U.S. Guide to Class Actions in Canada

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U.S. Guide to Class Actions in Canada provides general information only and does not constitute legal or other professional advice. Specific advice should be sought in connection with your circumstances. For more information, please contact Osler's Class Action Defence Practice Group.

Introduction

This guide contains an overview of class actions in Canada. While class actions in Canada are for the most part similar to class actions in the U.S., this guide serves to highlight key procedural and substantive differences.

Most class actions in Canada are litigated in provincial courts, and there are differences among the provincial approaches, particularly regarding the class certification procedure, the opt-in or opt-out mechanisms, and the potential for adverse costs awards. These differences are particularly significant between Québec and the other provinces. For this reason, it is common for plaintiffs to start one class action in Québec on behalf of Québec residents and one or more actions in another province (or provinces) on behalf of a national or international class.

For more information on the Canadian court system, and common types of class actions in Canada, please refer to the Appendix – The Canadian Legal Landscape.

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Stages of a Canadian class action

OVERVIEW

A claimant usually starts a class action in Canada by filing an originating process such as a statement of claim (equivalent to the U.S. complaint) setting out the claims, and then seeking to have the action certified as a class proceeding.

If the action is certified as a class proceeding, the claimant will be designated the representative plaintiff and will have authority to prosecute the case on behalf of the defined class. In most cases, discovery does not occur until the action has been certified. The trial will then usually proceed in two phases:

1. The first phase is a trial on the common issues, following which the court will issue a judgment on each of the common issues that is binding on all class members.
2. If the class succeeds on some or all of the common issues, the case proceeds to the second phase in which any remaining individual issues are tried in individual issue trials.

The general process for class certification is similar in Québec, in that the first step in the proceeding is for a representative class member to seek authorization of a class action under the Québec *Code of Civil Procedure*. However, there are some fundamental procedural differences in Québec, as detailed throughout this guide.

AUTHORIZATION VS. CERTIFICATION

The term "Authorization" is used in Québec instead of the term "Certification", which is used in the common law provinces.

DEFENDING A CLASS ACTION

A. Pleadings and jurisdiction

Before filing any documents with the court, foreign defendants should consider whether the parties or subject matter of the litigation have a connection to the province in which they have been sued that is sufficient to establish jurisdiction. Filing a statement of defence (equivalent to the U.S. response) could constitute attornment to the court's jurisdiction. In many cases, U.S. defendants challenge jurisdiction in Canadian actions – or take the necessary steps to reserve the right to challenge jurisdiction – before taking any other steps to defend an action.

B. Timing of defence

Although the rules typically require a defendant to deliver a statement of defence, a practice has developed throughout Canada to defer that step in most cases until after an action has been certified or authorized. That practice is subject to exceptions, and certain judges insist on a statement of defence before certification in some contexts.[1]

Therefore, unless a defendant is contesting jurisdiction or forum, the first tactical decision for a defendant tends to be whether or not to file a statement of defence before certification. If the parties cannot agree, the matter will typically be referred to the case management judge.

There are typically two potential concerns about filing a statement of defence before certification. First, it can trigger disclosure obligations to produce relevant documents to the plaintiff, which can be onerous, expensive and unnecessary if the action is not certified. Second, the defendant runs the risk of assisting the plaintiff's certification motion by providing documents that the plaintiff can use to bolster the evidentiary record for certification. It also often makes sense to defer filing of the statement of defence because the scope of the claims to be defended (and the resulting production obligations) may be significantly different depending on which claims are ultimately certified, if any.

C. Joining other defendants

In every Canadian jurisdiction, a defendant to a class proceeding can bring:

- a cross-claim against an existing defendant; or
- a third-party claim that brings a new party into the proceeding as a third-party defendant.

The procedure governing such claims is set out in the rules of court of the relevant jurisdiction. The courts can direct such claims to be adjudicated separately from the common issues, particularly if they are not subject to any of the certified common issues.

D. Multiple defendants

Canadian courts have recognized the existence of a "common interest privilege" permitting parties with a common interest in actual or pending litigation to share certain communications without waiving privilege.

1 See for example *Pennyfeather v Timminco Limited*, [2011] 107 O.R. (3d) 201 (S.C.J.), at para. 9.

While it may not be strictly necessary, in complex multi-party litigation, defendants sometimes enter into a joint defence agreement or a common interest privilege agreement to formalize their claim of privilege and clarify the procedures for sharing confidential or privileged information. The defendants will typically claim that this agreement, itself, is privileged and protected from disclosure to the representative plaintiff. Additionally, defendants can enter into a tolling arrangement that suspends any limitation periods that may apply to claims for contribution, indemnity or warranty against each other while the claim is being litigated.

Multiple defendants can also engage the same lawyer under a joint defence retainer. The availability and rules governing joint defence retainers are regulated by the rules governing the legal profession in each province. Under such retainers, the lawyer will typically owe duties of loyalty to each client and will be required to share confidential information with each client. In addition, the lawyer may be unable to continue to act for more than one party if the interests of the respective defendants come into conflict.

Multiple defendants can also jointly engage experts. Where multiple defendants are opposing class certification or authorization, there can be significant advantages in jointly engaging an expert to testify on behalf of the defendants, or simply to consult on the opposition to the motion for certification or authorization. Testifying experts are generally subject to strict professional obligations, including obligations to the Court and obligations to be independent and impartial.

E. Other procedural options

There are other procedural steps at an early stage of a class proceeding that may be tactically advantageous to a defendant. For example, if the allegations in the claim are not sufficiently particularized for the defendant to plead in his or her statement of defence, as in any action, the defendant can demand particulars and request to inspect referenced documents.

The defendant may also choose to bring a motion to strike all or part of the plaintiff's claim as failing to conform with the requirements of a proper statement of claim, or for failing to disclose a cause of action. In some circumstances, a defendant may also seek to bring a motion for summary judgment under the applicable rules of court. An important Supreme Court of Canada decision in 2014 expanded the availability and scope of summary judgment motions, while also increasing the probability that a successful summary judgment motion will finally resolve the dispute.[2] However, summary judgment motions generally cannot be brought until the defendant has filed a statement of defence.

Plaintiffs often object to the court hearing any motion brought by the defendants (particularly a motion for summary judgment) prior to the certification motion, and may request that the supervising judge hear any such motions either together with, or directly after the certification motion. If the court orders that the defendant's motion and certification motion be heard at the same time, the tactical advantages of bringing the motion may be partly undermined as aspects of the motion could effectively become merged with the certification analysis.

2 *Hryniak v Mauldin*, 2014 SCC 7.

