Class Actions in Canada 2019

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What is a Class Action?

A class action is a procedural tool for a representative plaintiff to seek relief on behalf of a whole class of individuals, without those individuals having to advance their own claims. Class actions allow representative plaintiffs and their lawyers to advance claims that would not be economically viable individually. As the Supreme Court of Canada has held, the three goals of class proceedings are judicial economy, access to justice, and behaviour modification. Canadian courts typically construe class actions legislation with these three goals in mind.

In general, class actions in Canada have three stages:

1. The certification motion – at this initial stage, the plaintiff must persuade the Court that the case can effectively and efficiently proceed as a class proceeding.
2. The common issues trial – if certified, the case then moves towards a trial on the common issues that were certified. Following that trial, the court grants judgment on the common issues that were certified.
3. Individual issues trials – if the plaintiff is successful at the common issues trial but there remain individual issues to be determined, a series of individual trials or hearings may be held to determine the entitlement of individual class members to relief.

"There is no doubt that access to justice is an important goal of class proceedings. But what is access to justice in this context? It has two dimensions, which are interconnected. One focuses on process and is concerned with whether the claimants have access to a fair process to resolve their claims. The other focuses on substance — the results to be obtained — and is concerned with whether the claimants will receive a just and effective remedy for their claims if established. They are interconnected because in many cases defects of process will raise doubts as to the substantive outcome and defects of substance may point to concerns with the process."

AIC Limited v Fischer, 2013 SCC 69 at para 24

Because class actions can affect the substantive rights of a whole class of persons, they are subject to greater procedural protections and more stringent court oversight than are individual cases. For example, class members must typically be provided with notice of important steps in the proceeding, such as the certification of a case as a class action or the proposed settlement of a class proceeding. In addition, court approval must be obtained for any settlement reached.

Importantly, there is no Canadian analog to the American multidistrict litigation system, which allows US Federal Courts to coordinate and case manage a variety of proceedings from across the country relating to the same subject matter. In addition to allowing for coordination of class actions, the American MDL system can also allow for case management of large numbers of individual cases in parallel. By allowing plaintiff's counsel to advance large numbers of similar cases in parallel, challenging or complex cases that would not be cost effective in isolation, particularly mass torts cases, become economically feasible. In Canada, because there is no equivalent to the MDL system, it is much rarer for plaintiff's counsel to bring large numbers of individual cases in mass torts situations. Rather, such cases are typically brought as class actions; a failure to obtain certification often results in the end of the proceeding.

Class Actions across Canada

While certain provinces including Ontario have a disproportionate share of class actions in Canada, class actions legislation exists across the country. National classes that include residents from across Canada are possible and often advanced. However, it is also common for plaintiff's counsel to advance parallel claims in different courts across the country. This can give rise to coordination problems.

Most class actions in Canada are started before provincial Superior Courts. While the Federal Court also has the ability to hear class actions, the Federal Court's jurisdiction is limited to certain prescribed categories of claims. Consequently, only a limited number of class actions are heard before the Federal Court, and most of those relate to claims against the federal government or federal government agencies.

Parallel Class Proceedings

Because most class actions are heard before provincial Superior Courts, it is common for plaintiff's counsel to start different class actions in different provinces regarding the same subject matter. Initially, there can be disputes between different groups of plaintiff's counsel for carriage of a class action—that is, the right to advance the proceeding on behalf of the class. However, even once carriage disputes are resolved, it is not unusual for a single consortium of class counsel to advance multiple class actions across the country in respect of the same issue. In some cases, a single national class action might be asserted in one province. But in other cases, for example, different members of a consortium might bring a class action in British Columbia (on behalf of BC residents only), a class action in Québec (on behalf of Québec residents only), and a class action in Ontario (on behalf of everyone else in Canada).

"...the legislatures intended courts in Ontario and British Columbia to have wide powers to make orders respecting the conduct of class proceedings.... The broad powers appear on their face to authorize the sort of extraterritorial hearing which class counsel sought in these cases."

