

CLASS ACTION DEFENCE QUARTERLY

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IN THIS ISSUE

Class actions based on breaches of privacy are a relatively recent development in Canada, but they are quickly gaining ground. They are now arising regularly in the context of both unintentional and intentional breaches of privacy and could have a profound impact on the law and on commerce. Adrian Lang and Lesley Mercer, counsel at Bank of Montreal, track the emergence of these new actions and the torts on which they are based, and consider what the future may hold.....1

In May 2015, the Superior Court of Québec ordered three Canadian tobacco companies to pay more than \$15 billion in damages in two class actions. This record judgment is under appeal. Myriam Brixi of Lavery, de Billy LLP has provided a case summary of this landmark decision.....9

PRIVACY BREACHES: THE NEW FRONTIER IN CLASS ACTIONS



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Overview

Class actions based on breaches of privacy are still relatively new in Canada. Indeed, until recently, there were limited common law remedies for breach of privacy, and only British Columbia, Saskatchewan, Manitoba, and Newfoundland and Labrador have statutory causes of action under their respective *Privacy Acts*.¹ However, the Court of Appeal for Ontario’s 2012 decision in *Jones v. Tsige [Jones]*,² which established the common law tort of *intrusion upon seclusion*, opened the door for class actions based on privacy breaches in Ontario and throughout Canada.

Breach of privacy class actions may result from intentional and unintentional privacy breaches, including theft, hacking, poor information management systems, and/or human error. With the rapidly expanding use of the internet, social media and electronic storage, defendants—especially large institutions and government entities—can expect to be the target of an increasing number of unauthorized data breaches and, as a result, class actions based on those breaches.

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Unfortunately for defendants, privacy breaches are often ripe for certification due to the fact that data breaches often affect groups of similarly situated people (*i.e.*, who have had similar types of personal data misplaced and/or disclosed to the same unauthorized third parties) as a result of the same data breach. In addition, class actions are usually triggered by the public notice of the privacy breach (required by regulation or otherwise), which often serves to identify the very group of people who will form the “class” for certification purposes and may also assist in identifying some of the common issues. With the most recent amendments to the *Personal Information Protection and Electronic Documents Act* [PIPEDA],³ which now requires an organization to report a breach to the Commissioner and notify individuals if it is “reasonable in the circumstances to believe that the breach creates a real risk of significant harm to an individual”,⁴ we can expect more organizations to publicly disclose significant privacy breaches, inevitably resulting in increasing number of class actions.

Where privacy breach class actions have not been certified, in either whole or part, it is usually as a result of plaintiffs being unable to show any actual compensable damages.⁵ However, that trend may be changing, as the Federal Court of Appeal recently certified a privacy breach class action despite evidence that the class members had not suffered any actual damages.⁶ And, as we will see, the ability to show compensable damages is a non-issue in privacy breach class actions, based on the tort of intrusion upon seclusion.

Background: The “New” Tort of Intrusion upon Seclusion

Until the 2012 Court of Appeal for Ontario decision in *Jones*, the remedies available to individuals who had suffered privacy breaches varied by province and from court to court. As noted above, in *Jones*, the Court of Appeal for Ontario clearly articulated the existence of the tort of intrusion upon

seclusion in that province, and while the law surrounding the availability of this tort outside of Ontario remains unsettled, a pattern is developing. Courts, increasingly aware of the potential negative implications that mass privacy breaches may have in our rapidly evolving digital age, are showing an increasing willingness to find remedies for those individuals whose privacy rights have been violated.

In *Jones*, a bank employee, Sandra Jones, discovered that another employee, Winnie Tsige, had been surreptitiously looking at Jones's banking records. Over the course of four years, Tsige used her workplace computer to access Jones's personal bank accounts at least 174 times.⁷

Tsige and Jones did not know each other, but Tsige had been in a relationship with Jones's former husband. Tsige admitted that she had looked at Jones's banking information, without a legitimate business purpose, and explained that she was involved in a financial dispute with Jones's former husband and accessed the accounts to confirm whether he was paying child support to Jones. Tsige did not publish, distribute, or record the information in any way. When Jones discovered the conduct, she brought an action for damages for invasion of privacy.⁸

The Court of Appeal held that the case law, while far from conclusive, supported the existence of a common law cause of action for breach of privacy. The court emphasized that the *Canadian Charter of Rights and Freedoms* (the "Charter") and jurisprudence recognizes privacy as a fundamental value and specifically identifies information privacy as worthy of protection. The court held that the recognition of a civil action for damages for intrusion upon seclusion would reflect these Charter values and would also reflect the changing needs of society by responding to "the problem posed by the routine collection and aggregation of highly personal information that is readily accessible in electronic form".⁹