F. Limitation periods

Most Canadian provinces have statutory limitations legislation that sets out a general limitation period that applies to claims unless more specific provisions apply. For example, in the common law provinces of Ontario, British Columbia and a number of others, a general two-year limitation period applies to many claims at common law (including most claims in contract and tort). By contrast, in Québec, the general limitation period is three years. In most provinces, the general limitation period runs from the time when the plaintiff knew of, or reasonably should have discovered, his or her potential claim against the defendant. There are exceptions, including some special limitation periods that can apply to the assertion of contribution or warranty claims against co-defendants or third parties.

While the class proceeding statutes across Canada do not set out specific limitation periods, many statutes include special tolling provisions for the benefit of class members. In most common law provinces, once a class proceeding has been filed, the limitation periods that govern the claims of the putative class members against the named defendants will be suspended until certification has been determined.

If the proceeding is certified, the suspension of the applicable limitation periods will generally continue in favour of the class members until one of the following events occurs:

- a class member opts out;
- the certification order is amended to exclude the class member;
- the proceeding is "decertified"; or
- the class proceeding is settled, dismissed or abandoned.

LIMITATION PERIODS: KEY PRINCIPLES

- In most cases, the applicable limitations period is two years (three years in Québec).
- Examples of special limitation periods include:
  i. where a specific statutory limitation period governs (e.g., the *Securities Act* (Ontario) provides a three-year limitation period for a claim arising from a misrepresentation in secondary market disclosure);
  ii. where a statute permits an extension of the limitation period (e.g., the *Environmental Protection and Enhancement Act* (Alberta) allows the court to extend the limitation period for contaminated property claims in certain circumstances); and
  iii. claims by one defendant against another alleged wrongdoer for contribution and indemnity (for which the limitation does not start to run until the day on which the first defendant was served with a claim).

G. Procedural timetable

Common law provinces

The practice for setting a class proceeding timetable varies by jurisdiction. In Ontario, for example, there is a roster of specialized class action judges, and each class action is assigned to one of those judges for active case management. In other jurisdictions, such as British Columbia, a class proceeding can be assigned to any Superior Court judge, and a party must specifically request the appointment of a case management judge.

If a case management judge is appointed, that judge has broad discretion to manage the proceeding to ensure a fair and expeditious determination of the matter. In most common law provinces, the representative plaintiff commences the certification process by delivering a certification motion, usually consisting of a notice of motion and affidavits that set out the evidence in support of class certification. While most provincial statutes require a plaintiff to deliver its certification record within 90 days of the commencement of a proceeding, this rule is rarely enforced and plaintiffs tend to initiate the certification process in the months, or even years, after a claim has been issued. The court will set a timetable leading to the certification motion, including deadlines for the exchange of expert affidavits, cross-examinations and the exchange of legal factums or briefs (the nomenclature differs between provinces). The case management judge will typically hear the argument on certification, and a certification motion will typically be argued over one to four days (although some hearings can last longer). In some common law provinces, such as Ontario, Alberta and Manitoba, there are rules that preclude the case management judge from presiding over the trial on the merits of the case (unless the parties agree otherwise). In other provinces, such as British Columbia, New Brunswick, Newfoundland, Nova Scotia and Saskatchewan, the case management judge may also hear the common issues trial.

Québec

The practice for authorization in Québec is significantly different from the certification procedure in the rest of Canada. The representative plaintiff commences the authorization process by delivering an application for authorization to bring a class proceeding, before any pleading is issued.

Following the issuance of the application, the court typically assigns the case to a co-ordinating judge of the Class Action Chamber who will contact the parties to deal with scheduling matters. Unlike in common law provinces, the court's analysis is focused on the framing of the allegations in the application for authorization, which are deemed to be true for the purposes of the application. Under the Québec procedural rules, a plaintiff is not required to file any affidavit evidence in support of authorization, and a defendant must seek leave to examine the plaintiff or file responding evidence. Authorization is usually argued through oral submissions; however, the court can allow the parties to file written submissions. The authorization motion is typically shorter in Québec, and the co-ordinating judge is usually the same judge who will preside over the trial on the merits of the action.

If the action is authorized, the court will set a timetable for the trial of the common issues, including the completion of discovery. After authorization, it can take several years before the court convenes a trial on the merits to determine the common issues. While many class actions settle prior to trial, an

increasing number of class actions proceed to trial. One of the largest class actions in Québec led to a 253-day trial.[3]

The timing of the hearing of authorization and that of the common issues trial varies widely depending on the:

- number of defendants;
- complexity of the issues;
- need for expert evidence; and/or
- general court schedule.

CERTIFICATION PROCEDURE VS. AUTHORIZATION PROCEDURE

- In common law jurisdictions, the representative plaintiff will file a pleading before its certification motion; proceedings in Québec are initiated by an application for authorization.
- There is no requirement to file affidavit evidence in support of an application for authorization in Québec; affidavit evidence is required in other jurisdictions.
- In Québec, a defendant must seek court permission to cross-examine on any affidavit evidence, or to file reply evidence; such permission is not typically required in other jurisdictions.
- In Québec, authorization is typically argued through oral submissions; in other jurisdictions, certification is argued through both written and oral argument.
- The authorization process in Québec is typically quicker than in other jurisdictions.

THE CERTIFICATION MOTION

TEST FOR CLASS ACTION CERTIFICATION

The test for certifying a class action is generally similar in the common law provinces, subject to some minor differences. Generally speaking, on a certification motion, the plaintiffs must establish that:

i. The pleadings disclose a cause of action;
ii. There exists an identifiable class of two or more persons;
iii. There are common issues as between members of the proposed class;
iv. Proceeding by way of a class action is the "preferable procedure"; and
v. A representative plaintiff exists who would fairly and adequately represent the interests of the class.

3 *Letourneau v. JTI-Macdonald Corp*, 2015 QCCS 2382.

The certification motion does not consider the merits of the case. The plaintiff must establish only that there is "some basis in fact" to show that the certification requirements (except the cause of action requirement) are met. This is a low standard. Canadian courts have generally rejected the "rigorous analysis" that is required at certification in the U.S. Federal Courts and are reluctant to resolve any conflicts in evidence at certification.[4] Defendants should therefore consider whether it may be strategically beneficial in specific cases to negotiate certification on consent and proceed directly to a trial on the merits.

In common law provinces, the parties normally file evidence by way of affidavit, and the defendant has the opportunity to file responding affidavit evidence. An affidavit must satisfy the normal rules of admissibility and some minimum content requirements (for example, many jurisdictions require the parties to address the estimated class size), but there are otherwise no special rules governing the tendering of affidavits. Once affidavits have been exchanged, a party may have the right – depending on the provincial procedures and rules – to cross-examine the opposing party's affiants in respect of the certification issues. The cross-examination is typically conducted outside of court before a court reporter, who prepares a written transcript. In the common law provinces, lawyers normally argue the certification motion based on a written evidentiary record that is filed with the court (e.g., affidavits and transcripts from cross-examinations).

