Litigation trends

2020 report

Commentary and analysis on litigation trends that will influence business in the year ahead.

TORYS LLP

Executive summary

This year, the courts in Canada have been forced to innovate, not only in the administration of justice, but in addressing business disputes facing unprecedented commercial realities. Several themes coming out of 2020 case law developments will have implications for businesses going forward.

Recent U.S. litigation suggests that management oversight failures and inadequate disclosures are two dominant themes set to influence Canadian litigation. A rise in investor class actions in the U.S. in response to cybersecurity incidents means senior management will want to ensure their cybersecurity governance is effective in mitigating business vulnerabilities. Canadian boards will also want to examine their oversight of international operations given the U.S. trend of Caremark claims alleging significant failure of risk management of overseas operations.

The pandemic has drawn greater attention to the importance of company disclosures of risks as well as related opportunities. Securities issuers should think carefully about public disclosure of the impacts of the pandemic as the risk of class action litigation has heightened. Meanwhile class action law is changing, which will influence case strategy for litigators, including in securities and product liability matters. As Ontario becomes less class action friendly, other provinces may witness more filings.

Litigation strategists contemplating an appeal to the Supreme Court of Canada will want to consider if they have the right matrix of factors to win. And in the area of intellectual property, a new approach may be emerging to attack divisional patents.

Business claims are further setting the tone for 2021. In Québec, commercial litigation is facing its own unique challenges, while the SCC's recent Maple Leaf Foods ruling reminds businesses of the importance of comprehensive contracts to best guard against tort liability. Businesses should also keep close watch on the regulators: from their increased focus on competition among "digital giants" and in the telecom markets, to investor protection issues and new measures addressing the pandemic's impact, change is on the horizon.

For securities issuers, a trend of more stringent standards by courts and regulators around responsibility for losses is likely to continue.

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Directors' duties are in the spotlight amid the recent rise of U.S. Caremark claims.

Litigation trends in corporate Canada

By Andrew Gray and Lara Guest

2020 has been a year of change and challenges. In this uncertain environment, corporate litigation has remained active, with disputes being heard electronically and digitally, as opposed to in court rooms.

In this article, we outline trends that have affected or may affect Canadian corporate litigation, highlighting risks to corporations and their directors and officers.

1. Caremark claims—coming soon to Canada?

In the United States, there has recently been an increase in "Caremark" claims, with five such claims being allowed to proceed in Delaware in the past two years.[1] Caremark claims, which may be initiated after a significant failure of risk management, involve allegations that directors failed to make good faith efforts to oversee corporate operations, and therefore have breached their fiduciary duty of loyalty.

Most recently, in August 2020, the Delaware Court of Chancery held that a Caremark claim against the directors of AmerisourceBergen Corporation (ABC) could proceed.[2] One of ABC's subsidiaries illegally pooled excess drugs it received from a drug manufacturer and used this excess to fill syringes, which it then sold. The Delaware court concluded that directors of ABC faced a substantial likelihood of liability under the Caremark principle—i.e., that they had failed to make a good faith effort to oversee the corporation's operations and exercise oversight responsibilities.

"Canadian companies operating abroad may face new and increasing risk of liability in Canadian courts."

Canadian courts have not yet found a similarly articulated Caremark duty of corporate oversight. However, Canadian directors have fiduciary obligations, a duty of care, as well as statutory obligations to "manage" and "supervise" the business and affairs of a corporation.[3] It is not difficult to imagine that a Caremark claim could be brought against a Canadian director, in accordance with these pre-existing duties.

The recent proliferation of these claims in the United States indicates that we may see these types of claims in Canada soon. Further, the broad array of issues currently faced by directors (for example, pandemic-related stresses and increased social awareness of sexual harassment and discrimination) suggests that we may see Caremark-style claims in Canada connected to these new or heightened challenges.

2. Disclosure claims

Corporations and their directors and officers could also face litigation under securities legislation regarding the disclosure of risks, and the management of risks, among other things. The pandemic has highlighted disclosure claims regarding the disclosure of risks, but also disclosure of pandemic opportunities. The early stages of the COVID-19 pandemic caused large market declines for some issuers and has since continued to impact market volatility. We may therefore see

[1] This term is a reference to the case of *In re Caremark Intern. Inc. Derivative Litigation*, 698 A.2d 959 (Del. Ch. Sept. 25, 1996 (Caremark). See: *Marchand v Barnhill*, 212 A.3d 805 (Del. 2019); *In re Clovis Oncology, Inc. Derivative Litigation*, C.A. No. 2017-0222-JRS, 2019 WL 4850188 (Del. Ch. Oct. 1, 2019; *Inter-Marketing Group USA, Inc. v Armstrong*, C.A. No. 2017-0030-TMR, 2020 WL 756965 (Del. Ch. Jan. 31, 2020); *Hughes v. Hu*, C.A. No. 2019-0112-JTL, 2020 WL 1987029 (Del. Ch. Apr. 27, 2020); *Teamsters Local 443 Health Services & Insurance Plan v. Chou*, No. 2019-0816-SG (Del. Ch. Aug. 24, 2020).

[2] *Teamsters Local 443 Health Services & Insurance Plan v. Chou*, No. 2019-0816-SG (Del. Ch. Aug. 24, 2020).

[3] *Canada Business Corporations Act*, R.S.C., 1985, c. C-44, ss. 102(1), 122.

an increase in securities class action filings associated with the pandemic. Such cases have already been filed in the United States; for example:

- in *Norwegian Cruise Lines*, shareholders allege that the cruise ship company failed to disclose: (1) the potential impact of COVID-19 on its business operations and prospects; and (2) questionable sales tactics, motivated by the desire to hit sales quotas and designed to conceal the risks of COVID-19 to customers;[4]
- in *Inovio Pharmaceuticals, Inc., Sorrento Therapeutics and Chembio Diagnostics*, shareholders allege that management made misleading public statements indicating that the company had created a vaccine for the COVID-19 virus, leading to a jump in the company's stock price;[5] and
- in *Geo Group Inc.*, shareholders allege that the real estate investment trust made omissions and misstatements regarding the effectiveness of its COVID-19 response procedures after multiple outbreaks in halfway homes operated by Geo Group.[6]

3. Increasing risks for companies operating overseas

Canadian companies operating abroad may face new and increasing risk of liability in Canadian courts. These risks may be particularly relevant to companies in the resource and extraction industry, and they may arise within corporate groups.

Last year, the UK Supreme Court decision in *Vedanta Resources Plc and Konkola Copper Mines Plc v Lungowe* and *Others* determined that claims against a UK-domiciled parent company could be brought in the UK with respect to claims against its Zambian-domiciled subsidiary.[7] This ruling highlights the need for multinational companies to be aware of the possibility that non-UK claimants may be able to bring claims against them in English courts where they have an English parent company.

Similar issues are before Canadian courts for Canadian-owned subsidiaries of extraction companies.[8] While the decision in Vendanta is not binding on Canadian courts, it signals a heightened risk that claims may be brought seeking to hold Canadian parent companies liable for the actions of foreign subsidiaries.

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[4] See more on this case here. A similar lawsuit has been commenced against Carnival Cruiselines.

[5] See more on the Inovio case here.

[6] See more on the Geo Group case here.

[7] *Vedanta Resources Plc and Konkola Copper Mines Plc v Lungowe and Others*, [2019] UKSC 20.

[8] *See for example Caal Caal v. Hudbay Minerals Inc.*, 2020 ONSC 415.

4. Shareholder recourse for diminution of share value

In the 1843 decision of *Foss v. Harbottle*, the House of Lords established that only the corporation may pursue a claim for wrongs done to it.[9] This seminal decision has had a lasting impact on Canadian corporate law and has been repeatedly applied and adopted in Canadian jurisprudence. As a result, in general, shareholders in Canada are prohibited from bringing a personal action for harm caused to a corporation.

In *Tran v. Bloorston Farms Ltd.*,[10] the Ontario Court of Appeal confirmed an important exception to the *Foss v. Harbottle* rule. A shareholder can bring a claim for harm incurred by a corporation in circumstances where the shareholder has a unique cause of action (or the only cause of action) against the defendant. Following this guidance from the Ontario courts, it is possible that we may see an increase in claims being cast so as to fall under this exception.

Bloorston Farms involved a restaurant that was owned by a corporation. The restaurant operated in a space that was leased by Mr. Tran, the corporation's sole shareholder. Mr. Tran was the only listed tenant on the lease. When the landlord terminated the lease, the value of the corporation declined, because the restaurant was forced to close. Mr. Tran brought an action against the landlord, seeking recovery of the diminution of his shares in the corporation. The Ontario Court of Appeal concluded that Mr. Tran was not precluded from bringing an action against the landlord, even though the harm had been caused to the corporation (not him personally).

