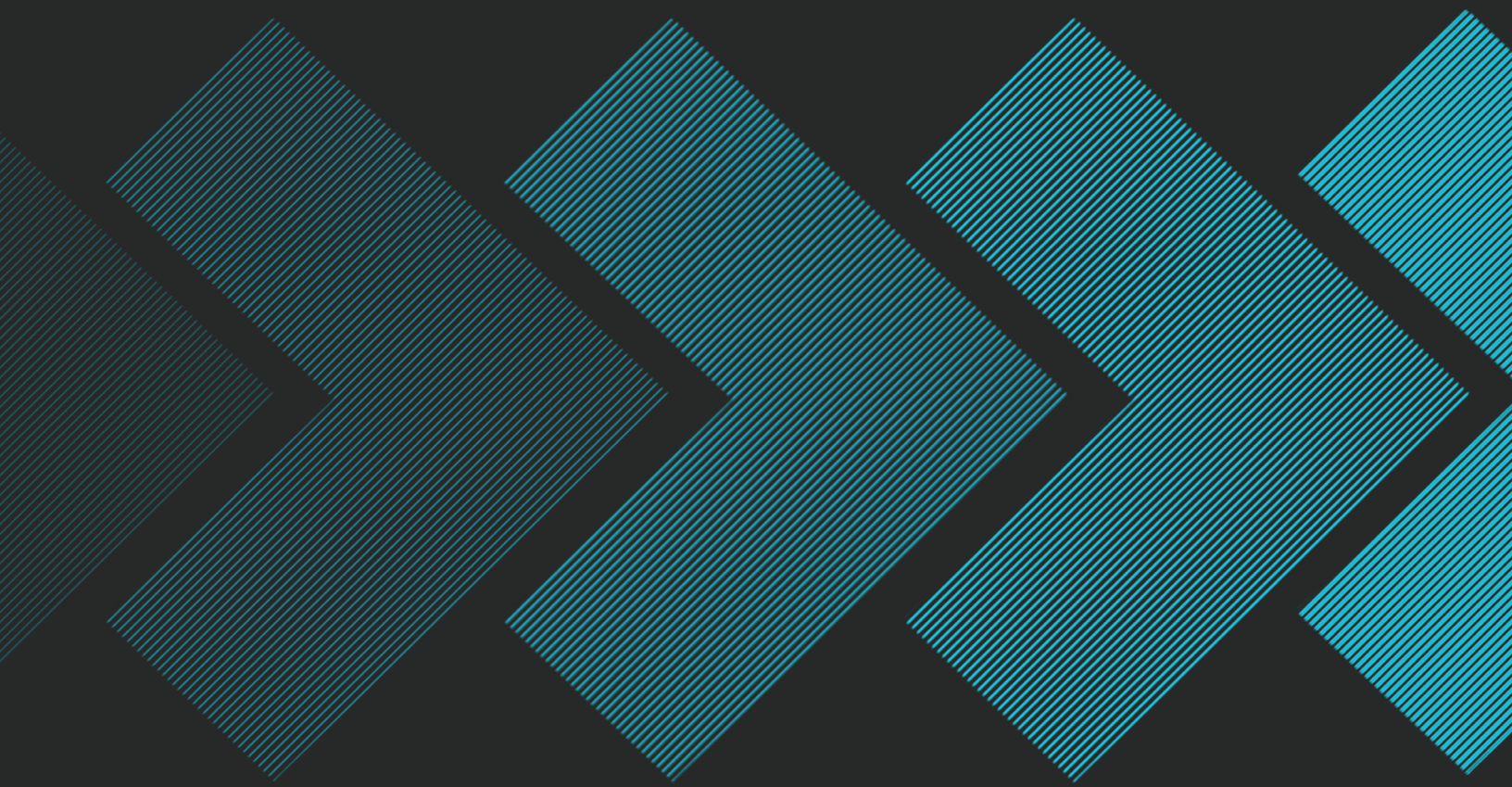
Class Actions in Canada 2021



Lenczner Slaght

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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.

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.