The practice in Québec is different, as a defendant must seek leave to file responding evidence and conduct a cross-examination. While it is possible, in certain limited circumstances, to obtain leave to file expert evidence in class actions in Québec, it is very rarely permitted at the authorization stage.

A. Whether the pleadings disclose a cause of action

Since a class proceeding must, like other actions, disclose a cause of action, this part of the certification test is, in most cases, easily met by plaintiffs. Plaintiffs only need to show that, assuming all of the facts as pleaded in the claim are true, the claims could possibly succeed at trial. In other words, the plaintiff must demonstrate that it has asserted an arguable claim and it is not obvious that the claim has no prospect of success.

There is some debate in different provinces about whether the proposed representative plaintiff must personally have a cause of action against each named defendant. In British Columbia, for example, the proposed representative plaintiff need only demonstrate that it has a cause of action against one named defendant. The Supreme Court of Canada has held that under the Québec *Code of Civil Procedure*, the proposed representative plaintiff need only have standing with respect to one named defendant.[5] While the Court's decision was limited to Québec, it remains to be seen whether the Court's approach will be adopted in other provinces.

4 *Pro-Sys Consultants Ltd v Microsoft Corporation*, 2013 SCC 57, at para. 102.

5 *Bank of Montreal v Marcotte*, 2014 SCC 55.

B. Identifiable class

General principles

The proposed representative plaintiff must seek to represent an appropriate class of claimants. The plaintiff must demonstrate the existence of an identifiable class of two or more class members, and the proposed class must be defined in an objective way that has some rational relationship with the proposed common issues.

The onus is on the plaintiffs to show that the class is not unnecessarily broad – i.e., that the class could not be defined more narrowly without arbitrarily excluding some people who share the same interest in resolving the common issues, and that members with viable claims exist. At certification, it is not necessary to establish the identity of each class member or even to know the total number of members with precision. However, on a contested certification motion, the plaintiff and the defendant must generally include their best information relating to the size of the class as part of their evidence. In circumstances where the proposed class is large or difficult to identify, the plaintiff will usually face arguments that the proposed class is unmanageable. In such a case, the court will consider the size of the class and the corresponding number of individual issues as a factor at the preferability stage. Class members must also be able to determine whether they are party of the class based on the class definition.[6]

The plaintiff must demonstrate the existence of an identifiable class of two or more class members, and the proposed class must be defined in an objective way that has some rational relationship with the proposed common issues.

Previously in Québec, there was a special rule that limited participation in class actions to individuals and certain small businesses, but as a result of new amendments that came into effect in January 2016, this limitation no longer exists. The removal of this restriction has opened up the availability of class actions to businesses across Québec and will result in the adoption of broad class definitions in Québec that capture larger amounts of commerce.

However, the preferable procedure requirement, discussed in further detail below, requires that the court consider alternate, "preferable" means of pursuing the claim. As a result, classes of limited size that are more effectively dealt with through joinder or other court processes may be defeated at the certification stage.

Extra-provincial claimants

Most class proceeding statutes do not specifically address whether courts can certify a class action that includes extra-provincial or foreign residents. Certain provinces (such as British Columbia, Newfoundland and New Brunswick) specifically allow the certification of classes that include extra-provincial residents, but only if such residents specifically opt in to the class proceeding.

In practice, the courts in Ontario and other provinces have certified numerous classes (both on a contested and settlement basis) that include extra-provincial residents. At the settlement stage, it has become quite common to seek certification of a settlement class in Ontario which includes residents in various other provinces, rather than seeking to certify a settlement class in each relevant province. In some cases, the courts have certified classes that include foreign class members. However, this practice remains controversial and unsettled, given the risk of forum shopping, contradictory rulings and concerns for interprovincial and international comity.

6 See for example, *Beveridge v British Columbia (Workers' Compensation Board)*, 2014 BCSC 2145, at paras. 65-69.

Professional claimants

There are no rules in various provinces that prevent or limit the ability of "professional commercial claimants" to purchase and prosecute a class member's claim. For example, in the common law provinces, the traditional rules on maintenance and champerty place some limits on the ability of a "stranger" to a proceeding to purchase a class member's cause of action. To date, professional commercial claimants have not been a common or visible feature of class actions in Canada, particularly compared to other jurisdictions. However, the courts have approved certain third-party funding arrangements, under which a third party funds certain aspects of a class proceeding in exchange for a financial return, but does not purchase any interest from class members.

C. Common issues

The third requirement for certification is that the claims raise one or more common issues. A common issue is an issue of fact or law that is common, but not necessarily identical, to all claims.

TEST TO ESTABLISH A COMMON ISSUE

The plaintiff must establish that there is:

1. Some factual basis in support of the common issue; and
2. A rational connection between the class definition and the proposed common issues.

The courts have generally held that an issue is common where it is necessary to the resolution of each class member's claim. An issue is not sufficiently common unless it is a substantial ingredient of each class member's claim. The resolution of the common issues must significantly advance the action, even though the common issues do not necessarily have to determine liability.[7] The Supreme Court of Canada held that a common question may exist even where the answer to the common question varies between class members, as long as it does not give rise to conflicting interests between class members.[8]

Accordingly, the common issues requirement will be met whether or not the common issues "predominate" over issues affecting individual members. The weighing of individual issues and common issues is addressed through the preferable procedure branch of the test (discussed below); however, the "predominance" test has been held to be inapplicable in that context as well.

Although it is sufficient to demonstrate the existence of a single common issue, in practice, a plaintiff will seek to identify several common issues to show the existence of a critical mass of common issues, which the objective of advancing the proceeding and satisfying the "preferability" requirement.

In complex cases, it is also common for each party to file an affidavit from a "commonality" expert who will typically give an opinion on whether there is a class-wide method of determining the proposed common issues.

7 *Hollick v Toronto (City)*, [2001] S.C.R. 158, at para. 32.

8 *Vivendi Canada Inc v Dell'Aniello*, 2014 SCC 1, at para. 45.

D. Preferable procedure

The fourth requirement for certification is that a class action be the "preferable" procedure for resolving the claim. Preferability is assessed through the lens of the three principal advantages of class actions: judicial economy, access to justice and behaviour modification.