Endean v British Columbia, 2016 SCC 42 at para 39

Coordinating Class Actions in Different Provinces

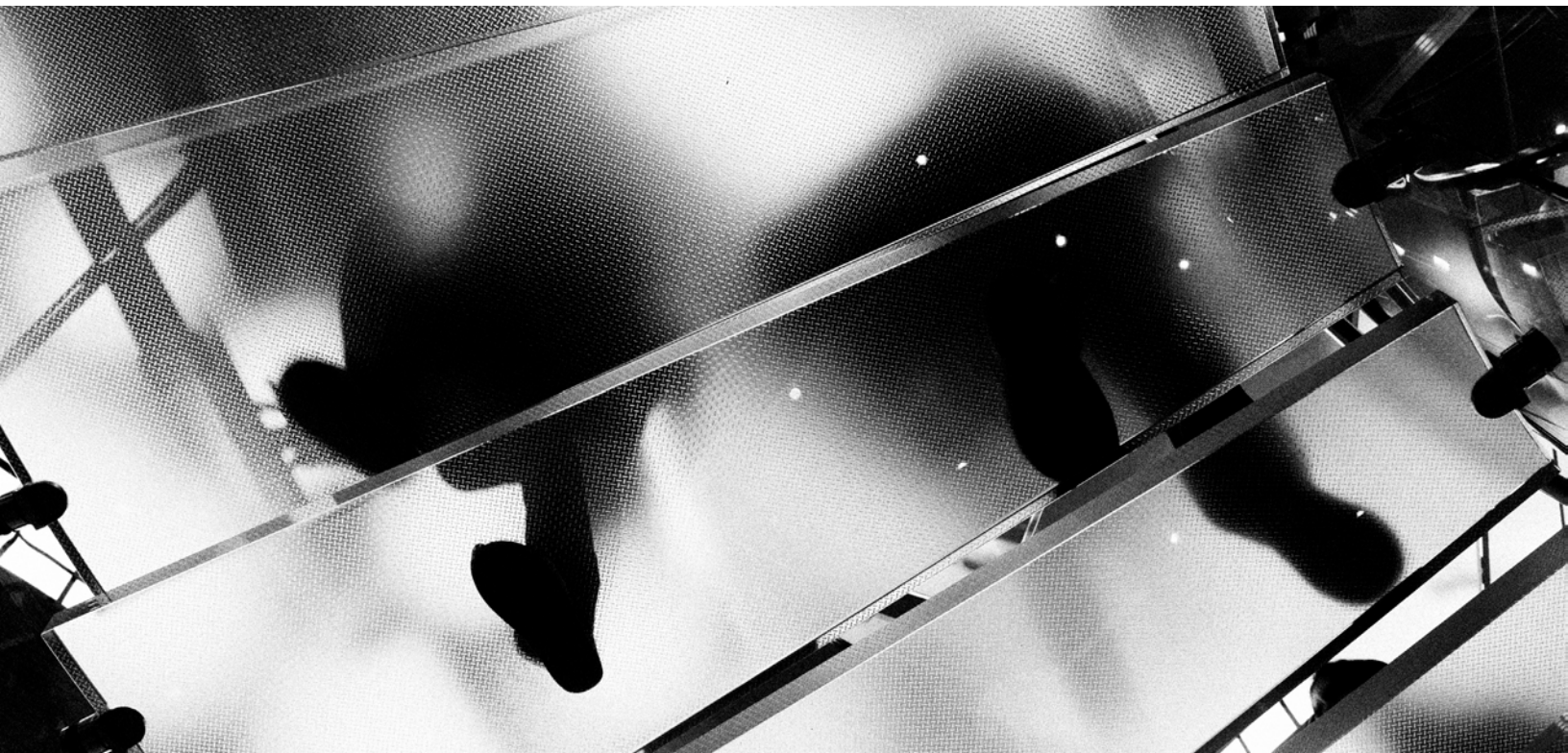
The existence of parallel proceedings in different provinces increases the complexity of the case as a whole. For example, it may mean multiple certification motions and, if a case is settled, multiple settlement approval hearings. Often the parties attempt to streamline the litigation by agreeing that the focus of the litigation will be in one particular province. However, the courts in each province where litigation is started retain supervision over the particular proceeding in that province.

As noted above, there is no Canadian analog to the American multidistrict litigation system. Consequently, where there are multiple class proceedings on the same issue in different provinces, each province's courts have jurisdiction to decide the same issues. In general they decide issues in parallel, and there are some mechanisms for coordination. In some circumstances, courts of one province have sat outside their home provinces in order for multiple different courts to hear argument on issues in a pan-Canadian settlement simultaneously. However, there is no requirement or even default for such formal coordination, and this means that occasionally different courts can reach different conclusions.

A dramatic example of this occurred in 2018 in connection with a series of class actions against Purdue Pharma. In that case, plaintiffs' counsel had brought cases against Purdue in Ontario, Nova Scotia, Québec, and Saskatchewan against Purdue, alleging that Purdue failed to warn consumers of the addictive properties of certain painkillers. In 2017, a settlement agreement was reached that covered all of the different Canadian proceedings, and the parties began the process of seeking Court approval for that settlement. While Courts in Ontario, Nova Scotia and Québec conditionally approved the settlements, the Saskatchewan Court of Queen's Bench declined to do so. While such a situation is unusual, it does highlight the risks for parties of parallel litigation in multiple forums across Canada.

The Certification Motion

In order for a proceeding to proceed as a class action, it must be “certified” as a class action. In Québec, this approval is called “authorization”, and a somewhat distinct system applies there. However, in common law provinces, the test for certification is broadly similar. The purpose of the certification requirement is to ensure that the case is appropriate to proceed as a class action.



The Requirements for Certification

In order for a proceeding to be certified as a class action, a plaintiff must show that:

1. The pleadings disclose a cause of action;
2. There is an identifiable class of two or more persons that would be represented by the representative plaintiff;
3. The claims of the class member raise common issues;
4. A class proceeding would be the preferable procedure for the resolution of the common issues; and
5. There is a representative plaintiff who fairly and adequately represents the interests of the class, has a plan for the proceeding that sets out a workable method of advancing the proceeding, and does not have, on the common issues, an interest in conflict with other class members.

The Standard for Certification

While the moving party bears the burden of proof for each of these elements, the standard of proof is low. For the requirement that the pleadings disclose a cause of action, a defendant can only resist certification where it is "plain and obvious" that the facts pleaded do not disclose a cause of action. For the purpose of this analysis, the factual allegations in the pleadings are taken as true; no evidence is admissible on this issue.

For all of the other requirements, the plaintiff must show "some basis in fact" that the requirements are met. The Supreme Court of Canada has confirmed that this standard is lower than the usual balance of probabilities standard. For each of these elements, evidence is admissible. However, the evidence is not relevant to whether there is basis in fact for the claim, but rather only to whether there is some basis in fact to establish each of the individual certification requirements.

> "Canadian courts have resisted the U.S. approach of engaging in a robust analysis of the merits at the certification stage"

Pro-Sys Consultants Ltd v Microsoft Corporation, 2013 SCC 57 at para 105

Procedure on a Certification Motion

In general, the procedure on a certification motion is as follows:

1. The plaintiff delivers a certification record – this generally includes affidavits from the representative plaintiffs and potentially other class members. Depending on the type of case, it may also include affidavits from one or more expert witnesses.
2. The defendant delivers a responding certification record – this generally includes affidavits from the defendants, and it may also include affidavits from one or more expert witnesses.
3. The plaintiff typically delivers a reply record – this may contain further affidavits that directly reply to the affidavits in the defendant's responding certification record.
4. The parties conduct cross-examinations on the affidavits delivered – parties then generally have the opportunity to cross-examine some or all of the opposing party's affiants. These cross-examinations occur out of court, and the transcripts of those cross-examinations are filed with the judge hearing the certification motion.
5. The parties exchange written legal arguments for and against certification – generally the plaintiff delivers their written argument first, and the defendant has an opportunity to respond.
6. The judge hears oral argument on the certification motion.