The Court of Appeal for Ontario determined that the new tort of intrusion upon seclusion requires proof of the following elements:

- (i) "[T]he defendant's conduct must be intentional", which includes recklessness.
- (ii) "[T]he defendant must have invaded, without lawful justification, the plaintiff's private affairs or concerns".
- (iii) "[A] reasonable person would regard the invasion as highly offensive causing distress, humiliation or anguish".¹⁰

In this case, the court found that Tsige committed the tort of intrusion upon seclusion when she repeatedly examined Jones's private bank records, and awarded Jones damages in the amount of \$10,000.¹¹

While the tort of intrusion upon seclusion does not require proof of damages, the Court of Appeal placed a \$20,000 cap on damages where there is no proof of pecuniary loss. The court held that while awards of aggravated and punitive damages may be appropriate in exceptional cases, they are not to be encouraged, as predictability and consistency are paramount values in an area where symbolic or moral damages are awarded.¹²

Subsequently, the Federal Court, the Nova Scotia Supreme Court, and the Alberta Arbitration Board have acknowledged the existence of a tort for invasion of privacy,¹³ and the Newfoundland and Labrador Supreme Court has left open the possibility for the existence of the tort of intrusion upon seclusion in that province.¹⁴

In Ontario, the tort appears to be taking root with both the Ontario Superior Court of Justice and the Divisional Court, including the possibility of organizations being held vicariously liable for the tort, based on the activities of one of its employees, and the Court of Appeal for Ontario has confirmed that the tort is available in the heavily regulated health care industry.¹⁵

Recent Class Actions Alleging Intrusion upon Seclusion

In *Evans v. The Bank of Nova Scotia*,¹⁶ the Ontario Superior Court of Justice certified that province's first privacy class action and allowed a claim to proceed against The Bank of Nova Scotia, based on an allegation that the bank could be held vicariously liable for the tort of intrusion upon seclusion.

The plaintiffs sought to certify a class action against the bank and one its employees, Richard Wilson, who had provided private and confidential information about the bank's customers to third parties in an identity theft scam. The bank identified 643 customers whose files were accessed by Wilson during the relevant period and wrote to this group to advise them that it was possible that there had been unauthorized access to their private information. As of the date of the certification motion, 138 customers had been victims of identity theft and/or fraud, and the bank had provided individual compensation to every customer who suffered losses arising from the data breach, and complimentary subscriptions to a credit monitoring and identity theft protection service to all members of the group.¹⁷

The plaintiffs sought to certify claims for breach of contract, negligence, breach of fiduciary duty and of the duty of good faith, waiver of tort and the tort of intrusion upon seclusion, and claim that the bank is vicariously liable for Wilson's actions, including for the tort of intrusion upon seclusion.

Despite the fact that the bank had not breached any privacy, nor had it authorized or condoned the breach, the court certified the tort of intrusion upon seclusion against the bank on the basis that it was not "plain and obvious" that such a claim could not succeed under a theory of vicarious liability.¹⁸ The court held that although the bank had not been involved in the improper access, the theory of vicarious liability "is strict, and does not require any misconduct on the part of the person who is subject

to it".¹⁹ While the bank provided immediate compensation and preventative measures to those affected, the bank acknowledged that there was a lack of oversight of its employees, including Wilson, with regard to the improper access to personal and financial customer information. The court stated that "[i]n this case, the bank created the opportunity for Wilson to abuse his power by allowing him to have unsupervised access to customers' private information without installing any monitoring system".²⁰

In a decision alarming to most defendants, the court also certified, along with other causes of action,²¹ a claim for waiver of tort on the basis that even though there was no causal connection between Wilson's wrongful conduct and profits made by the bank, there was a potential causal connection between the bank's possibly negligent supervision of its employees and the bank's profits. In a surprising finding, the court noted that it was a certifiable common issue as to whether the bank could potentially have to disgorge those amounts of money that the bank could have spent to properly monitor and supervise its employees.²²

With respect to whether there was an identifiable class, the plaintiffs proposed that the same Notice Group that was identified by the bank be confirmed as the class for certification. The bank argued that this was over-inclusive because it includes many individuals without a valid claim—their profiles were accessed for a legitimate business purpose, their profiles were not provided to third parties, or these individuals were not victims of identity theft or fraud. The court held that while a number of the individuals whose accounts were accessed may not ultimately be able to prove that their accounts were accessed for an improper purpose, that did not mean that the class was overbroad, stating that "there is a properly identified class of individuals, who were identified, selected by the Bank, and referred to as the Notice Group, who are limited in time, and who are known to the Bank".²³

In the end, the court certified common issues with respect to the bank's alleged negligence and breach of contract: (1) whether the bank is vicariously liable for the actions of Wilson for negligence, breach of contract, the tort of intrusion upon seclusion, and breach of the duty of good faith and (2) with respect to what damages can be claimed on the basis of waiver of tort.