The Supreme Court of Canada has held that the certification analysis must consider the fairness, efficiency and manageability of the proceeding as a whole, including any individual issues that might exist. Where individual issues overwhelm common ones, a class action will not achieve judicial economy, and cannot be the "preferable" method for resolving the claim.[9]

In terms of access to justice, where a defendant has put forward an alternate and reasonable method of resolving the disputes in question, the court will consider both substantive and procedural aspects of the competing proceedings, and may engage in a cost-benefit analysis, to determine whether a class proceeding is preferable in terms of providing access to justice.[10] The Supreme Court of Canada has stated that a class proceeding will serve the goal of access to justice if:

1. there are access to justice concerns that a class action could address; and
2. these concerns remain even when alternate avenues of redress are considered.[11]

Canadian jurisprudence has adopted a somewhat broader notion of "preferable procedure" than is sometimes seen in U.S. rulings involving Federal Rule 23(b)(3). Specifically, some U.S. rulings have observed that Rule 23(b)(3) requires a class action to be superior to other available means for the fair and efficient adjudication of the controversy, and therefore settlement funds and similar non-adjudicative schemes do not fall within the Rule. However, Canadian courts have expressly recognized such mechanisms can be preferable to a class action.[12]

Preferable procedure is assessed by determining whether proceeding by way of class action will advance any of the principle advantages of class actions, namely: judicial economy, access to justice and behavior modification.

E. Representative plaintiff

REPRESENTATIVE PLAINTIFF TEST

The last requirement for certification is that the proposed representative plaintiff:

i. fairly and adequately represent the interests of the class;

ii. has produced a plan for the proposed class proceeding that sets out a workable method of advancing the proceeding on behalf of the class and notifying class members of the proceeding; and

iii. does not have an interest in conflict with the interests of other class members on the common issues.

9 *Hollick v Toronto (City)*, [2001] 3 S.C.R. 158 ("*Hollick*"), at paras. 28 – 31; *Rumley v British Columbia*, [2001] 3 S.C.R. 184 ("*Rumley*"), at para. 35.

10 *AIC Limited v Fischer*, 2013 SCC 69.

11 AIC, at para. 26.

12 *Hollick*, at paras. 28 – 31.

In Québec, the test to qualify as a representative plaintiff is similar but less demanding, as a representative plaintiff need only demonstrate that it is in a position to represent the members adequately.

The presence of actual or potential conflicts of interest between the proposed class representative and the members of the proposed class has often been raised as a means of undermining the suitability of an action for certification, although with infrequent success.

The proposed plan for the proceeding does not need to be comprehensive at the certification stage and is often expanded or refined as the proceedings progress. However, the plan has to set out a workable method of advancing the claim on behalf of the class and must therefore also propose a method for resolving individual issues. A deficient litigation plan will rarely constitute a reason, in and of itself, for denying certification but a deficient litigation plan may be seen as evidence that the proposed proceeding is simply unworkable and cannot meet the preferable procedure requirement.

In most provinces, a representative organization or body can be granted standing to pursue a class proceeding on behalf of a class, but only if a substantial injustice would result to the class if the organization or body were denied representative status. For example, in Québec, a representative organization or body can lead a class proceeding provided that both:

- one of the organization's members is a member of the proposed class; and
- the interest of the member is linked to the organization's founding purposes or objects.

By contrast, Ontario's class proceeding statute does not address the potential role of a representative organization and body. Therefore, the majority of class actions in Ontario are brought by individuals or corporations that are members of the proposed class and have a direct interest in them.

KEY DIFFERENCES: CERTIFICATION TEST


- Representative plaintiff need only show "some basis in fact" that certification requirements have been met; this is a lower standard than that required by the U.S. Federal Courts.
- Contrary to U.S. Federal Rule 23, there is no requirement to show that the class is "so numerous that joinder of all members is impractical" or that the claims and defences of the representative parties are typical of the class.
- There is no "predominance requirement" with respect to the common issues versus the individual issues.
- Canadian courts impose a broader conception of "preferable procedure" than that imposed in rulings under U.S. Federal Rule 23(b)(3).

F. Authorization in Québec

AUTHORIZATION TEST

Québec is fundamentally different from that in the common law provinces. Generally, a representative plaintiff must demonstrate the following elements:

i. the claims of the members raise identical, similar or related questions of law or fact;

ii. the facts alleged appear to justify the remedies sought;

iii. the composition of the group makes joinder or representation by mandate difficult or impractical; and

iv. the representative member is in a position to represent the members adequately.

The requirement of predominance or preferable procedure has no equivalent under the Québec test for authorization. This authorization test is widely viewed as more lenient and less demanding than the test for certification in other provinces. In addition, there are procedural advantages for a plaintiff that seeks authorization in Québec. In particular, a petitioner is not required to file an affidavit in support of its request for authorization, and the respondent does not have the right to file a formal, written contestation to the motion. Rather, the respondent must seek leave from the court to adduce relevant evidence to contest authorization, including in order to examine the petitioner.

POST-CERTIFICATION PROCEEDINGS

Once certified, class actions will generally proceed in a manner that is largely similar to standard civil proceedings. The common issues trial will usually be tried first, to be followed by the individual issues trials or damages assessments. However, where facts permit, the common and individual issues can be heard concurrently.

KEY DIFFERENCES: JUDGE OR JURY?

Unlike the U.S., most civil actions in Canada, including class actions, are not heard by a jury, but are tried in front of a judge alone.

A. Notice to class members and opt-out rights

If the action is certified as a class proceeding, the court will make an order giving notice to class members. The method of giving notice may depend on the size of the class, the nature of the relief sought, where the class members reside, and costs associated with giving notice. The content of the notice is defined by the class action statutes, but generally mirrors the content of a notice in the U.S. The notice must contain sufficient information regarding the nature of the claim, the potential consequences of the claim, the right to opt out of the class

action, and any arrangements or agreements as to costs. It must also indicate that the judgment, whether favourable or not, will bind all class members who do not opt out.

Most provincial certification statutes have adopted an opt-out model for class membership, which is similar to the opt-out mechanism under the U.S. Federal Rule 23. On certification or authorization of a class, members of the class (regardless of their residence) are typically deemed to participate in the proceeding unless they take an active step to opt out of the class. The jurisdictions that apply an opt-out regime include Ontario, Québec, Saskatchewan, Alberta, Manitoba, Nova Scotia and the Federal Court.

Other provinces have adopted a hybrid opt-in/opt-out model that depends on the residence of the class member. In these jurisdictions, on certification or authorization of a class, members of the class that are resident within the province are deemed to participate in the proceeding unless they specifically opt out. Members of the class that are residents outside the province can only participate in the proceeding if they specifically opt in. The jurisdictions that apply a hybrid regime include British Columbia, Newfoundland and New Brunswick.

OPT-IN VS. OPT-OUT

Opt-out regime: Ontario, Québec, Saskatchewan, Alberta, Manitoba, Nova Scotia & the Federal Court.

Hybrid Opt-in/Opt-out dependent on the residence of the class member: British Columbia, Newfoundland & New Brunswick.