"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

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

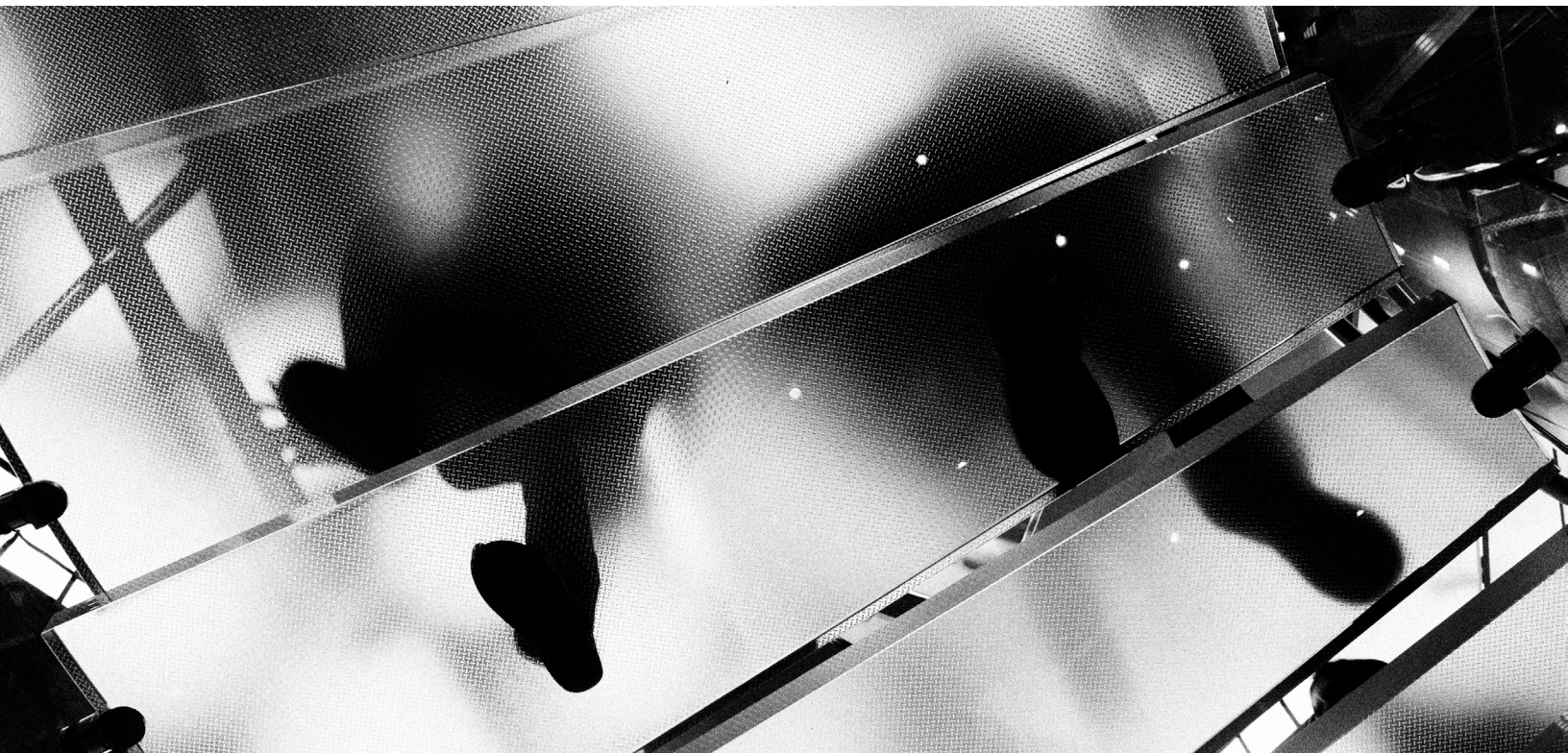
The existence of parallel proceedings in different provinces increases the complexity of the case as a whole. For example, it may mean multiple certification motions and, if a case is settled, multiple settlement approval hearings. Often the parties attempt to streamline the litigation by agreeing that 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, plaintiff's counsel had brought cases against Purdue in Ontario, Nova Scotia, Québec, and Saskatchewan, 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 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 members 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 plaintiff 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. In some provinces, there is an automatic right to conduct such cross-examinations, while in others leave of the court is required. 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.

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 themself.

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.

"... 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

After Certification

In many class actions, the certification motion is the most hotly contested part of the litigation. In many cases, a negotiated settlement 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 confidential 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 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.