In reaching this conclusion, the Court reviewed the principles behind the rule in *Foss v. Harbottle*: 1) a corporation is a distinct legal entity, separate from its shareholders; and 2) the rule avoids a multiplicity of actions. The Court of Appeal acknowledged that there was some jurisprudential uncertainty about the scope of the rule in *Foss v. Harbottle*, and confirmed that there is an exception to this rule where: 1) a shareholder has his or her own distinct cause of action because of a wrong done to him or her;[11] or, 2) the corporation—despite suffering its own losses—has no cause of action itself, because no legal wrong was done to it.

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[9] *Foss v. Harbottle*, (1843), 67 ER 189 (UKHL).

[10] *Tran v. Bloorston Farms Ltd.*, 2020 ONCA 440.

[11] The Court of Appeal notes that such cases may or may not be actionable, depending on the circumstances of the case. See *Tran v. Bloorston Farms Ltd.*, 2020 ONCA 440 at paras. 35-39.

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Winning your case in the Supreme Court of Canada: the three key ingredients

By Torys' Appellate Practice: Andrew Bernstein, David Outerbridge, Yael Bienenstock and Jeremy Opolsky

Finishing second isn't always bad. In the Olympics, second place will get you a silver medal and a place on the podium for your troubles. Sure, a few meddlesome friends or annoying relatives might ask "why didn't you come in first?" But there's no doubt that silver is a major achievement, worthy of acclaim.

But in litigation, there are no medals for second place. If you come in first, you're a hero. If you come in second, you're a zero. And the winners and losers can sometimes flip flop as cases work their way through the courts. So, when it comes to Canada's highest court, how can you maximize your chance of avoiding second place?

While there's no hard-and-fast formula for winning cases at any level of court, we suggest that the recipe for maximizing your chance of success has three ingredients: the right case, the right team and the right argument.

The right case

Not every case is right for the Supreme Court of Canada. For the Supreme Court to grant leave to hear a case, it must be of sufficient public importance to justify the Court's intervention. That means that if a case turns primarily on questions of fact, is based on a point of law that has been settled for a long time or recently re-affirmed (so that there is no reason for the Court to weigh in), or has no real application beyond the immediate interests of the parties (so is not a matter of public importance), then it is unlikely to be of interest to the Supremes.

"A Supreme Court appeal is a 40 page factum and one hour to shape and change the law. There is a lot riding on every word."

But even if you have a case that the Court might be interested in (such that leave to appeal may be granted), that does not necessarily mean you should ask them to hear it. You also need to assess whether this is a case where the Supreme Court is likely to help. Some cases have interesting legal issues but unfavourable facts or are on the wrong side of public policy. While trial or intermediate appellate courts apply settled law to bad facts, that does not happen at the Supreme Court. Rather, the Court decides cases largely based on two factors: the justice of the case in front of it, and the policy implications of shaping the law in a particular direction. If you don't have either of these, do not seek leave, unless you are prepared for yet another silver medal—and a negative judicial precedent of potentially broader scope for your issue or industry.

The right team

Picking an effective Supreme Court team is critical. The job of a Supreme Court

advocate is unique in our profession. A Supreme Court appeal is a 40-page factum and one hour to shape and change the law. There is a lot riding on every word.

All litigators are storytellers, but they tell different stories in different forms. Trial lawyers are the author and the lead actor in the unfolding drama. They use language, rhetoric and strategy to present the story in a legally and morally compelling fashion, appealing to judge or jury's common sense and human experience. There's a reason why courtroom dramas all take place at trial: that's where the dramatic moments invariably take place.

Appellate lawyers are not authors or actors. They are critics. They look and listen to what happened on the stage, and then talk about what went right and (more often) what went wrong. On appeal, the facts are the props and the scenery, but the narrative is all about the law. Appellate lawyers therefore traffic in law and precedent. Their role is to remind the appellate court of what it needs to know in a way that makes their client's case on the law easy to understand. As a result, on appeal, written advocacy often takes the place of in-court dramatics.

"The best arguments at the Supreme Court start with policy, explain why existing precedents advance that policy, and how the law can be developed to advance that policy even further."

The role of the critic still looms large at the Supreme Court, but with an additional layer: at the Supreme Court the crux of the job is to be able to contextualize the story and its criticism into the bigger picture: where has the law been, where it is going, and how should it change. The Supreme Court is interested in the dispute before it today but is often more focused on where this case fits into the legal arc that will carry on for a decade or longer. The Court does not enforce precedent, it creates it. Supreme Court advocates focus on the impact of the current case on the future law, not ensuring that it is decided consistently with the past.

A Supreme Court team that understands to whom it is appealing, and how that body thinks and works, gives a party an enormous advantage. The ideal counsel has been to the Court before, understands the judges, knows how to synthesize past law and can help the Supreme Court refine and reshape it in a way that results in a win. Marrying these skills together, in sufficient brevity, is difficult, but it takes more:

Supreme Court wins are built on telling the Court a legal or policy story that it can get behind. Supreme Court counsel must be able to answer the tough questions and grapple with all of the policy implications of your argument—the good and the bad. Picking the right team for your Supreme Court case may mean the difference between silver and gold.

The right argument

Working out the right argument for the Supreme Court means identifying the legal and policy argument that is most likely to influence a majority of the Court in your case.

What does the right argument look like? The best arguments at the Supreme Court start with policy, explain why existing precedents advance that policy, and explain how the law can be developed to advance that policy even further, in a way that is compelling and helpful to your case. "Here's what this area of law is intended to accomplish, here's what it currently does and does not accomplish, and here's what it could accomplish if you decided for my client" is the general narrative.

But the devil is in the details: how can you show the Court why your policy goals are the right ones? How do you demonstrate the shortcomings (or benefits) of the current rule? In an ideal world you say, "look at my facts—they tell you that what we have right now is (or is not) working." But if you are not lucky enough to have those facts, then you need to start hypothesizing about the facts that would only be decided correctly under the rule that you are suggesting. Because if you don't, you can be sure that the judges will.

This is hard. Knowing the Court is critical. Placing your argument in the larger context of the Court's jurisprudence allows you to control the narrative, comfort the Court that the precedent it sets is moving the law in the right direction, and win the case.

Conclusion: winning isn't everything, it's the only thing

There is no greater satisfaction than watching everything come together before the Supremes on your case's final day in court. While there's no way to make sure that you come home with gold, the right case, the right team and the right argument is the formula to maximize your chances.

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What the recent history of securities litigation tells us about the future of the capital markets

By Gillian Dingle, John Fabello and Alexandra Shelley

The past twenty years of securities litigation shed light on what businesses involved in Canada's capital markets can expect in the future. Whether the cases involve issuers of securities or dealers and advisers in securities, experience demonstrates that trends in securities litigation are driven by the state of the economy, investment product innovation and related regulatory initiatives.

These key drivers tell us that, in looking to 2021 and beyond, Canadian securities market participants can expect to be subject to claims influenced by the COVID-19 related market turmoil and securities regulators' ongoing focus on enhanced disclosure and registrant conduct standards. Businesses that view current market conditions through the lens of past litigation and regulatory trends will be better equipped to calibrate their business practices accordingly—as well as respond to the next wave of securities litigation.

Securities litigation then: the dot-com bubble and other cautionary tales

The mid-2000s marked a period of growth in investment loss claims against securities dealers and advisors, and against securities issuers. With the benefit of hindsight, it is evident that the economy and regulatory change both played a key role in this growth.

The early 2000s marked the end of a sustained bull market that had lasted through much of the late 1990s. This time period was defined in part by the bursting of the dot-com bubble, the Bre-X mining stock fraud, and the flattening of equity markets as investors sustained losses associated with these events. Retail investors were introduced to hedge funds that were manufactured in response to market stagnation and investor skittishness. However, some of these hedge funds were marred by high-profile failures resulting in significant losses for investors.[1]

Court and regulatory response

In reaction to this chain of events, securities regulators took steps to enhance market participant standards. In the late 1990's, the Allen Committee Report had recommended statutory civil liability for breaches of continuous disclosure allegations and by 2005, regulators across the country had implemented a new framework for this liability. As well, around the turn of the century the TSX/OSC Mining Standards Task Force issued new increased standards (including governance and disclosure) for mining companies. In 2003, IIROC issued enhanced standards for securities analysts and the research reports they issued. All of these regulatory changes were aimed at addressing market misconduct by creating more stringent standards for securities issuers and dealers.

[1] See for example the regulatory proceedings relating to the collapse of Norshield-related retail hedge funds in which investors lost close to $159 million. *Re: Norshield Asset Management*, (2010) 33 O.S.C.B. 2139.