The court quickly decided that a class action would be the preferable procedure, rejecting the bank's submission that a test case, which would be binding on all members, a series of Small Claims Court actions, or arbitrations before a retired judge would all be more preferable to a class action.

The Divisional Court Denied the Bank's Leave to appeal.²⁴

Recently, in *Hopkins v. Kay*,²⁵ the Court of Appeal for Ontario confirmed the availability of the tort of intrusion upon seclusion in a class proceeding brought against organizations regulated by the *Personal Health Information Protection Act, 2004* [PHIPA].²⁶

Between 2011 and 2012, approximately 280 patient records of the Peterborough Regional Hospital (the "Hospital") were wrongfully accessed by the Hospital employees. The plaintiffs brought a claim against the individual defendant employees and the Hospital for the tort of intrusion upon seclusion and alleged that the Hospital failed to adequately monitor its staff and implement policies and systems to prevent improper access to patient records. The Hospital brought a Rule 21 motion to dismiss the claim on the basis that it disclosed no reasonable cause of action and the court had no jurisdiction over the subject matter of the claim because PHIPA is an exhaustive code that ousts the jurisdiction of the Superior Court to entertain any common law claim for invasion of privacy rights in relation to patient records.

PHIPA is a detailed statute dealing with the collection, use, disclosure, retention, and disposal of personal health information; it gives the Commissioner considerable authority to investigate contraventions of the Act and require compliance.

Amongst other remedies, if the Commissioner has made a final order under PHIPA, a person affected by the order may commence a proceeding in the Superior Court of Justice for damages for actual harm that the person has suffered as a result of a contravention of the Act.

The Court of Appeal found that PHIPA does not create an exhaustive code and that "[t]o the extent PHIPA does provide for individual remedies, it turns to the courts for enforcement. The Commissioner has no power to award damages. It is only by commencing a proceeding in the Superior Court following an order of the Commissioner that an individual complainant can seek damages".²⁷ The court concluded that "allowing actions based on *Jones v. Tsige* to proceed in the courts would not undermine the PHIPA scheme. The elements of the common law cause of action are, on balance, more difficult to establish than a breach of PHIPA, and therefore it cannot be said that a plaintiff, by launching a common law action, is 'circumventing' any substantive provision of PHIPA".²⁸

While the decision in *Hopkins v. Kay* was a preliminary pleadings motion, and as such the actual test for certification was not before the court, the court's analysis made it clear that on the preferability aspect of the test for certification, it would have concluded that the regulatory scheme under PHIPA is not a preferable procedure to a class action.

The courts' willingness to recognize the availability of the tort of intrusion upon seclusion in a class action context is certainly not limited to Ontario.

While the British Columbia courts have, to date, refused to recognize the tort of intrusion upon seclusion due to the existence of its statutory cause of action for breach of privacy under its *Privacy Act*,

the courts of Newfoundland and Labrador have left open the possibility that both the statutory tort and the common law tort may co-exist. In addition, the Federal Court has certified a class action, including the tort of intrusion upon seclusion.

In *Hynes v. Western Regional Integrated Health Authority [Hynes]*,²⁹ the Newfoundland Supreme Court considered the tort of intrusion upon seclusion in that province. In *Hynes*, the plaintiffs' personal health information was improperly accessed by employees of the defendant, the Western Regional Health Authority. The plaintiffs claimed that they suffered stress, humiliation, anger, upset, anguish, shock, and fear of identity theft as a result of the defendant's failure to safeguard the privacy of their personal health information, and claim damages for, amongst other things, breach of privacy based on a statutory tort established under Newfoundland's *Privacy Act* and based on the tort of intrusion upon seclusion. The plaintiffs pleaded that the defendant was vicariously liable with respect to both causes of action.

The application for certification was divided in two stages, and, at this first stage, the court determined whether the pleadings disclosed a reasonable cause of action.

Section 3 of Newfoundland's *Privacy Act* provides that "It is a tort, actionable without proof of damage, for a person, wilfully and without a claim of right, to violate the privacy of an individual".³⁰ The defendant hospital argued that while the plaintiff would have a statutory cause of action against the employee because she is the person who acted "wilfully and without a claim of right",³¹ nothing was pleaded to suggest that the defendant Hospital wilfully violated the plaintiff's privacy and vicarious liability should not apply to this statutory tort.