If the court certifies or authorizes a class action, the court's order will address the process and timelines for class members to exercise their rights to opt in/opt out of the class (depending on the jurisdiction). In its order, the court will typically approve the publication or dissemination of the notice to the potential class members, often through a combination of newspaper advertisements, industry notices or postings, and direct mailing or emailing. The procedure and timeline for opting in/opting out can vary depending on the case, but the opt-in/opt-out deadline is typically set between 30 and 90 days from the dissemination of the class notice. In practice, a class member only has a single opportunity to opt in/opt out of the proceeding.

The existence of an opt-in or opt-out mechanism can potentially have a significant impact on class size. However, in past experience, very few class members have exercised their rights to opt in or opt out in Canada once a class proceeding has been certified or authorized.

B. Discovery and expert evidence

The procedure for disclosure of documents in class actions is governed by the applicable rules of court in each Canadian province and is very similar to the procedure for disclosure in normal civil proceedings. However, there are some important practice rules that govern the timing of "merits" discovery, and there are limits on the ability of a defendant to conduct discovery of individual class members.

In civil proceedings, a litigant has a general obligation to disclose documents that are in its possession, power or control and that are relevant to the issues in the proceeding. This obligation is normally triggered by the exchange of pleadings, once the matters in issue have been clearly set out by the parties. Unlike in the U.S., where information is considered discoverable if it is reasonably calculated to lead to the discovery of admissible evidence, to be discoverable in Canada, information must actually be relevant to material facts at issue in the dispute. As such, the volume of information exchanged between the parties is often significantly less in Canada than it would be in the U.S.

Once a class proceeding has been certified or authorized, a representative plaintiff and the defendant must produce all documents in their possession, power and control which are relevant to the common issues. It is the party that possesses the document who is responsible for collection and the determination of relevance. While an opposing party can challenge such determinations through discovery motions, document disclosure is usually conducted on a co-operative basis.

DOCUMENTARY DISCLOSURE IN QUÉBEC

In Québec, documents are only disclosed in response to specific requests made by the party seeking to obtain them. Such a request can be made by way of subpoena before examinations for discovery, or by way of undertaking following examinations for discovery.

In contrast with other jurisdictions, there are limits on the ability of litigants in a class proceeding to examine or obtain documents from a non-party. In Canada, a party that seeks to conduct discovery of non-parties must both obtain the leave of the court and generally show that the non-party's evidence is sufficiently relevant to a material issue in the action.

REQUIREMENTS FOR NON-PARTY DISCLOSURE IN CANADA

The court must generally be satisfied that:

i. the party seeking discovery of the non-party could not obtain the information elsewhere;

ii. it would be unfair to require the party to proceed to trial without the information; and

iii. the non-party discovery will not lead to undue delay or unreasonable expenses.

Moreover, in most jurisdictions, there are limits on the ability of a defendant to conduct discovery of individual class members regarding the common issues. As a general rule, the defendant must first seek to exhaust its rights of discovery of the representative plaintiff and must then seek permission from the court to discover individual class members. In considering whether to allow the discovery of individual class members, the court considers the following factors:

1. the stage of the proceeding;
2. the existence of sub-classes;
3. the need for discovery in view of the claims and defenses that have been advanced;
4. the value of individual claims; and
5. whether discovery would represent an undue burden for class members.

Finally, to the extent the parties seek to produce expert testimony at the common issues trial, they must comply with the procedural and evidentiary rules of the province. In most provinces, parties must exchange written expert reports well in advance of the trial, and such expert reports must satisfy certain requirements of substance and form. For example, in British Columbia, a party seeking to rely on expert opinion evidence at trial must serve an expert report at least 84 days in advance of the trial date (with responding expert reports due at least 42 days in advance of trial).[13] In Ontario, a party must serve its expert report not less than 90 days before the pre-trial conference (with response expert reports due to be served not less than 60 days before the pre-trial conference).[14] Typically, expert reports must contain at least: (i) the expert's name and qualifications; (ii) the information and assumptions upon which the opinion is based; and, (iii) a summary of the opinion. Ultimately, depending on the case, the case management judge may also set certain deadlines for the exchange of expert reports in advance of the trial.

KEY DIFFERENCES: DOCUMENTARY DISCOVERY

- The scope of documentary discovery is much more limited in Canada; documents must be relevant to material facts at issue in dispute.
- In Canada, there are limits on the ability to discover:
  i. non-parties; and,
  ii. individual class members.

C. Damages and remedies

General principles governing damage awards

The ordinary principles governing damages in civil litigation apply equally to class actions in Canada. The nature and scope of monetary relief depends on the underlying cause of action. While the assessment of damages is traditionally regarded as an individual issue that depends on the assessment of the harm suffered by each class member, most class action statutes in Canada provide that the existence of a claim for damages that requires individualized assessment is not a bar to certification on its own. However, the complexity of determining individual claims for damages is typically a factor that is weighed at the preferability stage when considering whether the claim should proceed as a class proceeding.

13 British Columbia *Supreme Court Civil Rules*, B.C. Reg. 168/2009, Rule 11-6(3) and (4).

14 Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 94, Rule 53.03

In most provinces, there are special provisions under the governing class proceeding statutes that allow a representative plaintiff to rely on statistical evidence for the purpose of determining the amount or distribution of damages to class members. In addition, under these statutes, the courts can conduct an aggregate assessment of damages on behalf of all, or certain groups of class members, in certain circumstances. Under these provisions, the courts can also allocate shares on an average or proportional basis if it would be impractical or inefficient to either:

- identify the class members entitled to a share in the aggregate award; or
- determine the exact shares that should be allocated to individual class members under the aggregate award.

Under these unique provisions on aggregate awards, Canadian courts have certified the aggregate assessment of damages as a common issue in several cases.

Punitive damages are usually awarded only in narrow circumstances for certain causes of action where the defendant has engaged in malicious, oppressive or high-handed conduct that offends the court's sense of decency. Many courts regard the determination of punitive damages as an individual issue, but some courts have certified the determination of punitive damages as a common issue.[15]

KEY DIFFERENCES: DAMAGES AWARDS

The amount of general damages awarded in Canadian lawsuits, including class actions, is typically less than those seen in the U.S. Canadian judges are also more constrained than their U.S. counterparts in their ability to award punitive damages. Unlike in the U.S., Canadian courts do not award treble damages in Canada.

Interest on damages

There are rules governing the award of pre-judgment and post-judgment interest in each province.

Other relief

A representative plaintiff can also seek declaratory relief and interim awards on behalf of class members under the applicable procedural rules in each Canadian province. A representative plaintiff that seeks to obtain declaratory relief in favour of all class members will typically seek to certify such relief as a common issue and, if certified, the court will consider the relief at the common issues trial.

