



Bennett Jones

# Class Actions: Looking Forward 2021



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# Introduction

Mike Eizenga, Cheryl Woodin, Ranjan Agarwal, and Joseph Blinick

Instability and uncertainty were the two constants in 2020. The COVID-19 pandemic uprooted social norms and challenged businesses. The long range impact of that instability and uncertainty remains to be seen. For different reasons, instability and uncertainty governed class actions in Canada in 2020 as well. A series of landmark decisions and legislative amendments impacted key substantive and procedural areas of the law, moving in both plaintiff- and defendant-friendly directions. While the long range impact of these developments remains to be seen, the objective is certain: to clarify, simplify and streamline not only what the law is but how it is to be applied through the procedural vehicle of the class action.

The Class Action Practice Group at Bennett Jones continued its tradition of involvement in the year's most significant cases, focusing on practical solutions where they are possible and seeking clarity from the courts where it is needed. As a group, we continue to work to earn our reputation for breadth and depth in the class actions practice and the ability to deliver critical victories for our clients in the nation's highest courts.

We review notable developments in Canadian class actions in 2020, and provide an outlook to critical areas of importance in 2021. We begin by focusing on the effects that COVID-19 has directly had on class action litigation. Since the pandemic began in the early months of 2020, more than 30 COVID-related class actions have been started in Canada, a number likely to grow as we move throughout 2021. We then turn to the important decision of the

Supreme Court of Canada in *Atlantic Lottery Corp. v Babstock*, which ended the 16-year-long debate on the use of waiver of tort as an independent cause of action. Next, we survey the recent amendments to Ontario's *Class Proceedings Act, 1992*, which have changed the certification test in Ontario and made other changes that aim to streamline the class action process in Ontario.

We also discuss the much anticipated decisions of the Supreme Court in *Uber Technologies Inc. v Heller*, which has reformulated the approach taken to mandatory arbitrations clauses, and *1688782 Ontario Inc. v Maple Leaf Foods Inc.*, which clarified the approach to the duty of care analysis in negligence claims for "pure economic loss". We then turn our attention to the precedent setting decision of the Federal Court of Appeal in *Laliberte v Day*, the first contested carriage motion in the Federal Court. Finally, we end with a look at other notable developments in class actions provided by appellate courts in 2020, including key developments relating to class action settlements.

As we look forward to 2021, we remain committed to navigating the intersection of the law that impacts our clients and the way that it is delivered in and out of the courtroom in the context of class actions.



# A Look at COVID-19 Class Actions in Canada

Tim Heneghan

The COVID-19 pandemic upended the class actions landscape in 2020, with over 30 COVID-19 related class actions launched in Canada since the pandemic took hold in March. While that number pales in comparison to the hundreds of COVID-related claims launched in the United States, it remains imperative for Canadian businesses and foreign businesses operating in Canada to be aware of potential areas of risk that may arise because of the global pandemic.

The main types of claims that have been started in Canada so far generally fall into one of four categories:

- **Long-Term Care Home Negligence:** Negligence claims have been launched against the owners and operators of long-term care homes which were the epicenters of the pandemic in the spring of 2020. The claims—brought by residents or their estates—broadly allege that the facilities failed to adequately address the threat of the virus in the pandemic’s early days. Plaintiffs allege that insufficient protective equipment, staffing shortages, and inadequate safety protocols have allowed the virus to spread rapidly among residents, causing death in the worst cases. These claims have been started against long-term care homes in Alberta, Quebec, and Ontario. In some cases, multiple claims have been brought against the same set of defendants. Carriage fights—in which Class Counsel square off to determine who can best represent the class—will ensue for cases where the facts and defendants overlap.
- **Breach of Contract/Inadequate Refunds:** With travel and live events on hiatus for months, frustrated consumers turned to the courts after requests for cash refunds were met with outright denials or offers of redeemable credits. Airlines, ticket agencies, and sports teams, among others, are facing claims for their decisions to opt against granting full cash refunds. In some cases, the claims have prompted companies to reconsider their initial position. While many airlines—including Air Canada, Westjet, and Swoop—at first offered redeemable flight credits, some have relented and offered full cash refunds to demanding consumers. In Quebec, organizers of the Mont-Tremblant Iron Man triathlon face a claim after they refused to refund entry fees for thousands of competitors.
- **Denial of Business Interruption Insurance:** Government-ordered closures of all “non-essential” businesses prompted some to seek coverage from their insurers under “business interruption” policies. While a preponderance of individual actions have been started against insurers, so too have broader claims framed as class actions. Insurers are defending these actions, relying on, among other things, provisions in the policies requiring that the interruption be caused by “physical” damage to the business as well as exclusion clauses that specifically permit denial of coverage in relation to viruses and government-mandated shutdowns.