The court allowed the claim to proceed on the basis that the pleadings included a direct allegation that the defendant Hospital failed to establish safeguards and that the determination of whether this

alleged conduct is sufficient to establish that the defendant "wilfully violated the Plaintiffs' privacy" will be determined at trial. In addition, the court held that the determination of whether vicarious liability could apply to this statutory tort would be influenced by the evidence presented at trial.³²

With respect to the tort of intrusion upon seclusion, the court recognized that since its establishment by the Court of Appeal for Ontario, its recognition in other Canadian jurisdictions has been mixed. The defendant relied on several decisions from B.C. in which the courts of that province have refused to recognize the tort due to the fact that it already has a statutory cause of action for breach of privacy under its *Privacy Act*.³³

The court noted that s. 7(1) of Newfoundland's *Privacy Act* declares that "the right of action for violation of privacy under this Act and the remedies under this Act **are in addition to, and not in derogation of, another right of action or other remedy available otherwise than under this Act**" [my emphasis in bold]". No similar wording exists in the British Columbia legislation. On that basis, the court distinguished the several court decisions from British Columbia and concluded that Newfoundland's legislative scheme does not exhaustively occupy the field.³⁴ Similar language exists in the respective *Privacy Acts* of Manitoba and Saskatchewan, leaving open the possibility that these courts may also conclude that statutory rights of action in privacy are not exclusive of the common law.³⁵

The court noted that "[t]his remains an unsettled issue, but at the level of a procedural application for certification of a class action, it is not appropriate to preclude the possibility of the common law tort action for intrusion upon seclusion".³⁶

In *Condon v. Canada [Condon]*, the plaintiff commenced a proposed class action in accordance with the *Federal Court Rules* against the Ministry of Human Resources and Skills Development Canada.

In November 2012, the Ministry had lost a hard drive containing personal information (including names, dates of birth, addresses, student loan balances, and SIN numbers) of 583,000 students who had applied for loans. The hard drive was not encrypted and had been stored in an unlocked drawer. The plaintiffs claimed damages for breach of contract and warranty, intrusion upon seclusion, negligence, and breach of confidence.³⁷

At first instance, the Federal Court certified the action for breach of contract and warranty and the tort of intrusion upon seclusion but refused to certify the claims for negligence and breach of confidence, holding that it was plain and obvious that those claims would fail for lack of compensable damages: in particular, the plaintiffs had not been victims of fraud or identity theft; they had spent, at most, four hours over the phone, seeking status updates from the Minister; they had not availed themselves of any credit monitoring services offered by the credit reporting agencies; nor had they availed themselves of the Credit Flag service offered by the Ministry.³⁸

The class, which was made up of all individuals whose personal information was contained on the hard drive, was not contested by the defendants. The court held that there were common questions on the following issues: (1) breach of contract, breach of warranty, and the tort of intrusion upon seclusion; (2) damages, including whether damages could be assessed in the aggregate and as to whether punitive damages were justified; (3) entitlement to pre- and post-judgment interest; and (4) injunctive remedies regarding new SINs, the provision of credit monitoring services, and the costs of the administrator, class counsel representative, and the arbitrator.³⁹

As to preferable procedure, the Ministry argued that the fact that it took steps to resolve the claims of the Class Members (a credit flag and annotations to the SIN registry) meant that the class action was not the preferable procedure. In addition, the Ministry argued that the intense media coverage and a

review before Parliament met the goal of behaviour modification. In particular, the Ministry argued that it had strengthened its policies for the security and storage of personal information, banned the use of portable hard drives, and implemented tough disciplinary measures should the policies not be followed. Moreover, the Privacy Commissioner had already initiated an investigation into this matter.