"...the question of scheduling and the order of proceedings must of necessity be decided on a case-by- case basis depending upon the peculiar circumstances of the matter. Indeed, ss. 12 and 13 of the CPA specifically confer a broad discretion on the class proceedings judge to determine these procedural questions."

Attis v Canada (Minister of Health) (2005), 75 OR (3d) 302 at para 10

Class actions are almost invariably case managed by a Superior Court judge. Such judges have broad discretion to give directions regarding the conduct of a proceeding to ensure the fair and expeditious determination of the issues. The case management judge typically sets the schedule for the steps on the certification motion and typically hears the certification motion herself.

A Court's decision on a certification motion can typically be appealed, though the appeal routes vary. For example, in Ontario, a plaintiff whose certification motion is denied has an automatic right to appeal that decision to the Divisional Court, an intermediate appellate court. By contrast, where certification is granted in Ontario and the defendant seeks to appeal that certification order, the defendant has to first obtain leave from the Divisional Court in order to be able to bring that appeal.

Authorization Motions in Québec

As set out above, the applicable rules in Québec for authorization are somewhat different. The request for authorization of a proceeding as a class action is generally based solely on an application for authorization, and the facts alleged are assumed to be true. The plaintiff does not have to file any affidavit evidence in support of an application for authorization, and the defendant may only file responding affidavits or cross-examine the plaintiff with leave of the Court. In order for a case to be authorized, the plaintiff need only show that they have an arguable case.

After Certification

In many class actions, the certification motion is the most hotly contested part of the litigation. In many cases, a negotiated settlement often follows soon after certification. Yet as time goes on, a growing number of class actions are being contested on the merits, either on a summary judgment motion or at a common issues trial. Even after certification, class actions have unique procedures from start to finish that require special consideration.

Notice to Class Members

After a class action has been certified and all appeals have been exhausted, the usual next step is that notice is given to class members of the fact that the class action has been certified. The form of the notice is in the discretion of the Court, but it typically includes placing an advertisement in one or more national or major regional newspapers. Depending on the size of the class, it may also involve some form of direct notification to class members. Class members generally have an ability at this point to opt out of the class action.

Discovery

After notice is given, the parties then engage in documentary discovery and examinations for discovery (the equivalent of depositions in the United States). As part of the discovery process, parties are generally obligated to disclose all relevant documents in their power, possession, or control. The disclosure process may involve the disclosure of confidentially or commercially sensitive information. Courts will often provide protective orders to protect at least some of that information, though they are not granted as a matter of course in every case.

Examinations for discovery are generally more limited in scope than are depositions in the United States. In general, examinations for discovery are only permitted of parties to the litigation, and it is by default only permissible to examine a single representative of each corporate party to the litigation. These default rules are maintained for class actions, though Courts have the ability to allow for additional examinations for discovery.

In order to compensate for the inability to examine multiple witnesses from a single party, it is common for an examining party to request undertakings of the party being examined to make inquiries of others or to produce additional information within that party's possession. Such requests must generally be complied with, provided the information sought is relevant and non-privileged and the scope of the request is proportional.

There is also no right to pretrial examinations for discovery of experts' opinions. In general, the only obligation on a party seeking to tender expert evidence at trial is to deliver a report in advance of trial that sets out the expert's opinion.

Summary Judgment Motions

Either a plaintiff or defendant (or both) can bring a summary judgment motion to dispose of a class proceeding. The timing of summary judgment motions varies significantly. In some cases, they are brought by defendants at the same time as the certification motion. In other cases, they are brought after certification but before discoveries, while in yet others they are brought once discovery is complete. In all cases, the burden on the party seeking summary judgment is the same: the Court must be satisfied that there is no genuine issue requiring a trial in order to grant summary judgment.

Common Issues Trials

After discovery is complete and expert reports have been exchanged, the parties then proceed to a trial of the common issues that were certified. In some cases, the common issues trial may dispose of the entire proceeding: for example, the plaintiff may be successful on the common issues, and the Court may be in a position to award aggregate damages to the class. While Ontario Courts in particular have emphasized the importance of aggregate damages as a meaningful part of the class actions scheme, there are important limits to where they can be awarded. Among other things: aggregate damages cannot be used to establish liability where loss is an element of liability; aggregate damages cannot be awarded unless all the elements of liability are made out at a common issues trial; and aggregate damages cannot be awarded where proof of damages is required from individuals.

In many cases, the common issues trial may resolve only certain aspects of class members' claims, and it may be necessary to conduct individual trials of remaining individual issues. Courts have significant discretion to fashion an appropriate system for the adjudication of remaining individual issues.

Settling Class Actions

While common issues trials are becoming more common in Canada, most class actions still settle at some stage of the proceedings. Because the representative plaintiff is advancing claims on behalf of an entire class of persons, the representative plaintiff has no power on his or her own to compromise those claims. Rather, any settlement agreement reached must be approved by the Court hearing the proceeding.

Settlements of Multiple Class Actions

In cases where multiple class actions are brought in different provinces, it is common that settlement agreements cover all of the different proceedings. In such cases, the settlement agreements typically provide that they are only binding and effective when approved by the courts of every province where a proceeding is brought.

The Settlement Approval Process

Where a settlement is reached, the typical process is that the parties will first bring motions in every court the class proceeding was brought to seek approval of a plan to notify class members of the settlement and, where a certification motion has not yet been heard, to certify the class action for settlement purposes only. After court approval is obtained for the notice protocol, notice is given to class members of the proposed settlement. Where the case was certified for settlements purposes and an opt-out period has not yet occurred, class members are provided with a set period of time in which to opt out of the settlement. The parties then bring a motion in each of the courts for approval of the settlement. Class members generally have a right to participate in the hearings to approve the settlement and to object to the settlement.