- **Actions Against Government:** The pace of claims against all levels of the Canadian government has been slow to date, despite a torrent of such claims in the United States (often purporting overreach related to public health directives). That said, inmates at some of Canada's penitentiaries have brought actions against the government alleging unsanitary living conditions and overcrowding, which heightened the risk of exposure to COVID-19.

As we move ahead in 2021, we see a continued risk of class action claims related to the COVID-19 pandemic arising. That said, new legislative measures may alter the potential scope of liability for certain claims related directly to the virus. For instance, Bill 218, the *Supporting Ontario's Recovery Act*, came into force in Ontario in November 2020. It provides broad liability protection from COVID-19 related incidents, going back to March 17, 2020. The new law states that a person (defined as including individuals, corporations, and even the government) will not be held liable if an act or omission, directly or indirectly, leads to another person being or

potentially being exposed to COVID-19, so long as they have made a "good faith" effort to act in adherence to public health guidance, and have not acted in a grossly negligent manner. The law defines a "good faith effort" as being an honest effort, no matter if the effort is reasonable.

While this new law will offer broad protection against liability much of the time, it does not remove potential liability in claims brought forward by employees or workers who were exposed to COVID-19 in the workplace.

It will be of great interest to see how the Ontario courts interpret this "good faith effort" standard in determining liability in COVID-19 related claims. While COVID claims are sure to continue in 2021, we predict that the new legislative trends seen in Ontario, as well as in other provinces such as British Columbia where similar legislation has recently been enacted, will provide added security for businesses seeking to continue their operations in accordance with public health guidelines, without the fear of undue exposure to legal liability.



# The Demise of Waiver of Tort as a Cause of Action

Nina Butz and Maya Bretgoltz

In July 2020, the Supreme Court of Canada released its highly anticipated decision in *Atlantic Lottery Corporation Inc. v Babstock*—Bennett Jones acted for ALC. The decision put to rest a 16-year-long debate about “waiver of tort”—a doctrine that class action plaintiffs have consistently alleged to be an independent cause of action that compels defendants to disgorge all profits earned as a result of a “wrongdoing”. Although the Supreme Court was split 5-4, it unanimously agreed that waiver of tort is not an independent cause of action under Canadian law.

In short, pleading waiver of tort as an independent cause of action allowed plaintiffs to seek a remedy quantified based only on a defendant’s gain, without proof of their own loss or injury. Before *Babstock*, waiver of tort claims were consistently certified with no determination on whether the alleged cause of action exists. Because the law surrounding the doctrine was unsettled, certification judges were reluctant to find that it was “plain and obvious” that a waiver of tort claim would fail. In fact, in 2013, the Supreme Court of Canada in *Pro-Sys Consultants Ltd. v Microsoft Corp.*, refused to strike a waiver of tort claim because it found that a pleadings motion was not the proper place to resolve the uncertainties surrounding the doctrine.

In 2018, the Newfoundland Court of Appeal strayed from the holding in *Pro-Sys* and the many certification appeals before it, recognizing waiver of

tort as an independent cause of action. This decision effectively opened the door for the Supreme Court of Canada to provide a conclusive determination on the issue.