Throughout this period, securities dealers and advisers, as well as issuers and fund manufacturers, saw a spike in investment loss claims. These claims were focused on suitability—claims that investors had been advised to buy securities that were incompatible with their financial circumstances and investment objectives—in a broad range of stocks. The impetus for these claims was both the investment losses and the regulatory changes, which put a spotlight on the conduct of market participants who may have caused or contributed to those losses.

Securities litigation now and into the future: the long shadow of the Great Recession

Through the 2010s to present day, the state of the economy and regulatory priorities both continued to be key drivers of securities litigation. Although investors enjoyed market recovery in the early 2000s, the capital markets were again rocked, this time by the Great Recession of 2007-2009, caused in part by the sub-prime mortgage market collapse in the U.S. One related ill effect in Canada was the gutting of the asset-backed commercial paper market. The market response to the Great Recession has included increased investment product innovation, designed to deliver income to an increasingly significant number of retirees in a sustained low-interest environment.

Court and regulatory response

Significant investor loss eventually brought with it litigation and regulatory enforcement actions, focusing on claims of improper disclosure by issuers, including related to subprime housing exposure.[2] Faced with a new wave of investor complaints and claims, courts and regulators have taken steps to further enhance market participant standards and make it easier for investors to seek redress.

Whereas in the early days of class actions in Canada, courts tended not to certify proposed investor loss class actions because of the many individual issues that each investor would have to prove in order to succeed, there has been a discernable move toward courts no longer seeing those individual issues as an impediment to certification, in order to grant retail investors with access to a cost-effective way to pursue claims. Though there has been some backlash to this trend (see changes to the Ontario *Class Proceedings Act*[3]), it seems to have taken hold in most provinces.

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[2] There is always a time lag between the occurrence of significant market events and litigation that is based on investment losses associated with those events.

[3] Bill 161, the *Smarter and Stronger Justice Act*, 2020 makes significant changes to the preferable procedure test under the *Class Proceedings Act*. Further details about the changes to the *Class Proceedings Act* can be found here.

The enhanced regulatory standards of the 2000s and the response by securities dealers to adopt enhanced technology to assist with assessing suitability and risk-rating securities has helped to reduce the volume of suitability claims for "standard" or well-known asset classes. At the same time, regulators have turned their sights to addressing new areas of the investor-client relationship. For example, there are new regulations focused on the requirement to resolve conflicts in the best interests of investors and on reducing or eliminating certain kinds of compensation paid by investors.[4]

As in the 2000s, these market factors, investment product innovations and regulatory changes have caused and will likely continue to cause new investor loss litigation[5] and related regulatory enforcement action.[6] The market turmoil caused by the COVID-19 pandemic is likely to accentuate the pressure on at least some market participants to account for investor losses.

What lies ahead for capital markets participants

History has taught us that market turmoil and related investment loss leads to evolution in the approaches of courts and regulators to market participant standards and responsibility for losses. The trend of more stringent standards being imposed by the courts and regulators is clear and likely to continue.

Securities issuers should think carefully about public disclosure of the impacts of the pandemic as we expect the risk of class action litigation has heightened.[7] Dealers and advisers should reflect on advice for retail investors grappling with financial hardship and market volatility, as both IIROC and the OSC have identified investor protection and the impact of the pandemic as areas of current focus.[8]

Market participants need to be nimble in adopting to evolving standards. Doing so will help them to defend the litigation and regulatory action which inevitably follows market turmoil.

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[4] See for example, the Canadian Securities Administrators' "Client Focused Reforms" to National Instrument 31-103 and other CSA changes which will prohibit the payment of upfront sales commissions to dealers.

[5] For example, numerous class actions have been commenced against mutual fund manufacturers in relation to the payment of trailing commissions by investors (e.g. *Stenzler v. TD Asset Management*, 2020 ONSC 111). The Ontario Court of Appeal also recently overturned the refusal to certify a class action in relation to the collapse of a derivatives-based exchange-traded fund (*Wright v. Horizons ETFS Management (Canada) Inc.*, 2020 ONCA 337).

[6] Regulators are increasingly pursuing advisors who recommend unsuitable investments to investors (see, for example, Re Locke, 2020 IIROC 14) and focusing on conflicts of interest (see, for example, for *Re: O'Brien*, 2020 ABASC 160).

[7] More detailed insight and analysis on key disclosure obligations for public companies in light of the COVID-19 pandemic, found here.

[8] The OSC's study on COVID-19 and the Investor Experience can be found here. The CSA and IIROC's joint statement on COVID-19's impact on Canadian equity markets can be found here.

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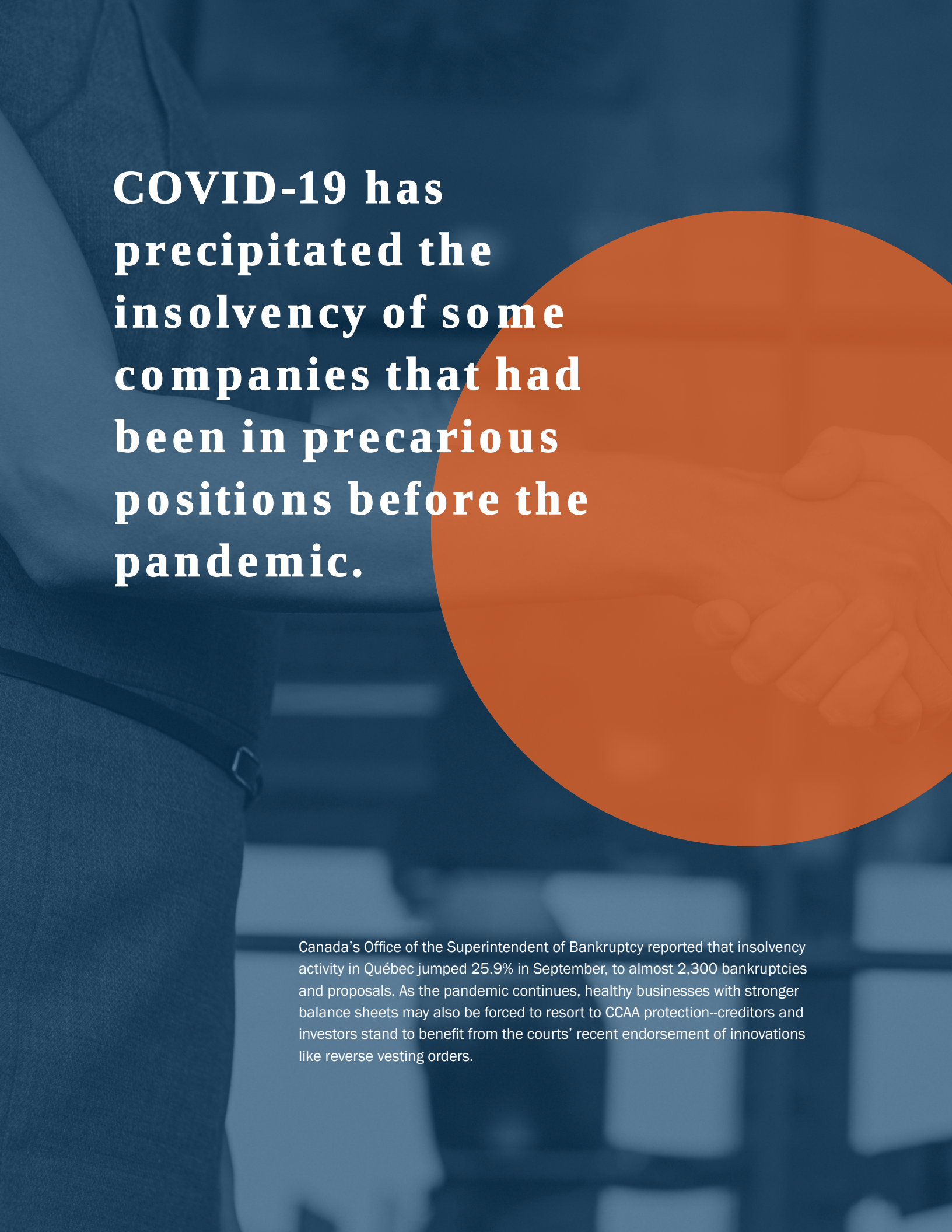

COVID-19 has precipitated the insolvency of some companies that had been in precarious positions before the pandemic.

Canada's Office of the Superintendent of Bankruptcy reported that insolvency activity in Québec jumped 25.9% in September, to almost 2,300 bankruptcies and proposals. As the pandemic continues, healthy businesses with stronger balance sheets may also be forced to resort to CCAA protection--creditors and investors stand to benefit from the courts' recent endorsement of innovations like reverse vesting orders.

