS

Stéphane Pitre
Montréal | 514.954.3147
spitre@blg.com

Patrick Plante
Montréal | 514.954.2571
pplante@blg.com

The Supreme Court of Canada on Contract Interpretation and On Certification – Reconcilable or Irreconcilable Differences?

The Supreme Court of Canada articulated a more robust and still nuanced method of contract interpretation in 2014 in *Sattva Capital Corporation v. Creston Moly Corporation*, 2014 SCC 53, a conventional commercial appeal.

The case arrived at the Court in a highly technical manner, with the consideration of whether contract interpretation is a matter of fact, a matter of law or a matter of mixed fact and law under question, and whether an arbitrator's decision on the interpretation of the contract was a matter of law and therefore subject to appeal. The case has profound implications for deciding contractual interpretation disputes and the availability of an appeal of an arbitrator's decision.

But now, the class action point. In their decision, the Court adopted reasoning from the English House of Lords that a court must consider the surrounding circumstances or the factual matrix when interpreting an agreement. The Court did not abandon the parol evidence rule and stated a court should consider objective evidence of background facts to the execution of a contract. The Court can consider, "... absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man."

Turning in particular to the impact on common issues analysis, plaintiff counsel's strategy is often to identify common wording in a contract that appears across the class and class period. They argue that class-wide interpretation across the class satisfies one of the policy goals of judicial economy. *Sattva* gives strong support for the proposition that although wording can be similar across a class, the common interpretation of that wording is not possible if the surrounding circumstances in which those words would be understood by possible class members are different across the class and the class period.

At a minimum this should require a common issues trial court to recognize the diversity in the class and the very different evidence that may apply to contract interpretation for different class members. If there is sufficient diversity in the class, the court should consider if the interpretation question is sufficiently 'common' or if it is so individual that the interpretation issue should not be certified as a common issue.

The factual matrix analysis has been considered in several recent class action cases and is under reserve in another. In one case, the court gave summary judgment to defendants when it interpreted the wording against the surrounding circumstances: *Sankar v. Bell Mobility Inc. et al*, 2015 ONSC 632. In another, the court refused to certify a common issue to construe the scope of a collection of releases executed in favour of the class defendant because of diversity in surrounding circumstances: *Barwin v. IKO Industries Ltd. et al.* 2015 ONSC 5994. By contrast, Justice Perell stated two weeks ago that he disagreed with the defence argument that Sattva changes the law about the certification of questions about breach of express terms of a standard form contract: *Fehr v Sun Life*, 2015 ONSC 6931.

This will be a hot issue for 2016. Development of this evidence of diversity on certification motions is very beneficial.

In a future article we will describe how the Sattva analysis may be applied in consumer protection cases to encourage the courts to look at the totality of facts surrounding a consumer transaction including the surrounding circumstances.

Evidence of diversity in surrounding circumstances will be a hot issue for 2016

In a recent decision, the court determined that in certain cases of contract interpretation it may consider "**absolutely anything which would have affected the way in which the language of a document would have been understood by a reasonable man**"...

AUTHORS

Tim Buckley
Toronto | 416.367.6169
tbuckley@blg.com

Maureen Doherty
Toronto | 416.367.6183
mdoherty@blg.com

Saying Goodbye to Class Actions – and Hello to Doing Business Like We Used To!

As the Ontario Law Reform Commission continues its review of the state of class actions in Ontario with a view to identifying what is working and what is not, litigants may be voting with their feet in increasing numbers as they return to conventional ways of litigating "mass actions". In some cases, this means that actions which might previously have been initiated as class proceedings are simply being pursued now as a group of claims on behalf of a group of plaintiffs (under the management of the same plaintiffs' counsel). In other cases, it means starting out as a proposed class proceeding but then discontinuing the proceeding (with court approval) in favour of an alternative scheme for adjudication and/or settlement. Either way, there is emerging support from courts for a return to the case management of a group of claims and the use of test cases where needed to provide guidance in the litigation as it unfolds.

There is increasing recognition that in claims where individual issues really do drive the analysis, the delay and cost which can be associated with the procedural aspects of a class action may not produce an advantage to any party. Regardless of what the OLRC produces by way of class action reform, alternative mechanisms for mass action dispute resolution are slowly but steadily finding their way into the toolkits of the courts and litigants who have identified through experience the limits of class action procedure.