The plaintiffs in *Babstock* sought to certify a class action against ALC based on allegations that their video lottery terminals were inherently dangerous and deceptive. In fact, the plaintiffs alleged that the VLTs were so deceptive that they contravened the *Criminal Code*’s prohibition of games like “three-card monte”. The plaintiffs relied on three causes of action: waiver of tort, breach of contract, and unjust enrichment, and sought disgorgement of the profits earned by ALC from operating the video lottery terminals. The trial court certified the plaintiffs’ claims, which the Court of Appeal largely affirmed.

The majority of the Supreme Court of Canada allowed the further appeal. It found that none of the plaintiffs’ three claims had a reasonable chance of success. The only point of disagreement between the majority and dissenting opinions was whether breach of contract constituted a reasonable cause of action in this case.

The majority held that the legal climate surrounding waiver of tort had developed since *Pro-Sys*, concluding that a claim should not survive an application to strike just because it is novel. It found that, where possible, legal disputes should be resolved promptly, rather than referred to a full trial.



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The Supreme Court unanimously held that waiver of tort is not a valid cause of action and should not be used to describe what is in effect, disgorgement. It clarified that disgorgement is a remedy that is only available upon a plaintiff proving all elements of a recognized cause of action. Further, granting disgorgement for negligence—without proof of damages—would lead to a remedy “arising out of legal nothingness”, and would be a radical shift in the law. The Court noted that the negligent conduct of a defendant is wrongful only when it damages the plaintiff. Without proof of damages, any one plaintiff would not be entitled to the full gain realized by a defendant.

The Supreme Court did not settle on whether disgorgement could be sought for the completed tort of negligence. It found that the plaintiffs’ claim of negligence was inadequate as they did not plead causation, and disclaimed any intention of doing so. The Court acknowledged that this matter may need to be decided in the future in an appropriate case.

*Babstock* will have a momentous effect on future class action litigation in Canada. The decision takes away plaintiffs’ ability to rely on waiver of tort as a means to certify actions that would otherwise not be certifiable because there is no proof of the plaintiff’s loss. It also inspires a cultural shift in early determinations in the certification process. As a result of this decision, we predict that certification judges will be more inclined to resolve complex legal disputes at the pleading stage, allowing for quicker resolutions of class proceedings across the country.



# Ontario's Revamped Class Proceedings Landscape to Begin Taking Shape

Katrina Crocker, Cheryl Woodin, and Ranjan Agarwal

For the first time in 25 years, substantive amendments have been made to Ontario's *Class Proceedings Act, 1992* (CPA). These changes apply to any class action started on or after October 1, 2020.

While the new amendments to the CPA aim to improve procedural efficiency and streamline the class action process, the major change is the introduction of a stricter certification test for class actions in Ontario. Previously, certification under the CPA required showing that a class action be the preferable procedure to resolve the common issues between members of the class. The amended CPA now requires that the proposed class action be a superior way to determine the rights or entitlement of class members, and that questions of fact or law common to the class members predominate over the individual issues.

These new requirements are similar to the requirements for certification of class actions in the United States. If interpreted as courts in the United States have, it will impact the type of cases certified as class actions in Ontario—particularly those which involve many individual issues, such as product liability and personal injury cases. As a result, other provinces like British Columbia may become increasingly attractive for plaintiffs and Class Counsel. British Columbia has already been an attractive forum for class action plaintiffs because of its facilitation of national classes and its no-costs regime, two features now joined by the lack of a predominance requirement.

For those class actions that do continue in Ontario, parties are likely to see more pre-certification challenges. Courts must now hear any dispositive motions—those seeking to put an end to legal proceedings altogether or to narrow the issues to be determined—prior to or simultaneously with a certification motion. This overhauls the traditional practice of hearing certification motions first, and will allow for summary judgment motions and strike motions, to take place earlier in the certification process. Parties will also have the right to bring a stay motion prior to certification where there is an overlapping class action in another province.