D. Settlement

Settlement rules

In Canada, a representative plaintiff must obtain court approval to implement a proposed class settlement. To obtain court approval, the representative plaintiff must generally prove that the proposed settlement is fair, reasonable and in the best interests of the class. A court order approving a settlement will usually specify that the settlement (including any releases) binds all class members.

15 See *Rumley*, at para. 34.

In advance of the settlement approval hearing, the plaintiff may seek certification or authorization of a proposed class for settlement purposes (i.e., before seeking approval of the settlement). Unlike in the U.S., the test for class certification or authorization at the settlement stage is more permissive than the test that applies to a contested motion. If the court has certified or authorized a settlement class, the representative plaintiff will distribute a class notice that describes the terms of the settlement and presents the opportunity to file objections with the court. The class members will have an opportunity to opt out of the proceeding and the settlement if they have not had a prior opportunity to do so. If the court approves the settlement and a class member has not opted out, the class member will generally be bound by the settlement.

In Canada, the test for certification or authorization at the settlement stage is more permissive than the test that applies to a contested motion.

There are different rules across the provinces about whether a plaintiff requires court approval to effect a settlement with a defendant before class certification or authorization. For example, in Ontario, Québec, Alberta, New Brunswick and in proceedings before the Federal Court, the applicable rules appear to require court approval for any settlement regarding a proceeding commenced under the statute or that is "subject of an application for certification," even if the proceedings have not been certified.

Separate settlements

Where the representative plaintiff has brought a class proceeding against several defendants, the representative plaintiff can enter into partial settlements with some, but not all, defendants. Each partial settlement is subject to court approval (if required in the applicable jurisdiction). However, where there are potential claims of contribution, indemnity or warranty, it is common for the settling defendant to seek a bar order (also known as a waiver of solidarity order in Québec) to bar future contribution claims from the non-settling defendants as part of the settlement.

E. Alternative dispute resolution

Mediation

The use of mediation is well-established in Canada and is available in class action proceedings. In certain jurisdictions, parties to civil proceedings (including class action proceedings) are required to conduct mediation before trial. In the absence of such a requirement, the parties to a class proceeding must consent to mediate their dispute.

Arbitration

The use of binding arbitration is also well-accepted in Canada, and there is legislation that facilitates the use of arbitration in every province, as well as at the federal level. However, the availability of binding arbitration in a class action proceeding remains uncertain. The statutes that relate to class actions across Canada make no reference to arbitration, nor do the commercial arbitration statutes provide any mechanism to impose arbitration awards on absent class members. As a result, it is unsettled whether there is legislative authority to impose binding arbitration on class members who have not consented to arbitration.

In Canada, it is unsettled whether there is legislative authority to impose binding arbitration on class members who have not consented to arbitration.

The potential availability of arbitration in national class actions is further complicated by the diversity of statutes across the provinces, and the fact that

certain provinces bar the enforcement of contractual arbitration provisions as against consumers under consumer protection legislation. However, given the strong judicial endorsement of private arbitration as an alternative to traditional litigation, there is continuing debate as to whether binding arbitration is available as a mechanism to litigate issues in the context of a certified or authorized class action proceeding.

F. Appeals

Subject to certain narrow exceptions, a party can appeal any decision made under class action legislation in Canada, including judgments regarding class certification or authorization and those regarding common issues. However, the specific procedures differ depending on the relevant jurisdiction as well as the type of decision under appeal.

RIGHTS OF APPEAL

- In Ontario, a plaintiff can appeal as of right from an order denying class certification, but must obtain leave from the court to appeal a partial or total certification order.
- In Saskatchewan, Manitoba, New Brunswick, Nova Scotia and Newfoundland, a party must seek leave from the court to bring an appeal, regardless of whether the court granted or refused class certification.
- In British Columbia, Alberta and the Federal Court, a party has an automatic right of appeal regarding class certification and is not required to seek leave.
- In Québec, the legislature has adopted an asymmetrical right of appeal in favour of the representative plaintiff. Under these rules, a proposed representative plaintiff can appeal the denial of a judgment authorizing the class action as a right, but a defendant's right of appeal against a judgment authorizing a class action is subject to leave from the Court of Appeal.

In all of the provinces, a party has the right to appeal a final judgment on the common issues or a final award of aggregate relief. The representative plaintiff generally has authority to pursue rights of appeal on behalf of the class, except for appeals relating to individual claims. However, in certain provinces, if the representative plaintiff is unwilling or unable to appeal a decision, a class member can seek leave from the court to bring the appeal in place of the representative plaintiff.

The procedures for a representative plaintiff, defendant or class member to appeal a decision relating to individual claims vary significantly across jurisdictions. In most provinces, a party must seek leave from the court to appeal such decisions, particularly for judgments involving small amounts.

KEY DIFFERENCES: POST-CERTIFICATION PROCEEDINGS

- Certain jurisdictions impose a hybrid opt-in/opt-out model, in which non-resident class members can only participate if they expressly opt in to the class actions.
- Most civil proceedings (including class actions) are heard by a judge alone, and not a jury.
- There are limits on a defendant's discovery rights vis-à-vis non-parties and individual class members.
- Documentary productions tend to be smaller in numbers in Canada than the U.S. owing to the test for production.
- General damages awards tend to be lower in Canada than in the U.S., and Canadian courts are more constrained in their ability to impose punitive damages.
- The test for class certification at the settlement stage is more permissible than in a contested certification motion.

2

Costs and funding in class actions

COSTS

The approach to costs in class action litigation in Canada varies from jurisdiction to jurisdiction. In most cases, the general costs rules that govern civil proceedings also apply to class actions. However, there are special rules in each jurisdiction which can modify or mitigate the impact of general rules in some circumstances, partly to facilitate class actions and advance the goal of access to justice. In addition, awards of costs are subject to a wide degree of judicial discretion. Some courts have expressed reluctance to impose costs awards in a way that would deter litigants from pursuing future class actions in meritorious cases.

In Ontario and Québec, there is a general "loser pays" costs rule that applies to civil proceedings. This means that the losing party to a motion, application or action must pay a portion of the other party's costs (and certain disbursements). Although this rule applies to class actions, in both jurisdictions, the representative plaintiff (not individual class members) is generally responsible for adverse costs awards that relate to the common issues. In Ontario, the court also has discretion to modify the application of this costs rule in cases involving a test case, a novel point of law or a matter of public interest. In Québec, costs awards are usually limited to relatively small amounts. However, the court may award the plaintiff an indemnity for disbursements and an amount to cover legal costs, payable out of the amount recovered collectively and before individual recovery of claims.