Commercial litigation in Québec: 2020 review and takeaways for business

By Christopher Richter, Chantale Dallaire and Corina Manole

The COVID-19 pandemic has had an undeniable impact on the Québec courts, and yet the pace of commercial litigation has remained virtually unchanged in 2020 as businesses continue to respond to rapidly changing circumstances.

Three notable areas of development are set to shape commercial litigation in Québec in the year ahead: insolvency proceedings and distressed M&A; allegations of force majeure to excuse the non-performance of contractual obligations; and the expansive use of regulatory powers by government agencies.

Cirque du Soleil, Nemaska, and innovations in insolvency proceedings and distressed M&A

Canada's Office of the Superintendent of Bankruptcy reported that insolvency activity in Quebec jumped 25.9% in September, to almost 2,300 bankruptcies and proposals. Even the most iconic Québec businesses were not spared: the Cirque du Soleil filed for creditor protection under the Companies' Creditor Arrangement Act (CCAA) in late June after being forced to cancel all shows and lay off the majority of its workers as a result of the pandemic.

The existing shareholders were unsuccessful in imposing their own bid as the "stalking horse" for the sale or investment solicitation process (SISP). The Cirque subsequently entered into a stalking horse purchase agreement with its lenders that was eventually accepted and approved by the Court as the winning bid on October 26. This transaction involved in part a new innovation in distressed M&A—the Reverse Vesting Order (RVO)—which was the subject of much attention in another CCAA proceeding before the Québec courts.

"Courts have generally been reluctant to qualify an event as force majeure; however, the COVID-19 pandemic created fertile ground for considering this issue in Québec."

The approval of an RVO as part of the CCAA proceedings of Nemaska Lithium Inc. was the first time an RVO has been approved in Canada following a contested hearing. The Court of Appeal's refusal to grant leave to appeal further supports the use of an RVO as a creative solution to complex financial issues.

Nemaska had been developing lithium deposits in the James Bay region of Québec, as well as a transformation plant. Unable to find new sources of capital, Nemaska entered into CCAA protection in December 2019 and obtained court approval for a SISP. The successful bid was a form of credit-bid put forward by Nemaska's principal secured creditor, Orion, along with Investissement Québec (IQ) and the Pallinghurst Group (PG).

Pursuant to the RVO, IQ and PG will take ownership of Nemaska free and clear of creditor claims, which will be transferred, along with unwanted assets, to a newly incorporated non-operating company. Nemaska's existing shareholders will become shareholders of the new corporate entity, which will be subject to the continuing CCAA proceedings.

Takeaway: COVID-19 has precipitated the insolvency of some companies in precarious positions. As the pandemic continues, healthy businesses with stronger balance sheets may also be forced to resort to CCAA protection. In the coming months, creditors and investors stand to benefit from the courts' endorsement of creative and flexible solutions like the RVO.

Québec's interpretation of force majeure and pandemic-related claims

Force majeure releases parties from their contractual obligations which have become impossible to perform due to a disruptive event. From tenants and consumers of live events, to other organizations whose activities have been disrupted as a result of the pandemic, 2020 has seen many parties seeking to invoke force majeure in the course of their contracts.

Force majeure is interpreted differently under civil law than in Canada's common law jurisdictions. It exists as a matter of law under the Civil Code of Québec (CCQ), which means that it may be applicable even without specific mention in the contract between the parties. However, it is interpreted narrowly: the event has to be unforeseeable, irresistible, independent of the non-performing party, and must have led to an absolute impossibility of performance. Courts have generally been reluctant to qualify an event as force majeure; however, the COVID-19 pandemic created fertile ground for considering this issue in Québec.

In the first decision on this issue under COVID-19, the Superior Court of Québec found that the government decree which forced the closure of non-essential businesses qualified as force majeure. The landlord in that case sued its fitness centre tenant for unpaid rent. The fitness centre had been forced to close for months after the Government of Québec declared gyms to be non-essential businesses. The Court held that force majeure applied to the landlord's obligation in that it prevented the landlord from providing the tenant with peaceful enjoyment of the premises, and the tenant was therefore not obliged to pay rent for that period.

“Despite much disruption to their own internal management, regulatory authorities have continued to make broad use of their powers over businesses operating in Québec.”

In another decision, the Superior Court was called upon to interpret the impact of the Canada Mortgage and Housing Corporation’s (CMHC) rent relief program whereby the CMHC funds 50% of a tenant’s rent, the tenant pays 25%, and the final 25% remains outstanding. The landlord in that case sued the tenant for unpaid rent and asked for a safeguard order for the payment of arrears. The tenant opposed this on the basis that the criteria for a safeguard order were not met. The Court noted that the landlord had chosen to deprive itself of 75% of the rent by refusing to adhere to the CMHC’s program and therefore could not seek a safeguard order for the entire amount.

Takeaway: While these early cases show a certain sympathy for the invocation of force majeure for contractual obligations affected by the pandemic, it is by no means certain that such generous interpretations will continue into 2021 as the pandemic persists. In one sign that patience may be wearing thin, landlords of The Bay in several Québec shopping centres were successful on November 20 in obtaining interim payment of rent pending final resolution of the matter. Similar considerations will also arise in the case of merchants obliged to refund pre-paid goods and services that are cancelled or postponed due to the pandemic. Businesses with contractual obligations that may be subject to disruption from the pandemic will want to monitor this area of case law as it develops as well as regularly assess and work to optimize their contractual relationships and contracting practices in Québec and elsewhere.

Regulatory authorities’ broad use of powers

Despite much disruption to their own internal management, regulatory authorities have continued to make broad use of their powers over businesses operating in Québec. The Autorité des marchés financiers (AMF), for example, announced many measures to lessen the impact of COVID-19 on Québec’s financial system.

It also pursued several large investigations, levying fines against a number domestic and international companies. This trend was also observed at the federal level as the Financial Consumer Agency of Canada's (FCAC) new enforcement powers came into force in late April 2020. The FCAC has used these powers and exercised enhanced scrutiny of the financial institutions it regulates, leading to an increase in litigation and enforcement proceedings.

Takeaway: Regulators in Québec, as elsewhere, have been responding quickly to the rapid change of 2020; businesses will want to ensure they keep close watch on the fast pace of regulatory adjustments being made as the pandemic crisis and economic impacts continue.

Conclusion

It has been a dynamic year for commercial litigation in Québec. COVID-19 has brought new issues before the courts and forced them to innovate, not only in the way they dispense justice, but in their approach to addressing commercial realities in a pandemic. Creative thinking and innovation in addressing these unprecedented developments will continue to be essential for businesses in 2021.

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Class actions in Canada: what to expect in 2021

By Linda Plumpton, Sylvie Rodrigue, Sarah Whitmore and Matthew Angelus

With this unprecedented year almost behind us, we are looking ahead to how the events of 2020 may shape the landscape for Canadian class action litigation in 2021 and beyond.

What to expect: in light of the end to waiver of tort and a rise in pandemic-related class actions, allegation of actual damages will be required in class actions.

As the novel coronavirus continues to wreak havoc on the health, wellbeing and livelihoods of Canadians, covid-related class action litigation has proliferated. Class actions have been commenced seeking compensation on behalf of various groups

for death, illness, financial losses, services not received, and refunds not provided during the pandemic. Although provincial legislatures have proposed certain liability protections for defendants named in these class actions,[1] we anticipate that as the harms of the pandemic crystallize, the number of related class actions will continue to rise.

One hurdle plaintiffs will face in having these claims certified or authorized is the impact of the Supreme Court of Canada's recent decision in *Atlantic Lottery Corp Inc. v Babstock*, 2020 SCC 19. The Supreme Court finally clarified that waiver of tort is not an independent cause of action and cannot be the sole basis on which a class action is certified.[2] To pass the certification or authorization, plaintiffs alleging that a defendant's negligent conduct caused harms relating to the virus will need to allege actual damage and not simply "exposure to an unreasonable risk."

What to expect: class certification in Ontario will be more onerous.

On October 1, 2020, the first comprehensive amendments to Ontario's class proceedings legislation since its adoption more than 25 years ago came into effect.[3] We expect these amendments to have a meaningful impact on class action law in 2021.

Arguably the most significant amendment is the introduction to the certification test of a preferable procedure threshold that adopts almost verbatim the predominance and superiority test set out in the rules for class action certification in the U.S. Federal Rules of Civil Procedure.

The amended test signals a more onerous test for certification. If Ontario courts follow the clear legislative intent to raise the bar for certification, there may be new grounds "to protect the defendant from being unjustifiably embroiled in complex and costly litigation."[4] This is clear from the experience in the United States where the predominance and superiority criteria have led courts to more frequently refuse certification.