The new legislation brings much needed clarity to the rules surrounding the suspension of limitation periods. Besides the existing instances under the CPA where the limitation period of a cause of action asserted in a class proceeding resumes, the amendment adds that the limitation period will also resume where: (a) the court refuses to certify the proceeding as a class proceeding; (b) the court makes an order that the cause of action shall not be asserted in the proceeding; or (c) the court makes an order that has the effect of excluding the member from the proceeding. Thus, where a class action is not certified, plaintiffs will need to begin their individual actions in quick-fashion or else risk that the limitation period will expire, thereby barring their claim.

This provision of the legislation was prompted by a key decision of the Ontario Court of Appeal in *RG v The Hospital for Sick Children*. Ms. Green was representative plaintiff in a putative class action

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against SickKids for negligently operating the Motherisk Drug Testing Laboratory and delivering false positive results. After certification was denied and her appeals dismissed, the plaintiff moved for an order to continue the suspension of the putative class members' limitation periods, to continue the proceeding as a multi-plaintiff action under section 7 of the CPA, and for leave to join 200 other claimants to her claim.

The motion judge held that if a motion to certify a class proceeding is dismissed and the limitation period does not resume running under section 28(1) of the CPA, as occurred here, the suspension of the limitation periods remains in effect until the defendant brings a motion.

SickKids appealed the motion judge's interpretation of section 28. The Ontario Court of Appeal dismissed the appeal. It found that section 28(1) sets out an exhaustive list of circumstances governing limitation periods in class proceedings. As the denial of certification was not specifically listed as one of those circumstances, the limitation period was still suspended. The Court accepted this result was not ideal, but that judicial interpretation could not overcome clear legislative language. SickKids has sought leave to appeal the Court of Appeal's decision to the Supreme Court of Canada.

Between the disposition of the appeal (June 2020) and the filing of the leave to appeal application (November 2020), the various amendments to the CPA came into force, which added the refusal to certify a class claim as an instance in which a limitation period will resume. While generally not applying to proceedings commenced before October 1, 2020, it will be interesting to see whether the Supreme Court exercises the court's plenary jurisdiction under section 12 of the CPA to manage class proceedings and apply the new provision in the

case. In any instance, the amendments to section 28 of the CPA will render cases such as this one a thing of the past, as it is now clear that the dismissal of a certification motion will cause limitation periods to resume.

In addition, parties may expect to see an increased pace in the prosecution of Ontario class actions. Any proposed class action will now be automatically dismissed for delay unless, within one year from issuing the claim, the plaintiff has filed a "final and complete" motion record for certification. Dismissal can be avoided only if the parties agree upon a timetable or one is established by the court. Notably, this provision also applies to actions already existing prior to October 1, 2020.

Finally, on appeals from a certification order, plaintiffs can no longer materially amend their notice of motion, pleadings or notice of application, without leave of the court, and can only do so in exceptional or unforeseen circumstances. This will place pressure on plaintiffs to ensure that they deliver complete and comprehensive pleadings at the earliest stages of the class action process.

While these amendments are welcome news for companies with class action exposure, judicial interpretation will help determine their impact in the years to come. In the short term, class actions will be subject to heightened scrutiny as the amendments take effect, and the Ontario courts seek to interpret and apply them. Going forward, we expect to see strategic forum selections being made for newly proposed class actions, more pre-certification motions for those class proceedings that are started in Ontario, and a moderately quicker pace to the certification process in Ontario as a whole.



# Mandatory Arbitration Clauses Are No Longer Presumptively Enforceable

Rabita Sharfuddin and Charlotte Harman

Last year, we reported on how Canadian courts will uphold mandatory arbitration clauses in some cases, depending on how the plaintiffs are classified.

In 2019, the Supreme Court of Canada held in *TELUS Communications Inc. v Wellman* that a mandatory arbitration clause found in telephone service contracts prevented a proposed class of business customers from advancing a class action proceeding against TELUS, but the same clause did not preclude a class action of consumers from bringing forward their claim. Mandatory arbitration clauses were only generally unenforceable against consumers under Ontario's *Consumer Protection Act, 2002*, and that other types of parties to an agreement, such as business customers, are held to the strict terms of a mandatory arbitration clause.