The Standard for Settlement Approval

In order for the court to approve a settlement, the court must conclude that the settlement is fair, reasonable, and in the best interests of the class. In considering this, courts will consider a variety of factors, including: (a) the likelihood of recovery or likelihood of success; (b) the amount and nature of discovery, evidence or investigation; (c) the proposed settlement terms and conditions; (d) the recommendation and experience of counsel; (e) the future expense and likely duration of the litigation; (f) the number of objectors and nature of objections; (g) the presence of good faith, arm's-length bargaining and the absence of collusion; (h) the information conveying to the court the dynamics of, and the positions taken by, the parties during the negotiations; and (i) the nature of communications by counsel and the representative plaintiff with class members during the litigation.

In order for the court to approve a settlement, the court must conclude that the settlement is fair, reasonable, and in the best interests of the class.

Courts generally grant approval to settlements that fall within a zone of reasonableness, and it remains the exception for courts to decline to approve settlements. However, it does occur. For example, in its decision in *Perdikaris v Purdue Pharma Inc* in early 2018, the Saskatchewan Court of Queen's Bench refused to approve a settlement reached between a representative plaintiff and the defendants in a case involving allegations that Purdue failed to warn consumers of the addictive properties of those painkillers. Consequently, settlement approval is by no means a pro forma exercise, and parties need to ensure that the settlement can be thoroughly justified to all reviewing courts in order to ensure that a settlement agreement is approved.

Costs and Funding of Class Actions

Class actions are expensive and risky for all parties. In some provinces, those risks are increased by a loser-pays costs model, where the unsuccessful party typically has to pay at least a portion of the successful party's costs of the case. Third-party litigation funding is becoming increasingly common, as plaintiff's counsel seek to lessen their risks of bringing class actions. However, court approval for third-party funding is generally required, and there are significant unanswered questions as to when approval will be granted.

Costs of Class Actions

In Canada, the default rule in civil litigation is that the losing party pays at least a portion of the winning party's costs. This rule applies both to the proceeding as a whole and to particular procedural steps.

Some provinces have modified their costs rules for class proceedings. For example, British Columbia and Saskatchewan have legislated that parties typically bear their own costs in class actions.

By contrast, in Ontario, the general loser-pays costs rule remains the norm. However, in granting costs, Ontario Courts have discretion to consider whether the class proceeding as a test case, raised a novel point of law, or involved a matter of public interest. A series of Ontario decisions in 2018 demonstrates how significant the cost awards can be:

- In *Hughes v Liquor Control Board of Ontario*, the defendants were successful in resisting certification of a proceeding that challenged an agreement that restricted how beer could be sold in certain retail channels. Excluding the costs paid to one defendant that had settled the costs issues, the Court ordered payment of costs to the defendants in that case in the aggregate amount of over $2.2 million.
- In *Das v George Weston Limited*, the defendants successfully opposed certification of a proposed class action relating to the collapse of a factory in Bangladesh. The motions judge ordered payment of costs in the aggregate to the defendants of over $2.2 million, though this was reduced on appeal by 30 percent.

Costs remain highly discretionary, and in many cases the costs awarded have been substantially lower. For example, in *Heller v Uber Technologies*, the plaintiff brought a proposed class proceeding against Uber, alleging that Uber drivers had been improperly classified as independent contractors rather than employees and thereby deprived of the benefits of employment standards legislation. Uber brought a motion that was successful at first instance to stay that proceeding on the basis that class members' claims were subject to arbitration. Uber sought costs in the more modest amount of $158,000, and even then it was awarded only $65,000.

Contingency Fees

Plaintiffs' counsel almost invariably take on potential class actions in the hopes of receiving a contingency fee if they are successful. Such contingency fees are typically set out in the retainer agreement between class counsel and the representative plaintiff, and they are often expressed as entitling the plaintiff's lawyers to a percentage of recovery in the event of a settlement or judgment. However, fees payable to class counsel are subject to court approval, and courts have made it clear that they will not automatically rubber stamp any contingency fee. Rather, courts will consider a number of factors in deciding what an appropriate fee is, including the complexity of the case and the risks for class counsel in bringing the case.

Third-Party Funding for Class Actions

To defray the costs of potential class actions and avoid the downside risk of adverse costs awards, plaintiffs' counsel routinely look to third-party litigation funders. While litigation funding is becoming increasingly common in Canada, the contours of appropriate litigation funding arrangements remain in flux. Because Court approval is required in the context of a class proceeding for any funds to be paid to either counsel or third-party funders in the event of a successful conclusion to a class proceeding, some funders may be wary of advancing funding without certainty as to what their recovery will be in the event of success.

In 2018, one funder tried to avoid that uncertainty by obtaining Court approval at the early stages of a proposed class proceeding for terms of an arrangement on which it was providing funding. In *Houle v St Jude Medical*, Bentham IMF had entered into an agreement with class counsel to pay 50 percent of class counsel's fees as well as 100 percent of their disbursements, up to certain limits. In return, Bentham IMF would receive between 20 and 25 percent of the recovery in the litigation. Collectively, in the event of success, plaintiffs' counsel and Bentham IMF were to recover between 30 and 38 percent of the potential proceeds of litigation. However, the funding agreement also included terms that allowed Bentham IMF to terminate the funding agreement if, among other things, it determined that

> "Third-party litigation funding is a relatively recent and growing phenomenon in Canada. The law has so far recognized that third-party litigation funding can have a positive effect on access to justice. However, aspects of the third-party funding model raise concerns about third parties improperly meddling in litigation that does not involve them."