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[1] To date, Ontario, Nova Scotia and British Columbia have adopted such legislation. See our bulletin on the Ontario Legislation here.

[2] See our bulletin on the Court's decision in *Atlantic Lottery* here.

[3] *Class Proceedings Act, 1992*, SO 1992, c 6. Subject to specific exceptions, the new provisions only apply to proposed class proceedings commenced on or after the coming into force date.

[4] *Robertson v. Thomson Corp.* (1999), 43 O.R. (3d) 161 (Gen. Div.) Justice Sharpe held that the certification motion was a screening device to achieve this end. His guidance has arguably not been followed more recently.

What to expect: Opportunities are emerging to streamline multi-jurisdictional class actions, but the timing to streamline these claims remains uncertain.

Overlap among multi-jurisdictional class actions continues to be a vexing problem. Until relatively recently, defendants had few options to deal with the costs and inefficiencies of duplicative class actions seeking the same or similar relief in multiple provinces. Ontario, British Columbia, Alberta, and Saskatchewan have now adopted provisions to give courts these tools. These laws require courts to consider the existence of overlapping multi-jurisdictional class actions and whether it would be preferable to have some or all of the claims resolved in another jurisdiction.

A second tool to address the costs and inefficiencies of overlapping class actions is the Canadian Bar Association (CBA) Canadian Judicial Protocol for the Management of Multi-Jurisdictional Class Actions (the Protocol). The Protocol aims to minimize confusion and maximize communication between judges and lawyers involved in multi-jurisdictional class actions.

An important question raised is the stage at which the court should streamline the claims. From a defendant's perspective, it should be as early as possible to avoid expending resources dealing with multiple, costly certification motions in multiple provinces. While the case law is in its infancy, several courts have reached the opposite conclusion. Courts in British Columbia have interpreted the B.C. *CPA*[5] as providing that motions to stay an overlapping proceeding should be resolved at certification unless the defendant can demonstrate that the actions are completely duplicative.[6] By contrast, a decision of the Québec Superior Court granted a stay of a proposed Québec proceeding in favour of an overlapping claim in Saskatchewan in advance of certification, in part, on the basis of the Protocol.[7]

We expect to see further developments in the year ahead. In Ontario, the courts seemed to be trending towards the British Columbia approach.[8] However, Ontario's amended *CPA* now expressly provides that this streamlining can be resolved in advance of certification.[9] The landscape may also shift in British Columbia where the

[5] Section 4(3) of the British Columbia *Class Proceedings Act*, RSBC 1996, c 50.

[6] *Fantov v. Canada Bread Company, Limited,* 2019 BCCA 447.

[7] *Varnai c. Janssen Inc.*, 2019 QCCS 5090.

[8] See for example: *DALI 675 Pension Fund v. SNC Lavalin,* 2019 ONSC 6512.

[9] *Class Proceedings Act,* RSBC 1996, c 50, s. 4(3), (4).

Court of Appeal has granted leave to appeal to address the issue of sequencing motions to strike proposed class proceedings and motions for certification.[10] Finally, it is worth noting that the CBA National Task Force has been reconvened to consider updates to the Protocol. Further clarifications or amendments from legislatures, courts, and the Task Force will be worth watching for in 2021.

What to expect: In Québec, applications for authorization to institute a class action will not be read liberally.

In a split decision in *Desjardins Financial Services Firm Inc. v. Asselin*, 2020 SCC 30, the Supreme Court outlined the limits of Québec's liberal approach to discovering implied messages conveyed in an application for authorization. While authorization judges in Québec may "read between the lines" at authorization, they should not, according to the court, search "on a blank page" for allegations which do not exist.

For the Supreme Court majority, the expression "read between the lines," used by the Court of Appeal to discover the full message of an application for authorization, should not be understood as an invitation to the lower courts to search for allegations that are missing from an application or to rewrite causes of action—and therefore is not a departure from the applicable law. In dissent, three Supreme Court justices would have limited the role of the court at the authorization stage and proposed to more rigidly scrutinize the allegations of an application for authorization.

What to expect: Increased filings in British Columbia, Québec and Federal Court

Finally, as Ontario becomes less class action friendly, we anticipate that other provinces may see an increased number of filings. In addition to the British Columbia courts' treatment of multi-jurisdictional class actions, British Columbia's no-costs and Québec's low-cost regimes may prove to be particularly attractive for plaintiffs. The Federal Court of Canada has also seen an uptick in claims commenced.

[10] *British Columbia v. Apotex Inc.*, 2020 BCCA 186.

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SCC on recoverable losses in tort: how Maple Leaf Foods impacts Canadian business

By Andrew Bernstein, Alicja Puchta and Nicole Mantini

If you don't operate a meat processing plant or a sandwich franchise, you might think that the Supreme Court's recent decision in *1688782 Ontario Inc. v. Maple Leaf Foods Inc.* does not affect your business. That is a mistake.

The *Maple Leaf Foods* case had the potential to expand tort liability for business activity far beyond its historical scope. Four Supreme Court judges endorsed such an expansion. Fortunately, the majority in this 5-4 decision disagreed, and instead maintained the rule that "pure economic loss" caused by negligence can only be collected in a relatively narrow set of circumstances.

Despite the narrow majority win, Maple Leaf Foods provides a clear lesson for businesses as they head into 2021: comprehensive contracts governing your obligations remain the best way to protect against tort liability.

Torts and economic loss

Every law student remembers learning about *Donoghue v. Stevenson*, the House of Lords' 1932 decision about a snail in a bottle of ginger beer. *Donoghue* stood for the idea that manufacturers have a duty of care to their ultimate consumer of their products, not just those parties with whom they are connected by contract. It did so by establishing a general principle that a duty of care could be applied to anyone who could be foreseeably affected by negligent conduct. This idea—sometimes called the "neighbour principle"—is the foundation for almost all modern negligence law. It is now (inelegantly) known as the "*Anns/Cooper* test" and it requires the court to ask two questions to establish a novel duty of care: first, are the parties in a sufficiently proximate relationship that one party's actions could foreseeably harm the other's interest; and second, are there any policy reasons why a duty should not be imposed even if the parties are sufficiently proximate?

"Determining whether the sufferer should be reimbursed by the careless is at the heart of a negligence case."

Like many common law concepts, the "neighbour principle" and the *Anns* test raise more questions than answers. One of the questions that courts still struggle with today is what kind of harms should be compensable as a result of negligent conduct. *Donoghue* is itself related to physical injury. The principle was readily extended to property damage. But the question that has given the courts the greatest difficulty is when liability for negligence should be extended to so-called "pure economic loss"—that is, when should one person's careless conduct result in liability for losses that do not flow from an underlying injury to a person or property? Although this sounds like a technical legal question, its consequences are quite far-reaching for businesses, as the *Maple Leaf Foods* case demonstrates.

Background to the Maple Leaf Foods case

In 2008, Maple Leaf Foods suffered a listeria outbreak in one of its manufacturing plants, resulting in a national recall of processed meats. At the time, Maple Leaf had an exclusive supply contract with Mr. Submarine for certain meat products. In turn, Mr. Sub franchisees were required to purchase Maple Leaf products under their individual franchise agreements, but had no privity of contract with Maple

Leaf itself. As a result of the outbreak and recall, the franchisees claimed to have suffered business and reputational harm from the lack of supply and the association with contaminated products. They commenced a class action to collect those losses from Maple Leaf, alleging that it had been negligent and failed to provide goods fit for human consumption. Maple Leaf opposed certification and brought a summary judgment motion to have the claim dismissed on the basis that it owed the franchisees no duty of care and, alternatively, that the pure economic losses suffered by the franchisees were not the type that could be collected under tort law. The motion court declined to strike or summarily dismiss the claim, but the Court of Appeal overturned.

Recovery for pure economic loss in tort

One of the reasons assigning liability for pure economic loss in tort is controversial is because it can circumvent the more traditional mechanism by which parties allocate economic risks, i.e., contracts. Contracts require parties to specifically turn their mind to their rights and obligations as against one another. The law of negligence developed with a certain anxiety that it not supplant the voluntary private ordering that contracts allow, which is why *Donoghue* was initially so controversial. However, the impetus behind the evolution of negligence law—responding to situations where someone's careless conduct has caused someone else to suffer loss—has a certain appeal. Determining whether the sufferer should be reimbursed by the careless is at the heart of a negligence case.