The court emphasized that the preferability inquiry is to be conducted through the lens of the three principle goals of class actions (access to justice, judicial economy, and behaviour modification) but that the ultimate question is whether other available means of resolving the claims are preferable, not whether a class action would fully achieve those goals. The court held that in this instance, the class action is the preferable procedure and noted that “the solutions offered by the Defendant are woefully inadequate for the needs of the Plaintiffs”. It noted that in all of the cases relied upon by the Ministry where alternate procedures were found to be preferable, monetary compensation was available through these alternative procedures. Civil claims cannot be adjudicated by the Privacy Commissioner or through other regulations and statutes governing the collection and use of personal information, and none of these procedures can award damages to the individual class members. In addition, the Privacy Commissioner is required to engage in individual investigations for each class member, and undertaking such a process would overwhelm the Commissioner’s office.⁴⁰

The plaintiff appealed the court’s refusal to certify the negligence and breach of confidence claims and, on July 6, 2015, the Federal Court of Appeal allowed the plaintiff’s appeal, holding that the determination of whether the plaintiffs had a reasonable cause of action in negligence or breach of confidence should have been based on the facts as pleaded, not on the evidence adduced in support of the motion, and that the Federal Court had failed to address the claims (as pleaded) for special damages

for “costs incurred in preventing identity theft” and “out of pocket expenses”.⁴¹

Conclusion

As can be seen, breach of privacy class actions are a growing trend in Canada. With increasingly complex technological changes and increasingly savvy criminal elements, corporations can expect to be at continued and ever-greater risk of data breaches, resulting in privacy breaches. Corporations have been placed in a difficult situation. While we can expect that most sophisticated organizations have already been disclosing privacy breaches where there is a real risk of significant harm (a practice now mandated by *PIPEDA*), for less serious breaches where no harm has been suffered, organizations must balance the risk of class actions with reputational concerns, including the desire to be transparent with affected individuals. It has become apparent that with the entrenchment of the tort of intrusion upon seclusion in Ontario (and its growing acceptance elsewhere in Canada), class actions will continue to be certified, even where affected individuals have suffered no compensable harm or have already been compensated for their losses. And as is seen in the *Evans v. Bank of Nova Scotia* certification decision, that tort may be coupled with waiver of tort, at least for the purposes of certification, leading to even greater uncertainty for defendants.

It also appears that the courts are likely to conclude that class actions are the preferable procedure for mass privacy breaches for a number of reasons, including that (1) the class will often be defined by the defendants’ notice of the privacy breach; (2) there will be common issues surrounding whether the defendant’s conduct was intentional, whether it invaded the class members’ private affairs, and whether it would be seen as a reasonable person as highly offensive; and (3) since proof of damages is not a necessary element of the tort of intrusion upon seclusion, any arguments about the

necessity to prove damages on an individual basis will likely be limited to class members’ claims for individual pecuniary damages and, even then, may not be excluded at the certification stage.

While it remains to be seen whether any of the above claims withstand the scrutiny of a full hearing, it will be imperative for corporations to have in place strong and well-documented data and privacy protection policies and to update them regularly. Given that data breaches can be a result of external or internal malfeasance, a clear and continuously updated understanding of the potential risks in each individual company will be required to avoid these breaches—and the class action that immediately follows.

¹ *Privacy Act*, R.S.B.C. 1996 c. 373, s. 1; *The Privacy Act*, R.S.S. 1978, c. P-24, s. 8; *The Privacy Act*, C.C.S.M. c. P125, s 2; *Privacy Act*, R.S.N.L. 1990, c. P-22, s. 3.

² *Jones*, [2012] O.J. No. 148, 2012 ONCA 32.

³ *PIPEDA*, S.C. 2000, c. 5.

⁴ *Digital Privacy Act* (Senate Bill S-4), s. 10.1(7). *Significant harm* includes “bodily harm, humiliation, damage to reputation or relationships, loss of employment, business or professional opportunities, financial loss, identity theft, negative effects on the credit record and damage to or loss of property”.

⁵ *Mazzonna v. DaimlerChrysler Financial Services Canada Inc.*, [2012] Q.J. No. 2133, 2012 QCCS 958; *Sofio v. IIROC*, [2014] J.Q. no 8804, 2014 QCCS 4061 (in French).

⁶ *Condon v. Canada*, [2015] F.C.J. No. 803, 2015 FCA 159.

⁷ *Jones*, *supra* note 2, para. 2.

⁸ *Ibid.*, paras. 4–5.

⁹ *Ibid.*, para. 68.

¹⁰ *Ibid.*, para. 71.

¹¹ *Ibid.*, paras. 90 and 92.

¹² *Ibid.*, paras. 87–88.

¹³ *Alberta v. AUPE*, [2012] A.G.A.A. No. 23, 111 C.L.A.S. 98 (Alta. Arb.); *Trout Point Lodge Ltd. v. Handshoe*, [2012] N.S.J. No. 427, 2012 NSSC 245, paras. 53–55.

¹⁴ *Hynes v. Western Regional Integrated Health Authority*, [2014] N.J. No. 336, 2014 NLTD(G) 137.