Houle v St Jude Medical Inc, 2018 ONSC 6352 at para 3

the class proceeding was no longer viable. In a decision by the Ontario Superior Court of Justice, later upheld on appeal by the Divisional Court, the Court declined to approve a funding agreement that would set Bentham's recovery in advance or that would allow Bentham IMF to terminate the agreement unilaterally without any approval process. The effect of this decision on the willingness of third-party funders to provide funding for class actions remains to be seen.

In some provinces, funding is available through public sources. For example, in Ontario, the Class Proceedings Fund is statutorily mandated to provide funding to plaintiffs in class actions. The terms of funding it provides are fixed by statute: it provides plaintiffs with indemnity for any adverse costs exposure, and it also has the discretion to pay for disbursements incurred by plaintiff's counsel (but not their fees). The statutory quid pro quo is that the Fund is entitled to receive a levy in the amount of 10 percent of any award or settlement in favour of the plaintiffs plus a return of any funded disbursements.

Courts in Ontario have indicated a broad willingness to ensure that both plaintiffs' counsel and the Class Proceedings Fund receive due compensation in the event of successful class actions. A notable example of this trend is the Ontario Court of Appeal's 2018 decision in *Jeffery v London Life Insurance Company*. In that case, the plaintiff had brought a class proceeding to challenge certain transactions that had been entered into by Great-West Life Assurance and London Life Insurance Company that removed certain funds from participating policy accounts. Following a lengthy trial and two appeals, the Courts found that the transactions had breached the relevant regulatory scheme, and they directed that certain transactions be unwound and funds returned to participating account holders' accounts. However, no funds were ordered to be paid to class members, nor did class members obtain a right to access the funds that were returned to the accounts.

Plaintiffs' counsel had a contingency agreement that provided them with 25 percent of the proceeds of any litigation, which they calculated as $16.4 million (representing 25 percent of the value transferred back to the participating accounts after those transactions were unwound). Plaintiffs' counsel sought an order directing that they be paid that $16.4 million from the accounts. The Class Proceedings Fund similarly sought an order for its levy, calculated at over $6 million. In a 2-1 decision, the Ontario Court of Appeal held that both Plaintiffs' counsel and the Class Proceedings Fund had a right to be paid their contingency fee and the levy, respectively, from the participating accounts, despite the fact that no damages were awarded directly to class members. This decision shows the willingness of courts to compensate both plaintiffs' counsel and funders for success in regulatory class proceedings that promote compliance with the law, even where no funds are paid directly to class members.

Differences in Class Actions between Canada and the United States

Class actions legislation in Canada came later than American legislation. While Canadian regimes have many similarities to American class actions systems, Canadian jurisdictions have in some respects opted to follow a different approach. Consequently, the dynamics and strategic considerations applicable to class actions in Canada can be very different from those in the United States.

While some class action cases are unique to Canada, many class actions filed in Canada concern similar factual situations and issues to claims already brought in the United States.

Yet while the issues between the two lawsuits may be similar, both substantive law and class action procedure is different in a number of respects between Canada and United States.

This guide is too brief to highlight all of the salient procedural and substantive legal differences. However, set out below is a summary of some of the main procedural differences in class actions law in Canada compared to the United States.

"... the drafters [of the *Class Proceedings Act*] rejected a requirement, such as is contained in the American federal class action rule, that the common issues 'predominate' over the individual issues: see Federal Rules of Civil Procedure, Rule 23(b)(3) (stating that class action maintainable only if 'questions of law or fact common to the members of the class predominate over any questions affecting only individual members')"

Hollick v Toronto (City), 2001 SCC 68 at para 30

	UNITED STATES	CANADA (OTHER THAN QUÉBEC)
Standard for certification	Preponderance of the evidence	Some basis in fact (lower than balance of probabilities)
Test for certification	Common issues must predominate over individual issues	No predominance requirement
Discovery	Extensive pre-certification and post-certification discovery	No pre-certification discovery; post-certification discovery generally more limited, including strict limits on number of deponents to be examined for discovery and discovery from non-parties
Coordination of multiple class actions or other claims	Multidistrict litigation system allows for coordination of multiple claims	No equivalent to MDL system
Juries	Class actions are sometimes tried by juries	Class actions generally tried by judge alone
Costs	Each party generally bears their own legal fees and disbursements	In certain provinces, unsuccessful party generally obligated to pay a portion of successful party's legal fees and disbursements

Securities Class Actions

Securities law class actions in Canada take a number of forms. Ontario's *Securities Act* creates civil causes of action for various forms of misconduct in securities markets. It creates causes of action both for primary market purchasers for misrepresentations in prospectuses and offering memoranda, as well as for secondary market purchasers for misrepresentations or failures to make timely disclosure of material changes. In addition, purchasers can also advance common law claims such as negligent or fraudulent misrepresentation. However, the common law requires individuals to prove reliance by the purchasers on the misrepresentations, while such reliance requirement does not exist under the statutory causes of action. This generally renders the statutory claims preferable from plaintiffs' perspectives.

"...comity is a key consideration. As such, the more appropriate forum for secondary market claims will often favour the forum of the exchange(s) where the securities trade"

Yip V HSBC Holdings Plc, 2018 ONCA 626 at para 75

In addition to the usual certification requirements, plaintiffs seeking to commence a claim for secondary market disclosure must obtain leave of the Court to start such a claim. In order for leave to be granted, the Court must be satisfied that the action is brought in good faith and that there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff. Both the plaintiff and defendant are permitted to file affidavit evidence setting out the material facts on which each intends to rely. Consequently, unlike in most class actions, the plaintiffs in secondary market disclosure cases must satisfy the Court, on admissible evidence, of the merits of their claim at an early stage.