In practice, the courts have often exercised their discretion to reduce or eliminate costs against unsuccessful plaintiffs. However, courts have from time to time made significant costs awards in favour of successful defendants, including in cases where the court has denied certification. Further, when a class proceeding is essentially commercial in nature, courts may be more willing to grant successful parties – including defendants – a higher portion of their costs.[16]

In British Columbia, Saskatchewan, Manitoba, Newfoundland and Labrador, and the Federal Court, the legislature has adopted special "no costs" rules that apply specifically to class actions. Under these "no costs" rules, the court is generally not

16 *Kerr v Danier Leather Inc*, [2007] 3 S.C.R. 331. Note also that securities class actions proceeding under the secondary market right of action in Part XXIII.1 of the *Ontario Securities Act* are subject to the normal cost rules (s. 138.11).

permitted to award costs against any party at any stage of the proceeding, including the certification motion. However, in these jurisdictions, a party will still generally be responsible for its own disbursements and the court can award costs in narrow circumstances where:

- a party has engaged in vexatious behaviour;
- a party has delayed the proceedings; or
- there are exceptional circumstances that warrant an award of costs.

Under the legislation in Alberta, courts only have discretion to award costs in accordance with the existing rules of court, which generally adopt a "loser pays" regime. In Nova Scotia and New Brunswick, the courts have a similar discretion, but there is also a rule that protects class members other than the representative plaintiff from adverse costs awards. However, in Nova Scotia, there is a special rule that allows the court to apportion costs between the parties according to their liability.

A representative plaintiff is potentially subject to an adverse costs award if it discontinues its claim before the conclusion of the action, particularly if the defendant has incurred significant costs in defending the action. However, an individual class member will generally not be liable for costs if he chooses to opt out before the opt-out deadline. An individual class member will generally not be liable for costs associated with the certification and/or trial of the common issues, but may be liable for costs associated with its individual claims.

Where costs are payable in Canada, they are calculated according to a court tariff. Therefore, the successful party will usually only recover a portion of its actual costs. In practice, class counsel frequently indemnifies the representative plaintiff against an adverse costs award. As a result, class counsel will usually bear the risk associated with an adverse cost award on an unsuccessful motion or application. In addition, where a request for funding has been approved by the class action funds in Ontario and Québec, the fund may cover adverse costs awards and certain disbursements.

On settlement of a class proceeding, a defendant will typically agree to pay a fixed settlement amount in favour of the class action on the understanding that the proceeding will be dismissed "without costs" (that is, without any cost award under traditional costs rules). At settlement approval, the plaintiff typically applies for a fee award that includes recovery of its costs and disbursements. In calculating a fee award, the court considers any past costs awards that have been made to date in the proceedings.

KEY DIFFERENCES: COSTS AWARDS

- Many Canadian jurisdictions follow a "loser pays" system, where the representative plaintiff will be liable to pay adverse costs awards.
- Other Canadian jurisdictions follow a "no costs" system for class actions.

SOURCES OF FUNDING

A. Lawyer fees in class actions

In class actions, a plaintiff's lawyer can act on a standard fee basis, but it is more common for such a lawyer to act on a contingency fee basis.

Under the provincial class action statutes, a lawyer is specifically permitted to enter into a fee arrangement with a representative plaintiff, which provides for the payment of fees and disbursements only if the class proceeding is successful. However, under these statutes, class counsel must generally seek advance court approval of any requested fee or disbursement payment in order to protect the interests of the class. There is no formal requirement for court approval in Québec, although in practice most class counsel will seek fee and disbursement approval as part of a settlement.

In assessing the reasonableness of the fee request from class counsel, the court will consider a range of factors, including the complexity of the matter and the risk undertaken by class counsel. Most provincial class action statutes allow class counsel to include the use of "multipliers" in contingency agreements, whereby a counsel's base fee is multiplied by a numerical factor to reflect the risk of the proceeding. In practice, it is more common for class counsel to simply seek a fixed fee or a percentage fee, although the courts often make a multiplier calculation to assess whether the resulting fee is within a reasonable range. Most class counsel will seek an order directing reimbursement of disbursements from the settlement funds, without any multiplier. In the final analysis, the court will consider whether the fee and disbursement request are fair and reasonable in light of the risks and complexity of the proceeding and the returns for the class. In a number of cases, class counsel have received fee approvals of between 20% and 33% of the total settlement funds that have been recovered for class members.

In assessing the reasonableness of the fee request from class counsel, the court will consider a range of factors, including the complexity of the matter and the risk undertaken by class counsel.

B. Third-party funding

Third-party funding arrangements are relatively new in Canada. Historically, class counsel and representative plaintiffs financed their own proceedings, and did not seek approval of third-party funding arrangements. However, with the increasing cost of class certification and the risk of adverse costs awards, class counsel have sought approval of such arrangements in several recent cases.

Although the law in this area is evolving, the courts in two leading jurisdictions have concluded that third-party funding arrangements are permitted in certain circumstances. The Ontario Superior Court approved the first third-party funding arrangement in 2011, and the Supreme Court of British Columbia approved its first arrangement in 2014. Based on the emerging case law, a third-party funding agreement must:

1. be transparent and disclosed to the court;
2. be subject to court approval to ensure that there is no abuse or interference with the administration of justice;
3. not compromise or impair the lawyer's duty of loyalty and confidentiality; and
4. not impair the lawyer's judgment and conduct of the litigation on behalf of the class.

C. Governmental support

A representative plaintiff with a worthy claim can seek financial support in the provinces of Ontario and Québec. Both provinces have created separate funds for the purposes of aiding plaintiffs in bringing class actions.

In Québec, a representative plaintiff can request the payment of a portion of its legal fees and disbursements from the *Fond d'aide aux actions collectives*. In Ontario, a representative plaintiff can apply to the Class Proceedings Fund for assistance with the payments of disbursements and for indemnification for adverse costs awards. However, a representative plaintiff cannot seek payment of its legal fees through the Class Proceedings Fund. Both funds apply strict criteria, and not all applicants receive funding. In addition, both funds set terms of reimbursement if the class action results in a settlement or award of damages. For example, the Class Proceedings Fund receives a levy of 10% on any awards or settlements in funded proceedings.

Appendix

The Canadian legal landscape

PRINCIPLE SOURCES OF LAW

The substantive law of each Canadian common law province is a combination of applicable federal legislation, provincial legislation and common law that draws heavily from the British legal tradition. By contrast, Québec is a civil law jurisdiction that is governed by a formal civil code, with heavy influence from the French civilian legal system.

The principle source of law governing class actions in Canada is statutory. The legislatures of each province of Canada (with the exception of Prince Edward Island and the three territories) have adopted specific class action legislation and/or amendments to the applicable rules of court that recognize class actions and set out the fundamental rules governing collective relief on behalf of the class. The statutes in each jurisdiction are very similar, and, to some extent, bear a resemblance to the U.S. federal class action legislation under Federal Rule 23. However, there are important differences between the statutes of each province, particularly regarding the certification procedure, the availability of opt-in/opt-out mechanisms and the treatment of costs.