In 2020, the Supreme Court of Canada released its decision in *Uber Technologies Inc. v Heller* (Bennett Jones acted for an intervener in the appeal), which considered whether Uber drivers could bring a class action despite the existence of a mandatory arbitration clause in Uber's standard form services agreement.

Uber argued for a stay of the proposed class in favour of arbitration, because of the existence of the mandatory arbitration clause in its services agreement. The clause required Uber drivers to pay a large up-front administrative and legal filing fee of US\$14,500, and to travel to the Netherlands to arbitrate their claims. The arbitration fees were

disproportionate to Uber drivers' average gross annual income of around C\$25,000.

The majority of the Supreme Court held that the mandatory arbitration clause was subject to Ontario's *Arbitration Act, 1991*, which mandates that actions in court should not be permitted to proceed if the parties had agreed to an arbitration clause, unless an exception to this general rule is found, such as the arbitration agreement being deemed invalid.

Before considering the invalidity of the arbitration clause, the Supreme Court had to determine whether it or the arbitral tribunal had jurisdiction to refuse to order the stay in favour of arbitration. The key consideration on this issue was whether the mandatory arbitration clause provided *bona fide* access to recourse, meaning that claimants could actually prosecute their claims. The Supreme Court found that the prohibitive filing fees, and the requirement that the arbitration be held in the Netherlands, denied Uber drivers a practical recourse. The onerous terms of the arbitration clause rendered arbitration "realistically unattainable" for Uber drivers, thus leading to concerns that allowing the stay would lead to the matter never being addressed and, ultimately, resolved.

The Supreme Court created a new ground for courts to refuse a stay of proceedings in favour of arbitration, where there are real concerns of access to justice. Here, the Uber drivers were likely unable

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to seek recourse due to the onerous and unfair terms of the arbitration clause in their standard form services agreement. Thus, the Supreme Court decided that they could hear the arguments about the potential invalidity of the arbitration clause.

The majority of the Supreme Court found that the arbitration clause was invalid under the doctrine of unconscionability as there was: (a) proof of unequal bargaining power between the parties; and (b) proof of an improvident bargain (i.e., gross unfairness). The Supreme Court held that standard form contracts are unconscionable if they create an “unfair and overwhelming benefit” in favour of the drafting party. As the Supreme Court found the arbitration clause to be invalid due to unconscionability, the class is now able to pursue their claims as a class action.

The implications of *Heller* will likely be far-reaching. Before *Heller*, mandatory arbitration clauses were presumptively enforceable, even in the class actions context. After *Heller*, individuals contracting with businesses will be guaranteed access to dispute resolution through the courts if the circumstances of their agreements make arbitration practically impossible. Accordingly, companies will have to consider access to justice issues when drafting alternative dispute resolution clauses in standard form contracts to ensure the clause provides a realistic and effective opportunity for dispute resolution. Existing arbitration agreements, particularly those found in standard form contracts, will also need to be reviewed to ensure they are enforceable and not unconscionable.



# A Clarified Approach to Pure Economic Loss Claims

Doug Fenton, Ranjan Agarwal, Gannon Beaulne, and Keely Cameron

In November 2020, the Supreme Court of Canada released its decision in *1688782 Ontario Inc. v Maple Leaf Foods Inc.* This is an important decision clarifying the analytical approach to the duty of care analysis in negligence claims for “pure economic loss”, which encompasses claims for lost profits, lost sales, reputational harm, and other economic injuries not accompanied by harm to person or property. The Court’s decision affirms that the concept of legal “proximity” is the core analytical tool to decide whether there is a duty of care in negligence extending to pure economic loss and, if so, the scope of the duty.

*Maple Leaf* was a class action brought by franchisees of Mr. Sub after a potential listeria outbreak at a Maple Leaf manufacturing plant led to a voluntary recall of certain meat products, including meat products used at Mr. Sub restaurants.

