What American lawyers and others need to know about privacy law class actions in Canada

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WHAT AMERICAN LAWYERS AND OTHERS NEED TO KNOW ABOUT PRIVACY LAW CLASS ACTIONS IN CANADA

The rising use of digital technologies and artificial intelligence is making privacy an increasingly serious and pressing issue. With the media coverage of the computer errors being made by big corporations like Google and Apple, users seem to have a growing awareness of their vulnerability. For corporations, the risk of being the target of litigation over privacy issues is therefore higher than ever. In short, cybersecurity is increasingly a fact of life in legal practice and the courts.

The objective of this paper is to provide an overview of the Canadian legal system as it relates to privacy law class actions. We will begin with a few general comments about the Canadian judicial system and class actions in Canada.

Official languages

Canada is an officially bilingual country; the two official languages are English and French. A majority of class actions are initiated in Ontario and Quebec, Ontario being majority English-speaking and Quebec majority French-speaking. In all cases, proceedings may nonetheless be brought in either English or French, and, regardless of the language chosen by the plaintiff, the defendant is entitled to conduct its defence in either English or French.

In Ontario, judgments are generally written in English. In Quebec, although the language of judgments of the Court of Québec and the Superior Court is left to the discretion of the judge, a majority of decisions are written in French. The Federal Court of Canada and the Supreme Court of Canada release their judgments in both languages. In Quebec, particularly in Montreal, it is not unusual for a hearing to be conducted in French and English.

Introduction to Canadian law

Canada is referred to as "bijural" because it belongs to two major systems of law: common law and *droit civil* or civil law. All Canadian provinces and territories, with the exception of Quebec, apply the common law in both private law and public law. Like the other provinces, Quebec applies the common law in its public law, but is set apart by its adherence to a Civil Code and Code of Civil Procedure that set down in writing the legislative provisions that apply to private law matters and procedure in the civil courts.

Because class actions are private law matters, the legal system in which they are brought will differ depending on where the proceedings are instituted; if the action is brought in Quebec, civil law will apply; if it is brought elsewhere in Canada, it will fall under the common law, provincial legislation concerning class actions, and the rules of the courts.

Canadian procedure at the certification/authorization stage of a class action

The procedure for certifying or authorizing a class action prior to going to trial differs slightly, depending on the province where the action is brought.

In Quebec, a person who wishes to institute a class action must comply with a two-stage procedure. The first stage consists of obtaining authorization of the court to institute the action. This is also the stage at which the applicant requests the status of representative of the other members of the class. The case is heard on the merits only at the second stage.

In order to obtain authorization to institute a class action, the applicant must show that their claim and the claims of the other members of the class raise identical, similar or related issues of law or fact. The applicant must also prove that the facts appear to justify the action and that the composition of the class makes an action in which all members of the class were plaintiffs, or mandated one of them to represent them, difficult or impracticable. The applicant must also show that they are capable of properly representing the class members.

However, a member who does not want to be bound by the judgment on the application made by the representative may opt out of the class.

In the rest of Canada, a class action is not commenced by an application for authorization; rather, an actual action is begun. In it, the plaintiff states his/her intention to bring a class action. The purpose of that request is to obtain certification of the action brought, not authorization to bring an action in the future.

In spite of this slight procedural difference, the tests to be met in a request for certification are virtually identical to the tests to be met in an application for authorization in Quebec, the one difference being that in Quebec, there is no requirement to show that the class action is the "preferable procedure" for resolving the issues said to be common to the class.

We will now consider privacy law class actions in Canada.

Recent proliferation of privacy law class actions in Canada

Organizations and corporations index a significant volume of personal data of all kinds, ranging from financial statements to medical records. This information may be retained on various digital platforms that may be mobile or involve cloud storage.

There are numerous statutes that govern the management of such personal information; they include:

(a) *Personal Information Protection and Electronic Documents Act* (federal) ("**PIPEDA**");

(b) *Act respecting the Protection of Personal Information in the Private Sector* (Quebec);

(c) *Personal Health Information Protection Act, 2004* (Ontario);

(d) *Personal Information Protection Act* (Alberta);

(e) *Personal Information Protection Act* (British Columbia).

Although their form and content differ, these laws are based on common principles that apply to the protection of personal information:

(a) no one may collect, use or disclose personal information unless it is relevant and also necessary to the stated purpose of the record relating to the individual concerned;

(b) it is essential that consent be obtained;

(c) there are limited and specific exceptions to the consent requirement;

(d) the individual concerned has access to his/her personal information, and may ask to correct any information that is incorrect, subject to specific, limited exceptions.