¹⁵ *Evans v. The Bank of Nova Scotia*, [2014] O.J. No. 6014, 2014 ONSC 7249 [*Evans* *], *aff*’g [2014] O.J. No. 2708, 2014 ONSC 2135, and *Hopkins v. Kay*, [2015] O.J. No. 751, 2015 ONCA 112, *aff*’g [2014] O.J. No. 485, 2014 ONSC 321.

¹⁶ *Evans v. The Bank of Nova Scotia*, [2014] O.J. No. 2708, 2014 ONSC 2135 [*Evans*].

¹⁷ *Ibid.*, paras. 1–5.

¹⁸ *Ibid.*, para. 26.

¹⁹ *Ibid.*, para. 23.
²⁰ *Ibid.*, para. 22.
²¹ In addition to vicarious liability for the tort of intrusion upon seclusion and waiver of tort, the court also certified the following causes of action: negligence, breach of contract, and vicarious liability for Wilson’s breach of duty of good faith. The court declined to certify a cause of action for breach of fiduciary duty, finding that there was no basis in fact that a special relationship or exceptional circumstances existed that justified imposing a fiduciary duty on the bank with regards to its customers. The court also declined to certify a direct cause of action for breach of the duty of good faith, finding that there is no free-standing duty of good faith and that even if one did exist, such a claim was bound to fail as the plaintiffs had not alleged that the bank acted with an improper motive, self-interest, ill-will, or a dishonest purpose and therefore is not alleged to have acted in bad faith.
²² *Evans*, *supra* note 16, paras. 61–63 and 103–106.
²³ *Ibid.*, para. 74.
²⁴ *Evans**, *supra* note 15.
²⁵ *Hopkins v. Kay*, [2015] O.J. No. 751, 2015 ONCA 112, aff’d [2014] O.J. No. 485, 2014 ONSC 321.
²⁶ S.O. 2004, c. 3, Schedule A.
²⁷ *Hopkins* (Ont. C.A.), *supra* note 25, para. 42.
²⁸ *Ibid.*, para. 52.
²⁹ *Hynes*, [2014] N.J. No. 336, 2014 NLTD(G) 137.
³⁰ *Privacy Act (Newfoundland)*, *supra* note 1, s. 3(1).
³¹ *Hynes*, *supra* note 29.
³² *Ibid.*, para. 20.
³³ *Hynes*, *ibid.*, para. 24; *Hung v. Gardiner*, [2002] B.C.J. No. 1918, 2002 BCSC 1234, para. 110, aff’d [2003] B.C.J. No. 1048, 2003 BCCA 257; *Bracken v. Vancouver (City) Police Board*, [2006] B.C.J. No. 233, 2006 BCSC 189, para. 28; *Demcak v. Vo*, [2013] B.C.J. No. 1058, 2013 BCSC 899, para. 8; *Mohl v. University of British Columbia*, [2009] B.C.J. No. 1096, 2009 BCCA 249, para. 13.
³⁴ *Hynes*, *ibid.*, para. 25; *Privacy Act (Newfoundland)*, *supra* note 1, s. 7(1).
³⁵ *The Privacy Act (Manitoba)*, *supra* note 1, s. 6; *Privacy Act (Saskatchewan)*, *supra* note 1, s. 8.
³⁶ *Hynes*, *supra* note 29, para. 26.
³⁷ *Condon*, [2014] F.C.J. No. 297, 2014 FC 250, paras. 2, 9, and 30.
³⁸ *Ibid.*, paras. 65–79.
³⁹ *Ibid.*, paras. 87–92.
⁴⁰ *Ibid.*, paras. 104–115.
⁴¹ *Condon v. Canada*, *supra* note 6, paras. 15 and 17.

HISTORIC QUEBEC LAWSUIT AGAINST TOBACCO COMPANIES: THE SUPERIOR COURT AWARDS MORE THAN \$15 BILLION IN DAMAGES



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On May 27, 2015, the Superior Court of Québec ordered the three Canadian leading tobacco companies¹ to pay more than 15 billion dollars in moral damages² and punitive damages in the context of two class actions filed in the late 1990s. In excess of 70 witnesses were heard over the course of a trial that spanned more than 250 days.³

The Actions

In February 2005, Justice Jasmin authorized two class actions against JTI-Macdonald (“JTM”), Imperial Tobacco (“ITL”) and Rothmans, Benson & Hedges (“RBH”) (together, the “Companies”).

The first class represented by Cécilia Létourneau was instituted on behalf of 918,000 smokers addicted to cigarettes. Per class member, they claimed \$5000 as moral damages and \$5000 as punitive damages.