Under the contractual agreements in place, Mr. Sub franchisees did not buy meat products directly from Maple Leaf. Rather, the national Mr. Sub organization (as franchisor of Mr. Sub restaurants) and Maple Leaf had an exclusive supply agreement, under which Maple Leaf was the exclusive supplier of many core Mr. Sub menu items. Separate franchise agreements between the national Mr. Sub organization and Mr. Sub franchisees required the franchisees to exclusively buy Maple Leaf meat products from the distributors, including the products subject to the recall.

There was no evidence that any Mr. Sub customers had become sick after eating contaminated meat, or that any meat supplied to Mr. Sub franchisees

was contaminated. But a press release issued by the Canadian Food Inspection Agency in connection with the voluntary recall, identified Mr. Sub as one of several restaurants where customers may have eaten contaminated meat. The negative publicity surrounding the voluntary recall allegedly affected sales at Mr. Sub restaurants. On this basis, Mr. Sub franchisees started a class action against Maple Leaf, seeking to recover economic losses flowing from the recall.

In a 5-4 decision, the Supreme Court of Canada dismissed the franchisees’ claim, holding that Maple Leaf owed no duty of care in negligence to Mr. Sub franchisees to protect them from the pure economic losses that the voluntary recall of meat products had allegedly caused. While Maple Leaf owed a duty of care to Mr. Sub franchisees’ *customers* to supply a product fit for human consumption, this duty was directed to protecting the customers’ health and safety, and did *not* extend to protecting the franchisees’ economic interests.

In reaching this conclusion, the Supreme Court of Canada affirmed that the concept of legal “proximity” is the controlling analytical tool in determining the existence and scope of a duty in care in negligence extending to pure economic loss. To establish a duty of care, the plaintiff must show not only that the economic loss was reasonably foreseeable, but also that the parties stood in a relationship of sufficient proximity to one another for the economic loss.

The Supreme Court’s focus on proximity builds on its prior decision in *Livent v Deloitte & Touche*, when the Court held that the existence and scope of any duty

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of care in negligence is defined by the nature of the defendant's undertaking, and scope of the plaintiff's reasonable reliance. For a particular type of loss to be recoverable, that loss must follow the normative reasons for imposing a duty in the first place. The contractual arrangements in place between the parties will be of central importance in determining the existence and scope of any corresponding duty of care in negligence.

In *Maple Leaf*, the majority focused on the contractual nexus between Maple Leaf and the national Mr. Sub organization, and between Mr. Sub and its franchisees. The majority held that commercial parties' abilities to structure their affairs by contract helps identify the "expectations [and] other interests" that may ground proximity. If the parties could have contracted for protections against a particular form of pure economic loss, but did not, that goes against imposing a duty of care. Similarly, if the parties *do* order their affairs by contract, how they agreed to allocate risk informs the duty of care analysis. Courts should be slow to impose duties that would fundamentally rearrange the contractual allocation of risk.

The majority found that the contracts in place among Maple Leaf, Mr. Sub and franchisees did not disclose a relationship of sufficient proximity to justify imposing a duty of care on Maple Leaf to protect franchisees from the alleged economic losses. The alleged duty would circumvent the parties' careful contractual arrangements which included no such

duty. The franchisees were "vulnerable" to losses on Maple Leaf recalling meat products, but that vulnerability resulted from the parties' contractual arrangements. It was not for the Court to reorder the allocation of risks.

The Supreme Court's decision in *Maple Leaf* is likely to have broad implications for Canadian manufacturers, franchisees, retailers, and other commercial actors. Perhaps most critically, *Maple Leaf* affirms that the bargained provisions of a contract between the parties plays a central role in the proximity analysis and, ultimately, in determining whether a duty of care exists in circumstances involving pure economic loss. The court may not impose a duty of care when the parties could have bargained for contractual protections but did not.

The decision will also have a critical effect on class actions in Canada. By clearly outlining the proximity analysis to be undertaken in determining a duty of care in pure economic loss claims, the Supreme Court has provided a new tool for analyzing these types of claims, including at an early stage. Judges will now have a heightened ability to adjudicate such claims at the certification stage, preventing the certification of class proceedings which assert pure economic loss against a third-party with a lack of privity of contract, where such extended protection was not specifically bargained for.