A picture of Canadian law is not quite complete without mentioning *Canada's anti-spam legislation* ("**CASL**"),[2] which came into force in part on July 1, 2014. Among other things:

(a) CASL sets limits on an organization's right to use electronic communication (email, text messages, etc.) for commercial purposes;

(b) unlike American legislation, most of which permits the sending of communications for commercial purposes unless the recipient has expressed a wish to no longer receive such communications, CASL takes the opposite approach: prior consent is required, subject to specific, limited exceptions;

(c) subject to the exceptions specified, CASL prohibits the use of an electronic communication to seek consent, since such a communication is itself considered to be a commercial electronic message;

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[2] The full title of the Act is as follows: *An Act to promote the efficiency and adaptability of the Canadian economy by regulating certain activities that discourage reliance on electronic means of carrying out commercial activities, and to amend the Canadian Radio-television and Telecommunications Commission Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act*, S.C. 2010, c. 23.

(d) CASL provides a broad definition of what constitutes a commercial electronic message: any electronic communication that it would be reasonable to conclude has as its purpose or one of its purposes to encourage participation in a commercial activity;[3]

(e) CASL provides for significant remedies against violators, such as the imposition of "administrative" penalties.

CASL also provides for the possibility of a "private" civil action. The amounts that can be claimed range up to $200 per individual for each message sent. At this time, that provision is not yet in force. A date for it to enter into force had previously been set for July 1, 2017; however, that date has been postponed to a date that is still to be decided.[4] Obviously, this is a measure that will eventually be an incentive to class actions against any organization that breaks the rule.

In the past, corporations ran a low risk of exposure to legal action and damages when they violated these laws. In fact, the main consequence for an organization of breaking privacy laws was that its reputation would be tarnished, particularly if an opinion was published by the regulatory bodies in this area (at the federal level and the other provinces, the Privacy Commissioner; in Quebec, the Commission d'accès à l'information).

The situation is very different today. For several years, we have seen a rise in the number of class actions filed for privacy violations. Over the last four years alone, more than 30 class actions of that kind have been initiated in Canada, for reasons ranging from hacking of computer databases[5] to the loss of a USB key containing the financial information of thousands of people.[6] While there have not yet been any judgments on the merit in these kinds of actions in Canada, some of them have passed the certification or authorization stage.

A number of factors seem to be fueling this new trend.

First, the courts today are particularly sensitive to privacy issues, privacy being a fundamental right protected by the *Canadian Charter of Rights and Freedoms* and by Quebec's *Charter of human rights and freedoms*.

This is probably not unrelated to the constantly lowering threshold for obtaining certification or authorization for a class action. Initially, the mere demonstration of a *risk* of identity theft or fraud, or the *fear* of falling victim to such an occurrence, was not

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3 Based on *Regulatory Impact Analysis Statement* published in 2014 by Industry Canada, pp. 8-9.

4 Order in Council P.C. 2017-0580, June 2, 2017.

5 *Demers* v. *Yahoo Canada*, S.C.M. No. 500-06-000841-177.

6 *Condon* v. *Canada*, 2015 FCA 159 [*Condon*].

considered to be compensable harm if no loss could be shown. That is the basis on which the courts, particularly in Quebec, have refused to allow certain class actions to go to trial.[7]

Recently, however, the federal courts of Canada have allowed collective actions to go to trial without requiring evidence of actual damages suffered.[8] It is therefore now possible for class actions to be heard on the merits even if, in the end, the members of the class might no longer be able to prove the existence of harm at trial. As a result, these decisions have set the threshold to be met very low.

In addition, the possibility of plaintiffs receiving economic benefits may also have encouraged both certification or authorization of class actions in privacy cases in Canada and the institution of such actions.

By bringing an individual action, some plaintiffs have been awarded damages amounting to several thousand dollars, without having to prove the existence of significant harm. For example, the Supreme Court of British Columbia, in one case, ordered the Bank of Montreal to pay $2,000 for violating a customer's privacy, even though he suffered no harm.[9] The amounts awarded are even larger when the plaintiff could prove that they suffered harm as a result of the violation.[10]

There is also the factor that a number of plaintiff groups in class actions have received settlements of their actions in which substantial compensation has been paid by the defendant organizations. In some Canadian settlements, the defendants have paid out hundreds of thousands of dollars in compensation to the class members.[11]

All of these factors encourage significant numbers of Canadians to use the class action method to resolve their privacy disputes.

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7 See, for example, *Larose* v. *Banque Nationale du Canada*, 2010 QCCS 5385 [*Larose*] and *Sofio* v. *Organisme canadien de réglementation du commerce des valeurs mobilières (OCRCVM)*, 2015 QCCA 1820.

8 *Condon*, *supra* note 6; *M. Untel* v. *Canada*, 2015 FC 916 [*M. Untel*].