Recent Developments

There has been extensive litigation in recent years as to when Canadian courts will entertain secondary market disclosure claims where the securities have relatively little connection to Canada. As the Ontario Court of Appeal's 2018 decision in *Yip v HSBC Holdings plc* makes clear, the fact that individuals in Ontario purchased securities that were the subject of the misrepresentation is not in itself sufficient. Rather, in order to establish jurisdiction over the claims, there must be a real and substantial connection between the issuer of securities and Ontario. Moreover, even where an Ontario Court has jurisdiction, the Ontario Court may often decline to exercise that jurisdiction in favour of the forum of the exchange(s) where the securities trade.

The Ontario *Securities Act* also contains a special three-year limitation period for secondary market misrepresentation claims. That limitation period begins running on the release of the oral statement or document containing the misrepresentation and does not depend on the plaintiff's knowledge of the statements. In the 2018 decision of the Ontario Court of Appeal in *Kaynes v BP, PLC*, the Court of Appeal dismissed arguments that attempted to extend the limitation period by treating multiple misrepresentations as part of a single ongoing misrepresentation.

Competition Class Actions

Competition and antitrust class actions play a large role in the Canadian class actions landscape.

Competition and antitrust law in Canada is largely set out in the federal *Competition Act*. In many ways, competition class actions are more limited in Canada than in the United States. Class actions can only be brought in respect of conduct that is governed by the criminal provisions of the *Competition Act*, which includes horizontal price-fixing cartels and fraudulent advertising. Importantly, no class actions can be brought in respect of any unilateral or vertical conduct, such as abuse of dominance (the Canadian equivalent of monopolization under American antitrust law) or resale price maintenance. Moreover, unlike in the United States, damages under Canada's *Competition Act* are not trebled.

The one respect in which Canadian competition law is more plaintiff-friendly than American antitrust law is in the treatment of indirect purchasers. In a 2013 trilogy of cases decided by the Supreme Court of Canada, the Court confirmed that both direct purchasers and indirect purchasers can advance claims for the overcharge paid as a result of a price-fixing conspiracy. Moreover, direct purchasers' claims cannot be lowered to account for any portion of the overcharge that was passed on to indirect purchasers. The Supreme Court stressed that the total damages awarded to both direct and indirect purchasers at trial cannot exceed the total amount of the overcharge, but how such damages would be awarded at trial remains unclear.

To date, no competition class actions have proceeded through a contested trial in Canada. A *Competition Act* claim against Microsoft was set to proceed to trial in British Columbia in the second half of 2018, but it settled after initial written filings had been made.

Recent Developments

The scope of the class that Canadian courts will include in antitrust cases has also been gradually expanding. Conventionally, the classes certified in price-fixing cases have been those direct and/or indirect purchasers who paid an overcharge either within the particular province where the case was brought, or nationally across Canada. However, plaintiffs' counsel have been testing those limits. In the 2017 decision in *Airia Brand's Inc v Air Canada,* the Ontario Court of Appeal certified a class that included individuals who were resident outside of Canada but who suffered from an alleged price-fixing scheme in relation to fuel and security surcharges on air freight shipping services for shipments from or to Canada. The extent to which this opens the door for Canadian courts to assume jurisdiction over absent foreign claimants with only minimal contacts with Canada remains unclear.

Perhaps the most hotly contested issue in Canadian competition law in 2018 was the ability of so-called "umbrella purchasers" to advance claims in a price-fixing class action. Umbrella purchasers are those individuals who bought products from a supplier who was outside the price-fixing conspiracy. The theory of harm is that while such suppliers did not participate in the conspiracy, the price increase or supply restriction that resulted from the conspirators' conduct allowed the non-conspiring suppliers to also raise prices to consumers. Whether umbrella purchasers have a viable cause of action that could be asserted in a class proceeding was the subject of conflicting decisions from courts across the country. While both the British Columbia Court of Appeal and the Ontario Court of Appeal ruled in favour of umbrella purchasers having a cause of action, the Supreme Court heard an appeal on that issue in December 2018. As of the date of this publication, that decision remains under reserve.

Product Liability Class Actions

Courts have also been dealing with a plethora of product liability class actions. Such claims can be framed as claims that products were inherently negligently designed or manufactured (as is often the case for electronic or mechanical products that have a risk of explosion), as a claim that the manufacturer failed to warn the consumer of the risks (as is often the case for pharmaceutical products or other medical devices), or both. The commonality inherent in the design or manufacturing process or in the warning to consumers means that such cases have been often certified.

Recent Developments

While product liability cases have sometimes been described as being particularly amenable to resolution on a class-wide basis, a series of decisions from 2018 shows that certification is by no means automatic.

One example of this is the decision of the Ontario Superior Court of Justice in *Price v H Lundbeck A/S*. That case was a proposed class action against H. Lundbeck A/S and Lundbeck Canada Inc. in relation to the drug Citalopram, a selective serotonin reuptake inhibitor (SSRI) that is used for the treatment of depression. The proposed class action alleged that the defendants had failed to warn women that Citalopram could cause birth defects. By the time the certification motion arrived, the plaintiffs had focused their case on a single common issue: did the defendants' breach a duty to warn Canadian physicians and patients that Citalopram is or may be teratogenic?

Ultimately, the Court declined to certify the proceeding as a class action. Where the claim primarily failed was on the requirement that there be common issues. While the Court held that there was some basis in fact for the question that Lundbeck breached the duty to warn Canadian physicians and patients that Citalopram is or may be a teratogenic, he held that this proposed common issue did not satisfy the test of commonality for two reasons. First, there was significant variation across the types of birth defects pleaded, such that the content of the duty to warn would have varied across birth defects and could not be adjudicated on a class-wide basis. Second, the Court held that the duty to warn was not a common issue because it did not form a substantial part of each class member's case; as the Court held, "the duty to warn issue does not connect the dots for a common issues trial that has any utility for a class proceeding that inevitably end with individual issues trials with very significant causation issues associated with the breach of the duty to warn."