# The First Contested Carriage Fight in Federal Court

Adam Zur

Carriage fights occur when overlapping class actions are commenced about the same alleged wrongdoing. Often, a stay motion is then brought to determine which representative plaintiff and class counsel should have carriage of the action. Carriage fights are common in provincial courts but, in 2020, the Federal Court of Appeal decided the first carriage fight in that court.

Two sets of plaintiffs started overlapping class actions on behalf of Métis and Non-Status Indians who were affected by the “Sixties Scoop” (the practice of separating Indigenous children from their families and communities, and placing them in foster homes for adoption). The plaintiffs both moved for carriage of the class action.

Having little jurisprudence to rely on, the Federal Court adopted the multi-factor test established by the Ontario courts for determining carriage, which includes a non-exhaustive list of factors such as the quality of the proposed representative plaintiff, the quality of proposed Class Counsel, the preparation and readiness of the action, the class definition, and the theory of the case.

The Federal Court also relied on seminal Ontario case law to adopt the principle that “the best interests of the class are paramount”, and that a

court should have flexibility in determining what the best interests of the class are in the circumstances. The Federal Court granted carriage to the representative plaintiff to Brian Day, stating that he was a textbook complainant given the severity of the damages he suffered, and that Class Counsel for the *Day* action had a greater level of expertise in a key area of the litigation (Bennett Jones acted as counsel for Mr. Day). The representative plaintiffs in the overlapping *Laliberte* action appealed.

In *Laliberte v Day*, the Federal Court of Appeal affirmed the lower court’s decision to grant carriage to Day. The Federal Court of Appeal emphasized that the carriage factors are not ends in themselves, and that the factors are not “watertight compartments”. Carriage should not be decided on a “tick the boxes” approach, nor by tallying points awarded on a factor-by-factor basis. Carriage factors are a way to assist the court in the unique context of each case, to determine the best interests of the class.

Both Courts recognized that Mr. Day personified some of the worst consequences of the Sixties Scoop, and his circumstances made him an ideal representative to advance claims on behalf of the class. The Federal Court of Appeal also noted that Class Counsel in both proposed actions had extensive class action experience, specifically with



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experience in the Sixties Scoop and residential schools class actions, as well as experience acting for Métis individuals. But unlike Class Counsel in the *Laliberte* action, Class Counsel in the *Day* action also had experience acting for Non-Status Indians, who comprised a lot of the class. For these reasons, the *Day* action was given carriage of the matter because it was in the best interests of the class.

This case represents the first of its kind to be heard in the Federal Courts. It remains to be seen whether the Federal Courts will continue to adopt the factors established in the Ontario case law for determining carriage motions. Lawyers representing businesses in federally regulated undertakings, such as banks, airlines and railways, should know that this decision set a precedent for future carriage fights that take place in the Federal Courts.



# Other Notable Cases and Developments in 2020

Some of the content of this article originally appeared in a presentation by Mike Eizenga and Celeste Poltak at the LSO Civil Appeals Year in Review program on December 8, 2020.

## Clarity on the Enforcement of Settlements

In *3113736 Canada Ltd. v Cozy Corner Bedding Inc.*, the Ontario Court of Appeal provided an answer about whether a class member is bound by a class action release even if the party did not receive notice of the class action, the settlement which contained the release, or the right to opt-out. The Court held that while notice to class members must be adequate, the lack of actual notice to any particular class member does not prevent the class from being bound where sufficient steps have been taken to provide adequate notice.

This case involved a manufacturer and supplier of foam products, Valle Foam and their long-term customer, Cozy Corner Bedding. In 2010, Valle Foam was charged with price fixing and a class proceeding followed. Valle Foam settled the proceeding on terms that included no payment to class members, though they maintained their ability to advance their claims in subsequent insolvency proceedings. Right afterward, Valle Foam filed for insolvency protection under the *Companies' Creditors Arrangement Act* (CCAA).