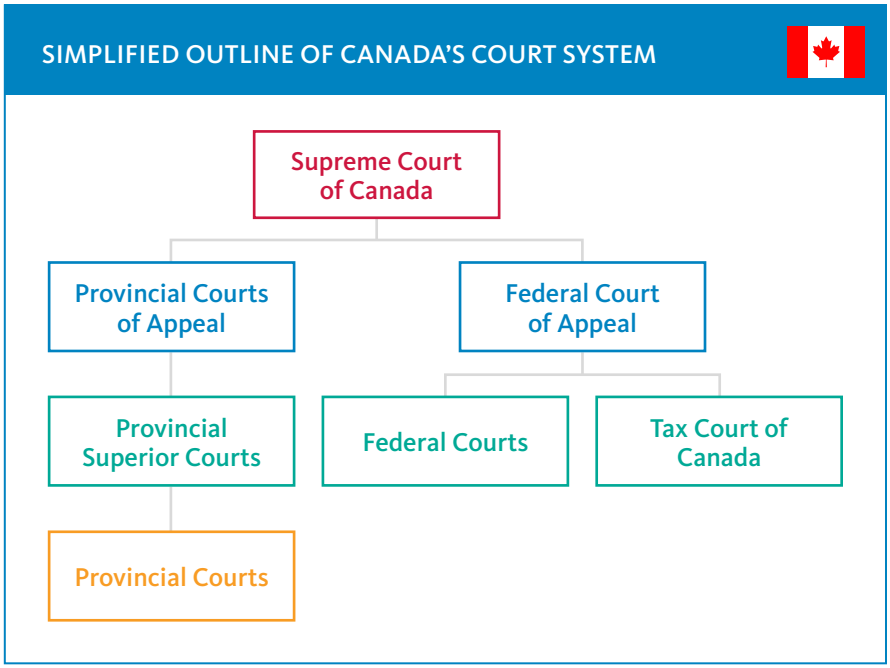
There is also a federal regime for class actions, which was adopted through amendments to the Federal Courts Rules in 2002. In addition, in the province of Québec, there has been a unique regime for class actions since 1978, which is currently set out in Articles 571 to 604 of the Québec *Code of Civil Procedure*.

PRINCIPLE INSTITUTIONS

Canada has a federal court system that includes both:

- the Federal Court, administered by the federal government; and
- provincial and territorial superior courts, administered by the provinces and territories.

The Federal Court is a statutory court that has limited jurisdiction over certain specialized matters arising under federal law (such as immigration, intellectual property and federal taxation). By contrast, the provincial superior courts are courts of inherent general jurisdiction over a range of claims arising under common law/civil law, in equity, as well as under federal and provincial statutes.



While class actions can be brought before the Federal Court (particularly for claims against the federal government and federally regulated institutions), the vast majority of class actions that are brought in commercial, consumer and personal injury cases are filed before the provincial superior courts because of their broad inherent jurisdiction.

The provincial superior courts have three qualities that distinguish them from U.S. state courts. First, the provincial superior courts are a hybrid federal creation as judges are appointed by the federal government, but the courts are administered by the provincial government. Second, the provincial superior courts have general jurisdiction over matters of both provincial and federal law. Third, provincial superior court decisions are subject to appeals to the Canadian court of final resort, the Supreme Court of Canada.

In addition, and unlike the U.S. Federal Court, Canada does not have a multi-district litigation procedure to co-ordinate overlapping or multiple actions involving the same subject matter or parties. If parallel proceedings are commenced in more than one province, the Federal Court does not assume jurisdiction. Rather, the superior courts of all of the provinces involved may each continue to exercise jurisdiction over the matter. In cases involving a single event that has a diffuse impact on consumers or individuals across Canada, it is quite common to observe multiple actions filed in different provinces, each of which seeks to bring similar claims on behalf of residents within that province. Depending on the case, there may even be multiple claims filed within each province.

The prospect of bringing or defending multiple proceedings that involve similar claims across Canada is an administrative challenge for both plaintiffs and defendants. This can, unfortunately, give rise to overlapping proceedings and jurisdictional issues that must be resolved with the assistance of the courts or through the co-operation of the parties and their counsel (for example, through an agreement to argue certification in one jurisdiction first, while holding the other proceedings in abeyance or stayed on consent pending the ruling on certification in the first jurisdiction). Although Canadian plaintiffs have no recourse to a federal class actions mechanism equivalent

to U.S. Federal Rule 23, Canadian provincial courts have demonstrated a willingness to certify a "national class" which includes extra-territorial class members. The Canadian Bar Association has also adopted a protocol to improve the co-ordination of national class actions, particularly at the settlement approval stage. However, in the absence of fundamental legislative and/or constitutional changes to the Canadian federal system, the practice of filing parallel claims in various provinces is, and will continue to be, a defining feature of the Canadian class action system.

KEY DIFFERENCES IN CANADIAN LEGAL SYSTEM


- Provincial superior courts have jurisdiction over both provincial and federal matters.
- Provincial superior courts are not the final arbiter of provincial law; all such matters are subject to further appeal to the Supreme Court of Canada.
- No multi-district litigation procedure to co-ordinate parallel proceedings in different provinces.

COMMON TYPES OF CLASS ACTIONS

In Canada, class actions are generally available to litigants in all substantive areas of law and are particularly common in the following areas: product liability; environmental law; competition law; pension disputes; financial services; consumer redress; securities and/or shareholder issues; consumer protection; mass tort/negligence; employee dismissal and/or overtime issues; privacy and data protection; constitutional law; and franchise law.

Generally, the procedure for class certification in Canada does not vary depending on the substantive area of law in which collective relief is sought. The class action statutes of each province and the federal rules were adopted as general procedural legislation/rules and are not limited to specific areas of law. However, it can be more difficult to seek class certification in certain areas of the law (for example, there are statutory and common law claims where a plaintiff must prove individual reliance or harm to establish liability as a matter of substantive law).

EXAMPLES OF CLAIMS THAT REQUIRE PROOF OF INDIVIDUAL RELIANCE OR HARM

- Common law claims of negligent misrepresentation
- Private nuisance
- Defamation

There can also be additional procedural requirements imposed in specific areas of law. For example, to bring a securities class proceeding that seeks relief on behalf of individuals who traded securities on the secondary market, several provincial securities statutes require a plaintiff to obtain leave from the court. In such circumstances, it is common for a representative plaintiff to bring a motion for leave coupled with a motion for class certification.

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For more information, please visit osler.com/litigation. For updates and further developments, please refer to our Canadian Class Action Defence blog. Please also do not hesitate to contact one of the following members of Osler's Class Actions Defence Practice Group.

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