Although it was framed in a number of different ways, the question for the Supreme Court in *Maple Leaf Foods* was whether the rule against pure economic loss had outlived its usefulness as a limit on recovery in tort. There is no doubt that the law as it stood was confusing and difficult to apply. The Court had previously indicated that economic losses could be collected if they fell into one of three categories: (1) negligent misrepresentation or performance of a service; (2) negligent supply of shoddy goods or structures; and (3) so-called "relational" economic loss. The Mr. Sub franchisees argued that their losses were covered by both categories (1) and (2).

Maple Leaf Foods: the outcome

The majority of the Supreme Court confirmed that the franchisees could not collect their business losses from Maple Leaf. It held that the correct starting point for evaluating whether economic loss is recoverable is the existence of a duty of care—i.e., the "proximity" analysis. This remains an absolute pre-requisite to liability, regardless of whether the losses fit into one of the three previously articulated categories.

The majority reiterated its prior holding that in the context of a negligent misrepresentation, proximity arises from the defendant giving an undertaking and the plaintiff relying on it. In this case, the majority reasoned that any undertaking made by Maple Leaf about its meats being safe and fit for human consumption was made to end-consumers (i.e., the public) not to "commercial intermediaries such as … the franchisees." Because the franchisees' business interests lay outside of the purpose of the undertaking, there was no proximate relationship. Moreover, the franchisees could not establish reliance since the undertaking would not have changed their position: they were required by their franchise agreements to purchase Maple Leaf products.

The plaintiffs' argument that this case fell into the "negligent supply of shoddy goods" category was also rejected. The majority reiterated that that duty is narrow and predicated on the plaintiff's establishing a "real and substantial danger" of "personal injury or damage to other property." Although there was a clear risk to consumers, the tainted meat posed no risk to franchisees, and in any event, the risk was eliminated by the recall.

Finally, the majority asked whether this was a circumstance where the court should recognize a novel duty of care. Its *Anns/Cooper* analysis turned heavily on the contracts between the franchisees, Mr. Sub, and Maple Leaf, and in particular, the policy concern that contracting parties should not circumvent a voluntary allocation of risk by deploying tort claims: the franchisees could have, but did not, protect their interests through contract, and instead agreed to Maple Leaf as their exclusive supplier of the meat products. Because of the contractual arrangements, the majority concluded that there was insufficient proximity between the franchisees and Maple Leaf. This was a significant point of departure for the four dissenting judges, who thought that the nature of the business relationship and the franchisees' lack of bargaining power justified imposing a duty of care.

Conclusion

Tort law often seems like a black box, and the box is never more opaque than in economic loss cases. Trying to find consistent trends or principles is remarkably difficult. That said, Maple Leaf Foods provides a clear lesson for businesses, which is that a comprehensive series of contracts governing your obligations is the best way to protect against tort liability. That said, there is no guarantee that this 5-4 decision will come out the same way the next time such an issue is before the Court.

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Rise in class actions
More cybersecurity claims
New strategy to patent attacks
Enhanced scrutiny on plaintiffs

Steady on course: competition litigation in 2021

By Linda Plumpton and James Gotowiec

Forecasting developments in competition litigation always involves two considerations: what are the Competition Bureau's enforcement priorities for the coming year, and what might occupy the attention of the courts?

Competition Bureau priorities

On the enforcement side, the Commissioner of Competition stated clearly since the start of the COVID-19 pandemic that robust enforcement of competition laws will be critical, in his view, to ensuring a strong economic recovery. In a recent speech, the Commissioner said that the Bureau would "remain vigilant" against attempts by firms to insulate themselves from competition.

The Bureau has signaled that its main priorities in 2021 will be focusing on ensuring that "digital giants" compete fairly, and safeguarding competition in the digital age. It will also continue to advocate for increased competition in telecommunications markets. The Bureau has been particularly active over the past few years in enforcing the misleading advertising provisions of the *Competition Act*, leading to ten consent agreements resolving investigations from 2018 through 2020. We expect this trend to continue into 2021.

Court developments

On the litigation front, we expect 2021 to provide opportunities for superior courts in various provinces to consider and apply the Supreme Court's most recent guidance on certifying class actions advancing claims under the *Competition Act*.

Pioneer Corporation v. Godfrey was released in September 2019.[1] It is a sequel of sorts to the 2013 *Pro-Sys v. Microsoft* decision, which was the last time the Supreme Court considered a competition class action.[2]

Plaintiffs in competition class actions usually seek damages from co-conspirators who are alleged to have agreed to fix the prices of their products, on behalf of both direct purchasers (those who bought the product directly from a defendant) and indirect purchasers (usually consumers, though there can be other intermediate purchasers in the supply chain).

The Supreme Court decided in *Pro-Sys* that indirect purchasers could sue defendants for damages, and that they could be part of the same class of plaintiffs as direct purchasers. The Court also clarified what sort of expert evidence was required to certify common issues related to damages suffered by class members. In short, the plaintiffs had to show there was a "credible or plausible methodology" to establish loss on a class-wide basis.

Exactly how these rules should be applied continued to be a battleground between plaintiffs and defendants following the release of the decision in 2013. Defendants said that plaintiffs had to show the methodology could identify whether particular class members had suffered damage and how much damage before a case could be certified. Plaintiffs argued that all that was required was for them to show that some harm had been passed on to the consumer level.

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[1] 2019 SCC 42

[2] 2013 SCC 57

In tandem with that issue, courts also grappled with a question that was not addressed in *Pro-Sys*: whether "umbrella purchasers" could sue alleged conspirators for damages. Those purchasers bought the affected product from a non-conspirator, though they claim damages because the conspiracy created a price "umbrella" that is said to have allowed other firms to charge higher prices than they otherwise would have.

The Supreme Court addressed both issues in *Godfrey*, and decided both in favour of the plaintiffs. Umbrella purchasers can sue for damages, and plaintiffs have to show "a plausible methodology to establish that loss reached one or more purchasers – that is, claimants at the 'purchaser level'".[3]

These conclusions will likely lead to plaintiffs seeking to certify larger classes and may impact the nature of expert evidence submitted by plaintiffs and defendants. This will become clearer as courts consider the case in the coming year. However, the Supreme Court was careful to note again, as it has in past cases, that class actions do not relieve plaintiffs from the burden of proving that class members have actually suffered loss before they can recover damages.

While the Supreme Court decided these issues against the defendants in *Godfrey*, the decision serves as a reminder that success at certification is not the same as success on the merits of a common issues trial, and proving that class members suffered damages remains an extremely complicated undertaking.

[3] 2013 SCC 57, para. 107

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Data governance and Canada's c-suite: are directors and officers liable for cybersecurity failures?

By Molly Reynolds, Shalom Cumbo-Steinmetz and Emma Loignon-Giroux

The world has gone digital, with the global pandemic accelerating the pace of transition. As online business and the data companies collect or generate become more central to organizational value, cybersecurity is, now more than ever, a critical enterprise issue. For senior management, cybersecurity planning, governance and resourcing now require dedicated attention; for boards, appropriate oversight and input into cyber risk assessment and mitigation must be given.

The crucial role of cybersecurity to an organization's investors, customers and regulators—as well as to the organization's profitability—is well demonstrated in both public company disclosure of data security risks and class action litigation following breaches. While officers and directors need to play a role in cybersecurity risk management to fulfill their obligations to the company, their potential personal liability for security failures is a developing area in Canadian law. A recent trend of investor class actions in the United States gives us insight into the question of liability that Canadian officers and directors may face when a company experiences a cybersecurity incident.

Current landscape in Canada

Directors and officers can be liable for regulatory penalties under Canadian federal and provincial privacy legislation. In Québec, directors and officers who authorize a corporate act or omission which violates privacy law may be named as parties and liable to penalties.

The scope of civil liability for directors and officers in the context of cybersecurity class actions, however, is untested in Canada.

So far, Canadian class actions have focused on effects experienced by consumers after an organization suffers a data breach. Examples include Home Depot customers whose financial information was stolen when cybercriminals hacked into that company's payment systems, and individuals whose personal information was stolen when hackers broke into Yahoo's databases.[1]

"Absent intentional misconduct by an insider, few cases alleging cybersecurity or privacy failures are likely to present the facts required to pierce the corporate veil."

Directors and officers owe statutory and common law obligations to exercise reasonable care and diligence in running the company. In Québec, directors and officers also remain subject to general rules of civil liability under article 1457 of the *Civil Code of Québec (C.C.Q.)*. Claims could be advanced by customers against directors and officers for failing to protect against known cybersecurity vulnerabilities, or for approving a product that is not compliant with privacy law

[1] *Lozanski v The Home Depot, Inc.*, 2016 ONSC 5447; *Bourbonnière c. Yahoo! Inc.*, 2019 QCCS 2624.

requirements. To be successful on claims like these, however, plaintiffs who are customers would need to overcome fundamental corporate law principles of separate legal personality. Absent intentional misconduct by an insider, few cases alleging cybersecurity or privacy failures are likely to present the facts required to pierce the corporate veil.