The other class action introduced by the Conseil québécois sur le tabac et la santé (“CQTS”), more widely known as the *Blais* case, was instituted on behalf of nearly 100,000 smokers and ex-smokers who had developed lung and throat cancer or emphysema. Per class member, the amount claimed was of \$100,000 in moral damages and \$5,000 in punitive damages. The Plaintiffs had waived any

right to make individual claims for compensatory damages.

The two class actions, spanning between 1950 and 1998,⁴ were joined for trial.

The Judgment

In a 276-page decision, Justice Riordan ruled that the Companies had knowledge of the harm caused by smoking, deliberately withheld critical information, and knowingly made false and misleading public statements.

The court reviewed the conduct of each company and found as follows:

- The Companies manufactured and sold a product that was hazardous and harmful to the health of the consumers.
- The Companies had knowledge of the risks and dangers associated with the use of their products.
- The Companies trivialized the risks and dangers of smoking and failed to disclose information on the subject during the entire duration of the class proceedings.
- Beginning in 1962, the Companies conspired to prevent users of their products from becoming aware of the inherent hazards of such use.
- The Companies interfered with the right to life, personal security, and inviolability of the Class Members, intentionally, prioritizing profit over health.

Fault

The Companies were found to have engaged in serious misconduct under the *Civil Code of Québec* [CCQ],⁵ the *Consumer Protection Act* [CPA],⁶ and the *Charter of Human Rights and Freedoms* (the “Charter”),⁷ thus incurring liability for moral and punitive damages.

The court found that the companies

- contravened their general duty not to cause injury to another person,⁸

- contravened the duty of a manufacturer to inform its customers of the risks and hazards involved in using its products,⁹
- unlawfully interfered with a right under the Charter,¹⁰ and
- engaged in a prohibited practice under the CPA.¹¹

Partial Exoneration

The manufacturer may be released of its liability if a consumer knows of a product’s defect and continuously uses the product.¹² However, Riordan J.S.C. specified that in the case of products hazardous to the physical well-being of the consumers, the test to assess public knowledge is more “stringent” and requires higher standards. Despite warnings on tobacco packages since 1972, the court found such statements to be incomplete and insufficient.

The court determined that, as of January 1, 1980, consumers knew or should have known the risk of contracting tobacco-related diseases,¹³ and, as of March 1, 1996, the risk of becoming addicted to tobacco. Therefore, members who started and continued after these periods¹⁴ committed a contributory fault. The court apportioned 80 per cent of the liability after the above dates to the companies and 20 per cent to the members.

Causation

The court concluded that faults committed by the Companies caused members to smoke. Justice Riordan favoured the “it-stands-to-reason” test, stating that the presence of other external factors leading to smoking did not have the effect of discharging the Companies from their liability. It was found that presumptions were not required to eliminate all other possibilities insofar as the Plaintiffs had shown that the Companies’ faults led in a logical, direct, and immediate way to the members’ smoking.

With respect to the *Blais* case, Riordan J.S.C. agreed that epidemiological evidence is sufficient to prove

individual causation of tobacco-related disease. He, however, specified that this evidence is permitted because of the application of article 15 of the *Tobacco-Related Damages and Health Care Costs Recovery Act*,¹⁵ which allows causation to be proven “on the sole basis of statistical information”.

Damages

The court ordered collective recovery (aggregate damages) if the evidence allows for an assessment of the total amount of members’ claims, with sufficient accuracy.¹⁶

For the *Létourneau* case, despite the fact that the three components of liability were found to be present, the court did not allocate moral damages because the evidence did not allow for sufficient accuracy among class members as to the nature and degree of such damages.

For the *Blais* case, the court awarded solidarity moral damages in the amount of \$6,858,864,000.¹⁷ The respective liability of the Defendants was established to be 67 per cent for ITL, 20 per cent for RBH, and 13 per cent for JTM.

In addition, the court found that all three Companies had engaged in reprehensible conduct, which warranted an award of punitive damages against them under both the Charter and the *CPA*. In light of the parties’ conduct and their ability to pay, the judge ordered the Defendants to pay \$1.31 billion in punitive damages¹⁸ to the members of the two classes, based on one year of before-tax profits for each Defendant.

It should be noted that in Quebec, in cases of collective recovery where individual liquidation is ordered, the court has discretion not to return the unclaimed portion to the Defendants. It disposes of the unpaid funds, taking into consideration the interest of the members.¹⁹ The balance is usually allocated as a *Cy-Près* donation to non-profit organizations whose activities are related to the interests of the class members.