9 *Albayate v. Bank of Montreal*, 2015 BCSC 695 [*Albayate*].

10 For example, **$5,000** was awarded in *Nammo* v. *TransUnion of Canada Inc.*, 2010 FC 1284 [*Nammo*] and in *Cote v. Day & Ross Inc.*, 2015 FC 1283 [*Day & Ross*]; $**7,500** in *McIntosh v. Legal Aid Ontario*, 2014 ONSC 6136 [*McIntosh*]; **$10,000** was awarded as compensatory damages and **10,000** as punitive damages in *Chitrakar* v. *Bell TV*, 2013 CF 1103 [*Chitrakar*]; **$2,500** was awarded in *Biron* v. *RBC Royal Bank*, 2012 FC 1095 [*Biron*]; **$1,500**, in *Girao* v. *Zarek Taylor Grossman Hanrahan LLP*, 2011 FC 1070 [*Girao*] and in *Arsenault* v. *Pomerleau*, 2009 QCCQ 15292 [*Arsenault*]; $**4,500** in *Landry* v. *Royal Bank of Canada*, 2011 FC 687 [*Landry*]; and **$7, 000** in *R.S.* v. *Commission scolaire A*, 2008 QCCQ 13546.

11 See, for example, *Rideout v. Health Labrador Corp*, 2007 NLTD 150 [*Rideout*] and *Speevak v. Canadian Imperial Bank of Commerce*, 2010 ONSC 1128 [*Speevak*].

Most common allegations in privacy law class actions in Canada

Not only has the number of class actions brought relating to privacy in Canada risen, but the possible bases for such actions have also expanded. In particular, class actions may now be brought for violations of the many privacy protection statutes in force in Canada based on both contract and tort (extra-contractual liability).

(a) Violation of a statutory right (PIPEDA, PHIPA, etc.)

There are dozens of laws in Canada, both federal and provincial, that relate to privacy. Some of them are general, like PIPEDA at the federal level[12] and the multiple Privacy Acts in the provinces, and other subject-specific laws, such as the personal information protection legislation that has been enacted by some provinces, the scope of which is limited to the protection of health information.[13]

Some of these laws include a provision granting a right to damages for violation of the provisions of the law. For example, PIPEDA provides that the Court may "award damages to the complainant, including damages for any humiliation that the complainant has suffered."[14] British Columbia's *Privacy Act*[15] provides that it is a tort to violate the privacy of another.[16] Accordingly, as for any other common law tort, a claim may be made for damages. Some laws also impose a cap on the damages that may be awarded if there is no pecuniary loss; that is the case for the Ontario *Personal Health Information Protection Act*, which limits the amount of non-pecuniary damages that may be awarded to $10,000.[17]

These provisions are the basis on which a number of class actions and individual actions have been brought, alleging violations of certain provisions of one of these laws and seeking damages for the harm caused by the violation.

No class action has yet been heard on the merits, but several have been certified in British Columbia and Ontario.[18] In practical terms, a large majority of individual actions have been successful; plaintiffs have been awarded amounts between $1,500 and $20,000.[19]

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12 S.C. 2000, c. 5 [*PIPEDA*].

13 See, for example, the Ontario statute: *Personal Health Information Protection Act, 2004*, S.O. 2004, c. 3, Schedule A; the New Brunswick statute: *Personal Health Information Privacy and Access Act*, S.N.B. 2009, c. P-7.05; and the Northwest Territories statute: *Health Information Act*, S.N.W.T. 2014, c. 2.

14 *PIPEDA*, *supra* note 12, section 16 (*c*).

15 R.S.B.C. 1996, c. 373.

16 *Ibid.*, section 1(1).

17 *Personal Health Information Protection Act, 2004*, S.O. 2004, c. 3, Schedule A, section 65.

18 See, for example, *Ari v. Insurance Corporation of British Columbia*, 2015 BCCA 468 [*Ari*] and *Douez v. Facebook Inc*., 2014 BCSC 953 under the British Columbia *Privacy Act*; *Hopkins v. Kay*, 2015 ONCA 112 [*Hopkins*] under the Ontario *Personal Health Information Protection Act*.

The Ontario Court of Appeal has said that when the statute in issue in the case provides for the possibility of bringing an action and obtaining damages for violation of the statute, it is still possible to bring an action in tort.[20] However, the federal courts and the courts of other provinces have not yet given any judgments on this point.