Probably for this reason, cybersecurity class actions in Canada have focused on the liability of organizations for failing to prevent data breaches.

Looking ahead: Investor class actions in the U.S.

In the U.S., however, a new trend of class actions has emerged: investor lawsuits against officers and directors when cybersecurity incidents cause a public company's share price to drop. Unlike a company's customers, investors may have special statutory remedies against directors and officers. Two recent cases illustrate the point.

In *Drieu v Zoom*, shareholders of the video platform sued the company and two of its officers after encryption flaws in the company's flagship product were revealed earlier this year. The claim alleges the officers breached U.S. securities laws by knowingly withholding information about cybersecurity vulnerabilities from the public market.

"New penalties and private right of action proposed under federal privacy law following a finding of non-compliance may raise director and officer exposure if they do not fulfill obligations to manage cybersecurity risk."

In *Laboratory Corporation of America Holdings v Berberian*, shareholders of a clinical laboratory company brought a derivative class action on behalf of the company against its officers and directors. The claim alleges the officers and directors neglected their fiduciary duties by failing to prevent data breaches, including a breach at a third-party service provider to the company.

Drieu is a good example of the types of cybersecurity claims directors and officers may face for alleged misrepresentations in securities law filings. However, as the *Berberian* case illustrates, directors' and officers' liability to investors is not confined to disclosure issues and may encompass allegations related to oversight of cybersecurity in the company's day-to-day operations.

Similar statutory remedies are available to shareholders in Canada. In Québec, recent case law in the securities context suggests an expansion of directors' civil liability to shareholders under the *C.C.Q.*[2] Moreover, proposed amendments to Québec's private sector privacy legislation would expand the scope of corporate liability for privacy violations. Those amendments include a new cause of action with no-fault liability where prejudice ensues from the violation of the legislation or of articles 35 to 40 of the *C.C.Q.*, which explicitly protect persons' reputations and privacy. And new penalties and private right of action proposed under federal privacy law following a finding of non-compliance may increase director and officer exposure if they do not fulfill their obligations to manage cybersecurity risk.

Conclusion

It is likely only a matter of time before class actions similar to those we have seen in the U.S. against directors and officers begin to emerge on this side of the border. To mitigate the risk of these claims, directors and officers should consider the appropriate level of oversight required for cybersecurity issues, and how this due diligence is documented in the event it is needed for litigation defence in the future.

[2] See *Catucci v. Valeant Pharmaceuticals International Inc.*, 2020 QCCS 1413 where the Superior Court rejected an application to dismiss a shareholder class action invoking directors' liability for misrepresentations. The directors argued that there was no cause of action under civil law (as opposed to securities legislation) because directors only have obligations towards the company. The Court found that directors can have extracontractual obligations toward shareholders under article 1457 *C.C.Q.*, and that shareholders did not have to demonstrate a distinct prejudice from that which was suffered by the company.

About our lawyers

Molly Reynolds leads the Privacy and Cybersecurity practice at Torys. As a litigator she defends organizations in class actions, administrative proceedings and regulatory investigations. Her experience informs the risk-based and practical approach she takes to privacy compliance advice in commercial transactions, technology implementation and data breach response. Clients welcome her business-friendly solutions and thorough, forward-thinking advice as well as her ability to adapt quickly to change.

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Product liability: important developments in 2020

By Sylvie Rodrigue, Grant Worden, Nicole Mantini and Corina Manole

2020 has seen several important developments in product liability law. These developments signal that a variety of challenges are on the horizon for plaintiffs in 2021 in three specific areas: product liability class actions alleging adverse health effects; claims relating to the sale of prescription medications; and "mass tort" claims.

No "workable methodology": an effective defence to certification

In 2013, the Supreme Court of Canada affirmed in *Pro-Sys Consultants Ltd. v. Microsoft Corporation*[1] that, at certification, plaintiffs must demonstrate a "workable methodology" for determining general causation on a class-wide basis. Since then, this issue—which has often been decided in the plaintiffs' favour—has arisen frequently in proposed product liability class actions alleging adverse health effects.

In 2020, two actions have bucked this trend and may foreshadow similar outcomes in 2021.

The first action, *Organigram Holdings Inc. v. Downton*[2], arose out of a 2016 recall of certain cannabis products which contained trace amounts of pesticides not approved for use on cannabis. In addition to economic loss claims, the plaintiff also alleged adverse health consequences.

The action was certified and the defendant appealed the portions of the order relating to the allegations of adverse health consequences, arguing, among other things, that the plaintiff had failed to establish a workable methodology for determining general causation on a class-wide basis. The Nova Scotia Court of Appeal agreed, concluding that while the plaintiff's expert had opined on theoretical harms that could be caused by certain of the pesticides, the plaintiff had provided no evidence that could link the symptoms alleged with the plaintiff's exposure to the product.

The second action, *MacInnis v. Bayer Inc. et al.*[3], yielded a similar result. *MacInnis* related to allegations that a permanent contraceptive device sold by the defendants was associated with "bleeding, bloating and other side effects." The Saskatchewan Court of Queen's Bench dismissed the plaintiff's certification application on several grounds, including that she had failed to provide a credible or plausible methodology for assessing either the reasonableness of the alleged risks, or the comparative benefits of the defendants' device and other forms of permanent contraception on behalf of all class members.

Limiting the scope of consumer protection claims in Québec

The Québec *Consumer Protection Act* (CPA) includes certain consumer-friendly presumptions, including an absolute presumption of prejudice if a merchant or manufacturer fails to fulfil an obligation imposed by the CPA, and an irrefutable presumption that the manufacturer knows all potential risks and dangers associated with a product's use. Following *Brousseau et al. v. Abbott Laboratories Co.*[4], these presumptions are not available for claims relating to the sale of prescription medications.

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[1] 2013 SCC 57

[2] *Organigram Holdings Inc. v. Downton*, 2020 NSCA 38, application for leave to appeal to the Supreme Court of Canada dismissed on November 5, 2020.

[3] 2020 SKQB 307

Takeaway: In the context of proposed product-liability class actions, courts are bringing more scrutiny to the requirement that plaintiffs show a workable methodology to determine harm on a class-wide basis, and are showing greater willingness to dismiss certification motions when that requirement is not met.

Brousseau related to allegations of certain neuropsychiatric side effects associated with the use of a prescription antibiotic. The plaintiffs relied, in part, on the presumptions in the CPA to advance their claim, which was dismissed following a common issues trial. The Québec Court of Appeal upheld the lower court decision and clarified that the sale of prescription medications by a pharmacist is not a consumer contract governed by the CPA. Leave to appeal to the Supreme Court was dismissed in April 2020.

The significance of *Brousseau* is well illustrated by comparison with cases involving non-prescription (over-the-counter) products. In *Gauthier v Johnson & Johnson Inc.*,[5] the plaintiff alleged that the defendants had misled consumers by failing to warn of potential risks and side effects associated with the use of certain OTC products, but did not allege that she had experienced adverse events associated with their use. Despite this, the court found that the plaintiff's proposed action presented a good "colour of right" and was suitable for authorization because it raised allegations relating to the enforcement of the defendants' duty to inform consumers in the marketplace in accordance with the CPA, which gives rise to an absolute presumption of prejudice.[6]

"Mass tort" claims and the challenges associated with "test cases" or "bellwether" trials

In "mass tort" proceedings, plaintiffs' counsel typically seek to advance multiple virtually identical actions, often to avoid the time and expense of a class action certification motion. Recent examples include cases relating to breast implants, e-cigarettes, pelvic mesh, hernia mesh, permanent contraceptive devices and anti-malarial medication.

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[4] *Brousseau v. Abbott Laboratories Limited*, 2019 QCCA 801 (CanLII), application for leave to appeal to the Supreme Court of Canada dismissed on April 9, 2020.

[5] *Gauthier c. Johnson & Johnson Inc., 2020 QCCS 690 (CanLII).*

[6] The plaintiff also pleaded breaches of the *Competition Act and the Civil code of Québec*.

Takeaway: ***Brousseau*** **affirms that plaintiffs will no longer be able to take advantage of the presumptions flowing from the CPA in claims relating to prescription products, including the presumption that the manufacturer is aware of all material risks. This development helps to level the playing field for defendants and may increase their chance of resisting authorization in proposed class actions relating to those products.**

Though not a product liability case, *Arya v. Nevsun Resources Inc.*[7] offers insight into the challenges plaintiffs may face in attempting to advance "mass tort" claims though the vehicle of "test cases" or "bellwether" trials. In Arya, the plaintiffs were refugees who brought claims in British Columbia relating to conditions at an Eritrean mine. As they were not B.C. residents, they could not bring their claims under the *Class Proceedings Act*, so they commenced 11 actions involving 96 plaintiffs, and sought an order allowing several actions to proceed as "test cases" to obtain rulings on issues of fact and law to provide a basis to resolve the remaining claims.