Another product liability case from the past year where the defendants successfully avoided certification is *Richardson v Samsung*. In that case, the plaintiff had brought a proposed class action against Samsung in connection with a defect in the Galaxy Note 7 smartphone that caused the devices to overheat, creating the risk of fire or explosion. Within a few weeks of the Note7 being released to the Canadian market, Samsung halted sales. Shortly thereafter, it announced the availability of replacement phones, and it exhorted customers to power down and replace their Note7 smart phones as soon as possible. Approximately a month later, Samsung began offering various credits to persons who had purchased the Note7.

When the matter came before the courts on a certification motion, the Ontario Superior Court declined to certify the claim. As part of the analysis as to whether a class proceeding was the preferable procedure, the court found that there was an alternative mechanism for resolving the harm that consumers had suffered. After the defects with the Note7 came to light, Samsung engaged in a recall of the defective products and offered customers new phones as well as credits. The court held that this compensation scheme was an appropriate alternative compensation scheme for dealing with class members of the claims.

These decisions by no means suggest that product liability proceedings cannot be certified as class actions. Such cases continue to be commonly certified. However, these decisions do signal that certification is not the inevitable outcome in every product liability case.

Privacy and Cybersecurity Class Actions

2018 saw new breach of privacy class actions filed in Canada against Marriot, Equifax, Facebook, and Uber, among others. The revelation of a corporate data breach is now routinely followed by the filing of a proposed class action.

Privacy breaches are governed in part by statute, including the federal *Personal Information Protection and Electronic Documents Act*, as well as provincial legislation, which varies from province to province. Some provincial privacy statutes explicitly provide civil causes of action for privacy breaches, while others do not.

Layered on top of such statutory remedies is the developing common law in relation to privacy. In 2012, the Ontario Court of Appeal affirmed the existence of the tort of intrusion upon seclusion, while in 2016 the Ontario Superior Court of Justice recognized the tort of public disclosure of embarrassing private facts. Claims for negligence are also routinely advanced against organizations that fail to take appropriate steps to maintain the security of personal information.

> "This settlement will serve as a benchmark for future privacy breach class actions and encourage organizations throughout Canada to take privacy seriously, for fear of facing serious litigation consequences for a privacy breach."

Condon v Canada, 2018 FC 522 at para 103

Recent Developments

2018 saw a number of developments in this area. For example, in *Doucet v The Royal Winnipeg Ballet*, the Ontario Superior Court of Justice certified claims against the Royal Winnipeg Ballet and a former instructor in connection with that instructor's improper photographing and dissemination of pictures of ballet students.

Yet the past year also showed that certification of privacy-based class actions is not inevitable. In *Broutzas v Rouge Valley Health System*, the Ontario Superior Court of Justice declined to certify two separate privacy class actions against the Rouge Valley Health System. In each case, the plaintiffs alleged that two nurses had improperly obtained information about patients who had given birth at the hospital and sold it to investment dealers, so that those dealers could in turn sell registered education savings plans to the new parents.

In deciding whether to grant certification, courts appear to be motivated by how egregious the conduct is and whether class members have suffered a real loss. In cases where class members have suffered privacy breaches that expose them to identity theft or pecuniary losses, courts appear more willing to certify such claims as class actions. By contrast, where the harm to class members is merely an inconvenience, courts appear less willing to certify such claims.

The 2018 decision of the Federal Court in *Condon v Canada* may signal that the remedies that are expected in privacy breach cases are increasing. That was a case against the federal government over the inadvertent loss of a hard drive containing the names, social insurance numbers, and contact information of 583,000 individuals who had student loans between 2000 and 2006. The federal government advised affected individuals of the breach and offered credit protection service to affected individuals. There was no evidence that the lost information had been accessed or misused by a third-party. The federal government paid $17.5 million to a fund through which all class members with no proof of any damages could claim $60 each for time and inconvenience. Individuals who had suffered actual losses could apply for additional compensation.

Employment Class Actions

Employment class actions continue to pose challenges for courts. Plaintiffs typically bring such claims on the grounds that either 1) employers have failed to provide employees with certain benefits due under employment standards legislation or 2) employers have misclassified their workers as independent contractors rather than employees to entirely deprive them of the benefits of applicable employment standards legislation.

Employment cases can be relatively challenging for plaintiffs to certify, as there may not be sufficient commonality between class members. For example, where a proposed class contains employees performing a variety of different roles and job functions, it may not be possible to determine on a class-wide basis whether such individuals are managers or non-managers, or whether they are employees or independent contractors. In such cases, it may be impossible to determine those individuals' rights on a class-wide basis, so certification will fail. By contrast, those employment cases that have been certified are those where the plaintiffs have been able to establish that the employer has a systematic practice of treating a uniform group of workers as ineligible for certain benefits.

Recent Developments

It remains an open question as to whether workers can agree in advance to binding arbitration, rather than a class proceeding, to resolve any disputes with their employer. The Supreme Court of Canada held in 2011 that arbitration clauses are generally valid and will preclude class actions, unless legislation has explicitly removed the ability of parties to agree to arbitration in some or all cases. While legislatures have done so in many domains (such as consumer class actions), the rule is less clear in other areas.

This enforceability of arbitration clauses in the employment law class action context was considered by Ontario Courts in 2018 in *Heller v Uber Technologies*. In his proposed class action against Uber group of companies, David Heller, an Ontario resident and Uber driver, sought $400 million dollars on behalf of the proposed class, alleging that the proposed class members had been improperly classified as independent contractors instead of employees and that they were deprived of the statutory benefits provided by the *Employment Standards Act*. In order to become an Uber driver, Mr. Heller had entered into two contracts with two different Uber companies, each of which contained a clause requiring that disputes be submitted to arbitration.