(b) Contract and tort liability

Violation of the statutory right is certainly a lucrative basis on which to bring individual actions. However, a majority of actions relating to privacy are brought on the basis of the defendant organization's liability in contract or tort. There are multiple allegations made: breach of privacy, breach of confidentiality, breach of trust, negligence, breach of contract, breach of warranty, misrepresentation, and the tort recently created by the Ontario Court of Appeal: the tort of intrusion upon seclusion.[21]

A number of individual actions in contract or tort have proceeded to trial and been successful. The damages awarded all amount to several thousand dollars, which is similar to the amounts awarded by the courts that have heard individual actions based on the violation of privacy legislation provisions.[22]

It should be noted that the damages awarded at common law may not exceed $20,000 if there is no pecuniary loss.[23]

As in the case of violation of a specific law, no class action in contract or tort has yet proceeded to trial. However, several have been certified[24] or authorized.[25] Often, applicants do not state the amount of damages they will be claiming at trial;[26] when they do, however, the amounts claimed are high. For example, a class action against Bell Canada that has been authorized by the Quebec Court of Appeal is seeking a reduction of the members' monthly charges since 2007, non-pecuniary damages for breach of privacy

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19 **$10,000** in compensatory damages and **$10,000** in punitive damages in *Chitrakar*, *supra* note 10; **$5,000** in *Day & Ross*, *supra* note 10 and in *Nammo*, *supra* note 10; **$4,500** in *Landry*, *supra* note 10; **$2,500** in *Biron*, *supra* note 10; and **$1,500** in *Girao*, *supra* note 10.

20 *Hopkins*, *supra* note 18.

21 *Jones v. Tsige*, 2012 ONCA 32 [*Jones*].

22 **$7,500** in *McIntosh*, *supra* note 10; **$7,000** in *R.S. v. Commission scolaire A*, 2008 QCCQ 13546; **$2,000** in *Albayate*, *supra* note 9; and **$1,500** in *Arsenault*, *supra* note 10.

23 *Jones*, *supra* note 21.

24 *M. Untel*, *supra* note 8; *Condon*, *supra* note 6; *Hopkins*, *supra* note 20; *Jones*, *supra* note 21; and *Rideout*, *supra* note 11.

25 See, for example, *TD Auto Finance Services Inc./Services de financement auto TD inc.* v. *Belley*, 2015 QCCA 1255 [*TD*]; *Albilia* v. *Apple inc*., 2013 QCCS 2805 [*Albilia*] and 2014 QCCS 5311; *Union des consommateurs* v. *Bell Canada*, 2012 QCCA 1287 [*Union des consommateurs*]; and *Larose*, *supra* note 7.

26 *TD*, *supra* note 25; *Condon*, *supra* note 6; *Albilia*, *supra* note 25.

in the amount of $500, and punitive damages of $1,000.[27] Damages total $1,500 per member, not counting the losses incurred as a result of the reduction in the monthly charges sought. Given the large number of users of Bell Canada's Internet services who are covered by the action, the repercussions for the company if it succeeded at trial would not be insignificant.

Some of these actions have been settled out of court. As noted earlier, and even though there have not yet been judgments on the merits of any cases, the amounts paid out by the defendant organizations (and received by the plaintiffs) in those settlements have been substantial.[28]

The situations where the bill is the highest for the defendants are those where punitive damages are awarded. Unlike compensatory damages, punitive damages are intended not to indemnify the victim, but to punish the party in the wrong, where they acted intentionally or were guilty of gross negligence, and to thereby deter any repetition of the wrongful conduct. The Canadian courts award punitive damages only in exceptional cases, but when they do, the damages are relatively high, in particular to ensure that they have a deterrent effect on the defendant and other potential wrongdoers.

The Quebec Superior Court has confirmed that a plaintiff may obtain punitive damages even where no compensatory damages are awarded.[29] However, the federal courts and the courts of the other provinces have not made similar decisions.

Conclusions

It is apparent from the high success rate (in terms of payments obtained) for privacy actions in Canada, whether brought individually or as class actions, that the Canadian courts are increasingly sensitive to privacy issues. That is reflected in the courts' openness to new torts, based on which such actions may be brought in the common law provinces, and, in the case of class actions, in the lowering of the threshold to be met in order for an action to be certified or authorized.

The inevitable result for corporations is a higher risk of being the target of an action for a privacy violation, and even a successful one.

Since no privacy law class actions have yet gone to trial, the amount of damages that might be awarded cannot be determined with certainty. However, given the individual actions and the settlements approved by the courts in this area of the law, these actions will undeniably result in substantial costs for corporate defendants. In addition, given the nature of the actions and the fact that the inevitably cover a large number of individuals, damages

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27 *Union des consommateurs*, *supra* note 25.

28 See, for example, *Rideout*, *supra* note 11 and *Speevak*, *supra* note 11.

29 *Albilia*, *supra* note 25.

that might seem insignificant at first glance could quickly rise to thousands or even millions of dollars once added up.

If the industry does not persuade the federal government to completely cancel the coming into force of the right of private action under CASL, we can foresee greater use of class actions in this area.