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AUTHOR

Cheryl Woodin
Toronto | 416.367.6270
cwoodin@blg.com

Privacy Class Actions – A Year in Review

2015 has been a very busy year for privacy breach class action lawyers. Several recent high profile cases feature loss or theft of personal data, such as sensitive banking information, love lives, and personal health information, via misplaced portable devices and calculated cyber-attacks, creating significant new privacy and security exposure for Canadian business. There has been one positive note – the Québec Court of Appeal held that lost personal data, while concerning, does not alone cause compensable injury: *Sofio v. Investment Industry Regulatory Organization of Canada (IIROC),* 2015 QCCA 1820. Ordinary life annoyances such as fear, stress, inconvenience and loss of time due to monitoring of monthly account statements do not constitute "compensable damages" – at least in Québec. The recent Court of Appeal decision in *Sofio v IIROC* will make it more difficult following a personal data loss for privacy class actions to be authorized in Québec.

Cases across Canada have found potentially compensable injury, at least for purposes of certifying a privacy breach class action, if the loss or theft entailed actual or attempted usurpation of identity or fraud. Most worryingly, a number of Canadian common law courts adopted and extended *Jones v Tsige*, a case where a banking employee's unauthorized intrusion on an individual's private matters through inappropriate access of banking records, led to judicial creation of a brand new common law foundation for privacy breach class actions – the intentional tort of "intrusion upon seclusion". It is important to bear in mind that this new tort has not been considered, as to existence or constituent elements, by any appellate court except in Ontario nor by the Supreme Court of Canada. Despite that, a series of cases is reviewing complaints of inappropriate employee snooping on personal information, made conveniently available through electronic records. While it has been argued that the new common law tort and comprehensive statutory remedies should not reasonably coexist, for instance in the case of a snooping hospital employee where an Ontario statute already provides a remedy, these arguments to date have failed, paving the way for a new realm of privacy class action litigation absent harm. British Columbia courts have repeatedly rejected the new *Jones v Tsige* tort of breach of privacy in favour of the statutory claim, but the BC Court of Appeal very recently did allow a vicarious liability class claim to proceed against an employer for an employee's breach of the *BC Privacy Act*. These cases raise critical questions about whether employers will be ultimately held liable for illegal employee security and privacy breaches.

Novel privacy class actions are increasing the cost of Canadian business, now potentially exposed to aggregate damages assessment through class action "common issues" trials bereft of evidence anyone suffered damage using traditional tests – apart usually from self-serving representative plaintiff evidence of being upset or annoyed by what happened.

Recent privacy cases raise many **complex issues concerning the duty to properly log, audit and disclose unauthorised access and use of private information** by employees.

Also, important questions have been raised over the extent to which employers are to be held vicariously liable for the privacy related illegal acts of their employees.

AUTHORS

Barry Glaspell
Toronto | 416.367.6104
bglaspell@blg.com

Anne Merminod
Montréal | 514.954.2529
amerminod@blg.com

The Class Action Group at Borden Ladner Gervais LLP has defended more class actions than any other Canadian law firm. We have argued some of the leading cases in this developing area of law and have a strong record of success in preliminary challenges and opposing certification of class proceedings. Our lawyers have vast experience in negotiating and implementing complex and creative settlements, including securing court approvals as required across the country.

To achieve the best results for you, we identify the key strategic issues at the earliest stages. We work collaboratively with your internal team to navigate all aspects of defending a class action, from preliminary motions, to the defence of certification, and beyond.

To learn more about how we can help you, contact:

National Leader
Tim Buckley | 416.367.6169 | tbuckley@blg.com

Regional Leaders
Calgary | Karen Salmon | 403.232.9476 | ksalmon@blg.com
Montréal | Marie Audren | 514.954.3126 | maudren@blg.com
Montréal | Robert Charbonneau | 514.954.2518 | rcharbonneau@blg.com
Ottawa | John Melia | 613.787.3517 | jmelia@blg.com
Toronto | Barry Glaspell | 416.367.6104 | bglaspell@blg.com
Toronto | Cheryl Woodin | 416.367.6270 | cwoodin@blg.com
Vancouver | Brad Dixon | 604.640.4111 | bdixon@blg.com

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Calgary
Centennial Place, East Tower
1900, 520 – 3rd Ave S W, Calgary, AB, Canada T2P 0R3
T 403.232.9500 | F 403.266.1395

Montréal
1000 De La Gauchetière St W, Suite 900
Montréal, QC, Canada H3B 5H4
T 514.879.1212 | F 514.954.1905

Ottawa
World Exchange Plaza, 100 Queen St, Suite 1300
Ottawa, ON, Canada K1P 1J9
T 613.237.5160 | F 613.230.8842 (Legal)
F 613.787.3558 (IP) | ipinfo@blg.com (IP)

Toronto
Scotia Plaza, 40 King St W, Toronto, ON, Canada M5H 3Y4
T 416.367.6000 | F 416.367.6749

Vancouver
1200 Waterfront Centre, 200 Burrard St, P.O. Box 48600
Vancouver, BC, Canada V7X 1T2
T 604.687.5744 | F 604.687.1415