Uber brought a motion to stay the proceedings on the basis that Mr. Heller's agreements required him to submit any disputes arising under his agreements to arbitration in the Netherlands. The Superior Court of Justice accepted Uber's position. However, in its first decision of 2019, the Ontario Court of Appeal reversed that decision and gave the green light for the case against Uber to proceed. The case law in this area remains limited, so it remains to be seen whether Canadian courts will accept generally that arbitration clause preclude class actions in the employment context.

> "The issue under s. 5(1)(c) of the CPA is not job similarities at large, but whether the evidence shows that job functions and duties of proposed class members relevant to their eligibility for overtime pay are sufficiently similar across the proposed class to permit determination of eligibility without addressing the individual circumstances of the proposed class members."

Wellman v TELUS Communications Company, 2017 ONCA 433 at para 73

Consumer Protection Class Actions

Class actions under provincial consumer protection statutes continue to be an active source of litigation across Canada. 2018 saw a significant number of new consumer protection class actions filed across Canada, including several proposed class actions in Ontario against a number of insurance companies for allegedly underpaying benefits to accident victims, several cases commenced against financial institutions for allegedly unlawful fees and commissions charged on mutual funds, and several cases against car manufacturers for various alleged defects.

Recent Developments

In general, Canadian consumer protection statutes prohibit contracts by which consumers submit in advance to binding arbitration of any disputes, and class actions are generally viable in this area. However, businesses and others who are not consumers who agree to contracts containing arbitration clauses may still find themselves excluded from class actions.

A good example of this issue is seen in the recent case of *Wellman v TELUS Communications Company.* In that case, the plaintiff brought a proposed class proceeding against Telus, a telecommunications company, alleging that Telus was improperly overcharging customers by rounding up calls to the next minute without disclosing this practice to customers. The proposed class included both consumers and business customers. While it was agreed that the Court had jurisdiction over the consumers' claims, Telus argued that the business customers' claims were governed by a valid arbitration clause. Numerous lower court decisions had previously held that s 7(5) of Ontario's *Arbitration Act* permitted courts to decline to grant a partial stay where some class members' claims were subject to a valid arbitration clause and others were not. The practical effect of this was that if some class members' claims were subject to a valid arbitration clause while others were not, Ontario courts would often let all class members claims be included in a class action out of concern for efficiency and access to justice. Consistent with those decisions, both the Ontario Superior Court of Justice and the Ontario Court of Appeal initially rejected Telus' arguments that the business customers' claims should be stayed.

On further appeal to the Supreme Court of Canada, Telus was successful. In a 5-4 decision, the Supreme Court stayed the claims of business customers. The majority of the Supreme Court held that the language of s 7(5) of the *Arbitration Act* did not allow Ontario courts to decline to stay claims of individuals whose contracts contained a valid arbitration clause. The Court held that s 7(1) of the Act provided a mandatory stay of a court proceeding where there was a valid arbitration clause, and s 7(5) did not provide an exception to that rule that would allow the courts to override a valid arbitration clause. While the plaintiffs had raised, and the dissenting judges accepted, numerous policy concerns of granting a partial stay of certain class members' claims, the majority of the Supreme Court held that the clear language of the statute did not allow for that outcome.

> "If accepted, Mr. Wellman's interpretation would reduce the degree of certainty and predictability associated with arbitration agreements and permit persons who are party to an arbitration agreement to 'piggyback' onto the claims of others. Ultimately, this would reduce confidence in the enforcement of arbitration agreements and potentially discourage parties from using arbitration as an efficient, cost-effective means of resolving disputes."

TELUS Communications Inc v Wellman, 2019 SCC 19 at para 76

Lenczner Slaght's Class Action Practice

A Canadian leader in class actions, Lenczner Slaght is one of the only firms in the country to have repeatedly litigated on behalf of defendants at the trial level. Our lawyers' class actions expertise has been sharpened through hands-on experience in a wide range of complex and technically demanding proceedings.

Our firm has defended many of Canada's most closely watched class action lawsuits over the past two decades.

It's that experience that has led to our lawyers being repeatedly recognized by various organizations as leaders in the class action bar.

Class Action Litigation Areas

Our nationally ranked litigators have represented Canadian and international clients across virtually every industry and across the spectrum of class action proceedings, including: antitrust and *Competition Act* matters; consumer claims; deceptive and unfair trade practices; employment disputes; environmental issues; financial services; health and medical malpractice; insurance matters; mass torts; misleading advertising; negligence claims; pensions and employee benefits; product liability; and securities and shareholder rights.

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Expert litigators with a class actions practice.

20+

Years representing our clients in class actions.

2018

Recognized in Chambers Canada - Dispute Resolution: Class Action (Defence).

We represent accounting firms, financial institutions, manufacturers, pharmaceutical companies, retailers, and more in class actions.

Litigate.com

"[Our class actions lawyers] are superb litigation tacticians who are able to stickhandle difficult issues, facts and witnesses in litigation. They also have enormous respect from sitting judges."

Chambers Canada

"...they handle the most complex class actions, the most high profile class actions."

Chambers Canada

Expert Strategy

At Lenczner Slaght, we help clients respond to the daunting challenges of class actions with rigorous legal groundwork, innovative thinking and carefully planned litigation strategy. Our lawyers are accomplished courtroom litigators, admired by their peers for the knowledge and skills they bring to complex commercial cases.

Class action litigation can be expensive and time-consuming for all parties – particularly the companies and individuals against whom actions are brought. To reduce the burden of litigation and minimize long-term costs, we focus our efforts on defeating an action at an early stage, primarily by challenging attempts to certify it as a class proceeding. At this key certification stage, there are many opportunities to narrow the parties and issues raised in the litigation and, in some cases, bring it to a conclusion. Lenczner Slaght's reputation and courtroom skills enable us to make the most of these opportunities – to the benefit of our clients.

If a class action is certified, we have the experience to skillfully guide clients through the next steps. Our lawyers have litigated some of the leading common issues trials and appeals. Whatever path the litigation takes, our team has the experience and judgment to find the best solutions for our clients.

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