While the parties agreed that mechanisms exist in the B.C. rules, the *Law* and *Equity Act* and under the court's inherent jurisdiction to permit "test cases", they disagreed as to whether in the circumstances they were appropriate or fair. The court dismissed the plaintiffs' proposal on the basis that it would be prejudicial to the defendants, would not promote settlement, and would result in significant delay if the claims were not resolved following the first test case. The court also noted challenges associated with selecting test case plaintiffs who were fairly representative, and expressed concern that the proposal that findings of fact from the test cases would be binding on subsequent proceedings created the risk of unjust results.

Takeaway: While it is likely that plaintiffs' counsel will continue to issue "mass tort" claims in 2021, we anticipate that few will take steps to advance their claims to "test case" or "bellwether" trials due to the challenges associated with these procedures.

[7] *Arya v. Nevsun Resources Inc*, 2020 BCSC 294

About our lawyers

Sylvie Rodrigue leads the firm's class actions and product liability practices, with experience acting for clients on high profile multi-jurisdictional class actions—not only in Québec but across the country—relating to banking, drugs and medical devices, product liability, price-fixing allegations, consumer complaints, civil liability, privacy, employment matters, securities, large tort and negligence. She is known by her clients for her attentiveness and her strengths in both strategy and execution. Among various other recognitions and distinctions, Sylvie has been awarded the designation of Advocatus Emeritus by the Québec Bar.

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Attacking divisional patents: is a new approach emerging?

By Henry Federer, Alex Peterson and Andy Shaughnessy

For companies litigating patents in Canada (and beyond), we are seeing a growing trend of attacks on patents on the basis of double patenting—a second patent for the same or similar invention claimed in an earlier patent. This trend is becoming more common particularly given the rise of divisional patents (often flowing from continuation-in-part applications in the United States).

Courts have traditionally held that once a divisional patent is issued by the patent office, it is beyond attack, and if an improper divisional application is approved, the ensuing divisional patent cannot be attacked—other than on the ground of double patenting.[1] A 2020 Federal Court case, however, suggests that a new approach to attacking divisional patents may be emerging.[2]

What is a divisional patent?

The *Patent Act* requires that "a patent shall be granted for one invention".[3] If a patent application contains more than one invention, the surplus invention(s) can be "divided out" into a divisional application,[4] which can either be done voluntarily by the applicant, or may be required by the examiner.[5] A divisional application is given the same filing date as the original, or "parent" application.[6] A divisional application (which is deemed as its own distinct application) can further be divided into other divisional applications.[7] Because a divisional patent is deemed to have the same filing date as its parent application, it should not include any new subject matter outside of that which is already disclosed in the parent. (Of course, as we posit, if new matter is added, the reliance on the parent's filing date is in jeopardy.)

But what happens where new matter is included in a divisional application, and that application is nevertheless allowed by the patent office?

The traditional approach

Traditional case law suggests that the new matter rule only applies to applications that are within the purview of the patent office—the patent office can object on this basis—but that once the application issues to patent, there is no recourse.

"Where new matter has been added, double patenting should still apply, but there must be other avenues of recourse available."

This view was discussed in *Merck & Co. Inc. v. Apotex Inc*.[8] There, the defendant argued that a divisional patent was improperly granted because there was another application covering the same subject matter pending before the patent office.[9]

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[1] *Merck & Co. Inc. v. Apotex Inc.*, 2006 FC 524 at paras. 201-204.

[2] *Biogen Canada Inc. v. Taro Pharmaceuticals Inc.*, 2020 FC 621.

[3] *Patent Act*, RSC, 1985 c. P-4, s. 36(1).

[4] *Patent Act*, RSC, 1985 c. P-4, s. 36(2).

[5] *Patent Act*, RSC, 1985 c. P-4, ss. 36(2), 36(2.1).

[6] *Patent Act*, RSC, 1985 c. P-4, s. 36(4).

[7] *Patent Act*, RSC, 1985 c. P-4, s. 36(4).

[8] *Merck & Co. Inc. v. Apotex Inc.*, 2006 FC 524.

[9] *Merck & Co. Inc. v. Apotex Inc.*, 2006 FC 524 at paras. 193-197.

Because the divisional application was improper, Apotex argued it was invalid, or at the very least, the divisional patent should have been given its actual filing date.[10] In *obiter* the Federal Court stated that the division of a patent is a procedural matter before the patent office and that once a patent issues a sufficient remedy can be found in double patenting.[11] The Federal Court of Appeal concurred, reiterating that double patenting affords a sufficient remedy.[12]

These cases, however, do not address the situation when new matter is added. When new matter is added, the divisional application should lose its claim to the filing date of its parent. It cannot be the case that divisional patents are shielded from scrutiny other than via the hyper-technical double patenting analysis. Where new matter has been added, double patenting should still apply, but there must be other avenues of recourse available, such as the filing date argument referenced above. The challenge will be to overcome the Federal Court of Appeal's *obiter* comments that once a patent has issued, these arguments are spent.

A new approach

In light of the above, it came as a surprise to see the Federal Court, in *Biogen Canada Inc. v. Taro Pharmaceuticals Inc.*, suggest that a new approach to attacking divisional patents may be available.[13] In this case, the plaintiff argued that their divisional application was "forced" (i.e., mandated by the patent office) and attempted to rely on the well-known rule that forced divisional patents are protected from attack.[14] This had been the argument traditionally used to readily and easily fend off double patenting allegations. Justice Manson found that the divisional application was voluntary—and not forced—because it was made in response to an objection, not a final action.[15] Further, the Court noted that reliance on *Consolboard* as "as a general proposition that patentees shall not be prejudiced by divisional applications is misguided."[16]

Justice Manson's view suggests that a patentee can be prejudiced by divisional applications and that divisional applications may well be open to attack.[17] It also

[10] *Merck & Co. Inc. v. Apotex Inc.*, 2006 FC 524 at para. 201.

[11] *Merck & Co. Inc. v. Apotex Inc.*, 2006 FC 524 at paras. 202-204.

[12] *Merck & Co., Inc. v. Apotex Inc.*, 2006 FCA 323 at paras. 40, 49.

[13] *Biogen Canada Inc. v. Taro Pharmaceuticals Inc.*, 2020 FC 621.

[14] *Biogen Canada Inc. v. Taro Pharmaceuticals Inc.*, 2020 FC 621 at para. 197.

[15] *Biogen Canada Inc. v. Taro Pharmaceuticals Inc.*, 2020 FC 621 at para. 106.

[16] *Biogen Canada Inc. v. Taro Pharmaceuticals Inc.*, 2020 FC 621 at para. 199.

[17] *Biogen Canada Inc. v. Taro Pharmaceuticals Inc.*, 2020 FC 621 at paras. 197-199.

suggests that the other ways to attack divisional patents—those other than double patenting—may be given airtime when they are argued in Court.[18] Lastly, it may limit the *obiter* found in *Merck & Co. Inc. v. Apotex Inc.*:[19] although that "improper divisional" argument was procedural, not all improper divisional arguments necessarily are.

What comes next?

The language in *Biogen Canada Inc. v. Taro Pharmaceuticals Inc.* creates a further crack in the longstanding approach to divisional patents. Filing multiple divisional applications is common practice,[20] and a remedy should be available when they are filed improperly. In the years ahead, it will be interesting to see whether litigants use Justice Manson's language to craft new attacks on divisional patents and how the courts respond to them.

What should companies filing patents keep in mind?

- Divide only when necessary: to keep your patents from being vulnerable to attack, ensure that a divisional application is the right approach from the outset to help mitigate double patenting litigation risk down the road.

- Apply scrutiny in the filing process: when filing a divisional application, be sure you are not adding new subject matter.

- Consider jurisdictional differences in process: for example, there are significant procedural distinctions between U.S. patent application (e.g., continuation-in-part and terminal disclaimer practices) and Canada, so strategies will need to be tailored accordingly.

- Consider any benefits of engaging the inventor in the process: if litigation does arise, as in some cases it may help assert the intent and nature of the invention.

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[18] *Biogen Canada Inc. v. Taro Pharmaceuticals Inc.*, 2020 FC 621 at para. 199.

[19] *Merck & Co. Inc. v. Apotex Inc.*, 2006 FC 524.

[20] *See e.g. AstraZeneca Canada Inc. v. Canada (Minister of Health),* 2006 SCC 49 at para. 39.

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