Initial Deposit

A judgment ordering a collective recovery of claims orders the debtor either to deposit the established amount or to carry out a determined reparatory measure or both. In order to ensure that the victims would be compensated and suspecting that the Companies would not remain in business if they deposited the full amount, the court fixed an initial deposit of \$1 billion. Should these amounts be insufficient, the judge reserved the right for the Plaintiffs to request additional sums.

Provisional Execution notwithstanding Appeal

Considering the exceptional nature of this case, the court approved the plaintiffs’ request for a partial provisional execution of the damages awarded. The judge pointed out that the case had begun 17 years ago and that an appeal could take up to 6 years.

Meanwhile, it was deemed to be in the interest of justice that the plaintiffs be compensated as quickly as possible, given potential health issues. As such, the judge ordered provisional execution within 60 days, regardless of an appeal, in an amount equal to its initial deposit for moral damages in addition to both condemnations of punitive damages representing more than \$1 billion. The judge would decide at some later date how to distribute these funds.

Appeal and Current Status

On June 26, 2015, the defendants filed an appeal seeking to have Riordan J.S.C.’s decision quashed in both class actions. The defendants also requested that the provisional execution order pursuant to which they were required to pay more than \$1 billion no later than July 26, 2015, notwithstanding the appeal be stayed.

The hearing on provisional execution was held on July 9, 2015, before a panel of three justices of the Court of Appeal. At the hearing, the Companies maintained that they were not in a position to pay the required amount, as such a measure could

bankrupt them and cause irreparable harm to their ability to appeal.

Less than two weeks after the hearing, the Court of Appeal issued its judgment in favour of the tobacco companies.

The court noted that the prospect of a further delay for appeals did not constitute a legal justification for provisional execution and that such delay in receiving payments would not “aggravate” the injuries already suffered by class members.

Finding few precedents, the court questioned whether the rules governing provisional execution are compatible with those governing class actions. Without specifically answering the question, the court noted that the Companies would suffer significant injury should they be required to pay, adding that should they be successful in appeal, recovering the amounts already paid to those who received them may prove difficult.

Considering the negligible benefit class members derived from the provisional execution order and the prejudice for the tobacco companies should they be required to pay the amounts pursuant to such order, the Court of Appeal cancelled the order of provisional execution.

It should be noted that at least seven similar class actions are ongoing in Canada as well as ten healthcare cost recovery lawsuits. The amount claimed in many of these cases exceeds even the amount awarded by the Québec Superior Court.

This is the first tobacco class action in Canada in which class members obtained an award.

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- ¹ *Létourneau v. JTI-MacDonald Corp.* (C.S., 2015-05-27), [2015] Q.J. No. 4729, 2015 QCCS 2382.
 - ² Commonly referred to as non-pecuniary damages.
 - ³ The trial stage began on March 12, 2012, and ended on December 11, 2014.
 - ⁴ Date on which the motions for authorization were served.
 - ⁵ *CCQ*, CQLR c C-1991.
 - ⁶ *CPA*, CQLR c P-40.1.
 - ⁷ Charter, CQLR c C-12.
 - ⁸ *CCQ*, *supra* note 5, art. 1457.
 - ⁹ *Ibid.*, art. 1468ff.
 - ¹⁰ Charter, *supra* note 7, arts. 1 and 49.
 - ¹¹ *CPA*, *supra* note 6, arts. 219 and 228.
 - ¹² *CCQ*, *supra* note 5, art. 1473.
 - ¹³ Lung and throat cancer or emphysema.
 - ¹⁴ The court ruled that it takes approximately four years to become dependent on smoking. Therefore *Blais* class members who started smoking after January 1, 1976, and *Létourneau* class members who started smoking after March 1, 1992, and continued smoking after these dates must share liability.
 - ¹⁵ CQLR c R-2.2.0.0.1; “In an action brought on a collective basis, proof of causation between alleged facts [...] may be established on the sole basis of statistical information or information derived from epidemiological, sociological or any other relevant studies, including information derived from a sampling”.
 - ¹⁶ *CCQ*, *supra* note 5, art. 1031.
 - ¹⁷ Once interest and the additional indemnity of the *Civil Code* are added, this sum increases to \$15,500,000,000.
 - ¹⁸ The judge decided that the circumstances justified that 90 per cent of the total punitive damages go to *Blais* members and 10 per cent to *Létourneau* members. Considering the amount allocated for moral damages in the *Blais* file, the court made a symbolic award and ordered each company to pay \$30,000 in punitive damages, which, according to the court, represents one dollar for each Canadian who dies from tobacco-related illnesses each year.
 - ¹⁹ *CCQ*, *supra* note 5, art. 1036.