While under CCAA protection, Valle Foam sued Cozy Corner for unpaid invoices, and Cozy Corner counterclaimed that its overpayments due to price fixing exceeded the amount of the invoices. Valle Foam moved for summary judgment on its claim for unpaid invoices. It also moved to dismiss the counterclaim on the basis of the release in

the class action. The motion judge rejected Cozy Corner's argument that it was not bound by the release because it had not received actual notice of the settlement or a right to opt out. Based on this finding, the motion judge granted summary judgment to Valle Foam and dismissed Cozy Corner's counterclaim.

On appeal, the Ontario Court of Appeal agreed that Cozy Corner was bound by the class action release notwithstanding that Cozy Corner did not receive notice of the settlement, but it overturned the motion judge's decision on the basis that the release itself did not bar a claim for equitable set off in the context of an insolvency proceeding. The Court of Appeal set aside the prior judgment, and directed the matter to proceed to trial.

Another important recent case in the class action settlement landscape is the 2019 decision of the Ontario Court of Appeal in *Bancroft-Snell v Visa Canada Corporation*. The Court affirmed the prior decision of the Court of Appeal in *Dabbs v Sun Life Assurance Company of Canada*, which held that class members hold no rights to appeal a settlement approval order. The Court dismissed the challenge to the law from *Dabbs*, stating that giving individual class members the right to appeal settlement approval orders would lead to uncertainty and inefficiency in the class action process.

These two important decisions signify the Court's desire for class action settlements to provide finality to legal proceedings. Ensuring that class action defendants have confidence that the settlements they reach will be enforceable, so long as adequate notice is provided, promotes the efficient use of resources and further encourages settlements to

take place, avoiding the costs and risks of protracted litigation. These two decisions will provide class action defendants, and their counsel, welcomed comfort in knowing that court-approved settlements will bring a complete end to their litigation exposure for released claims.

### A Clearer Route of Appeal on Motions to Stay Proceedings

In 2019, two groups started class actions against SNC-Lavalin Group regarding disclosures affecting the value of SNC's securities. One was based in Quebec, the other in Ontario. Both the Quebec plaintiff and SNC moved to stay the Ontario action, in favour of the Quebec proceeding, but their motions were dismissed. The motion judge held the Ontario action had not been established as an 'abuse of process'. Instead, the Court noted that the Quebec plaintiff and SNC could argue at the certification stage that the Ontario action should not proceed, on more complete record.

The Quebec plaintiff, believing the dismissal to be a final order, appealed the decision to the Ontario Court of Appeal, while also filing a motion for leave to appeal the dismissal to the Divisional Court in case the dismissal was found to be an interlocutory order. SNC only moved for leave to appeal to the Divisional Court. The Ontario plaintiff argued that the dismissal was an interlocutory order, and moved to quash the Quebec plaintiff's appeal to the Court of Appeal.

In *Drywall Acoustic Lathing Insulation Local 675 Pension Fund v SNC-Lavalin Group Inc.*, the Court of Appeal found that the dismissal of the motion for a stay of the Ontario action was an interlocutory

order because it did not bring an end to the proceedings. The dismissal did not determine any substantive right to relief that either the Quebec or Ontario plaintiff had against SNC, or determine any substantive defence. The Court relied on its own 2012 decision, *Locking v Armtec Infrastructure*, in which it found that an order resulting from a carriage dispute was interlocutory because the plaintiff's action was not stayed for all purposes, but only as a class action. The Court therefore quashed the Quebec plaintiff's appeal.

This decision makes it clear that any appeal of a decision to dismiss a motion to stay an Ontario class proceeding in favour of a class proceeding in another province, must be made to the Divisional Court with leave, as it is an interlocutory order. This is an important reminder by the Court which will be especially relevant in the years to come given the new amendments to Ontario's *Class Proceedings Act, 1992*, which have imposed a tougher test for certification.



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## **Class Actions: Looking Forward 2021, January 2021**

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