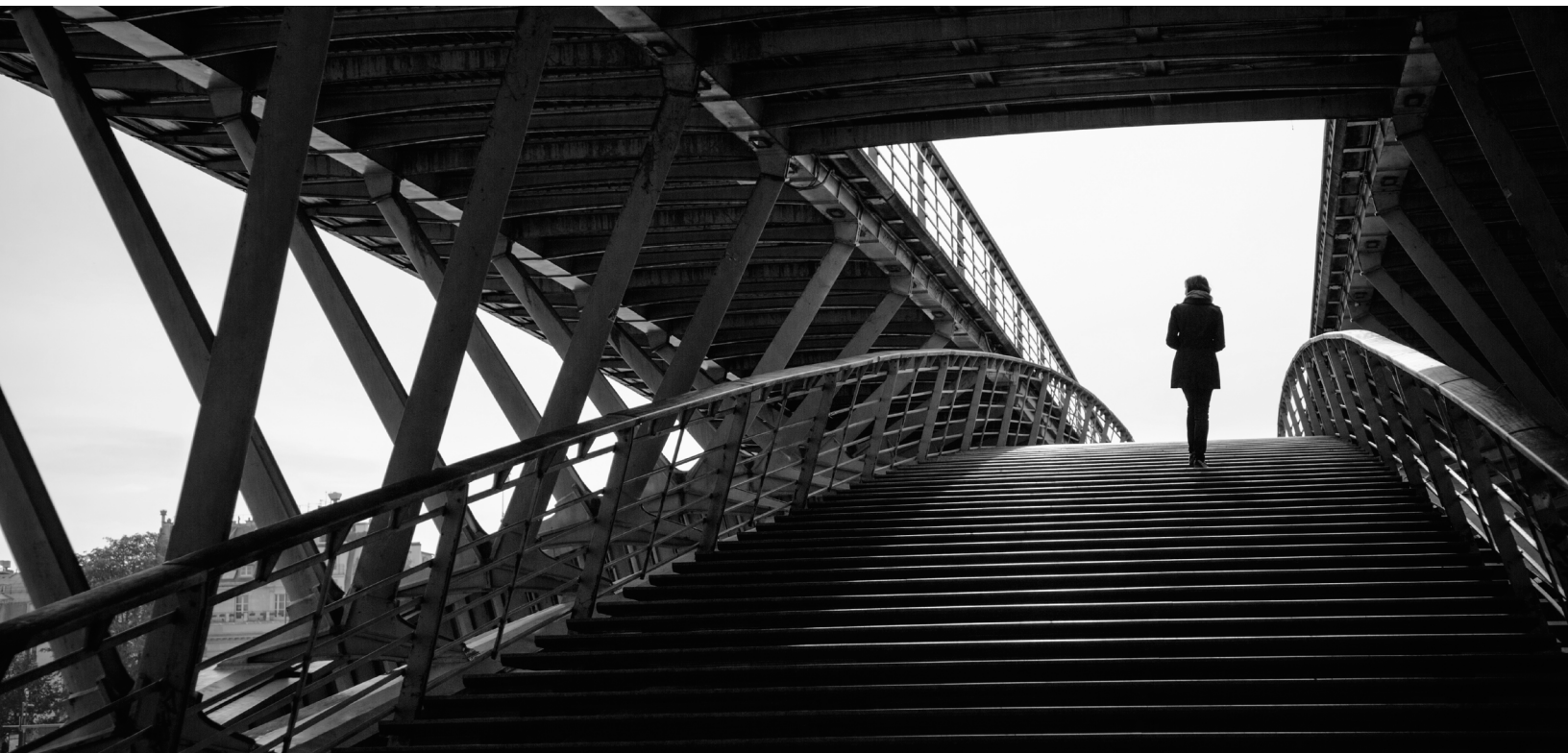
Common Issues Trials

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 settlement 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.

In some provinces, this process is modified slightly because of particular rules in those provinces. For example, some provincial class proceedings statutes provide that a case cannot be certified as a class action for settlement purposes until the settlement agreement has been approved.

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.

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.

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 their 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 the last few years 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 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.

The amendments to Ontario's *Class Proceedings Act* that came into force in October 2020 formalize the requirement that a third-party funder must obtain court approval for any funding agreement. Under those provisions, an Ontario court must conclude that: (i) the agreement, including indemnity for costs and amounts payable to the funder under the agreement, is fair and reasonable; (ii) the agreement will not diminish the rights of the representative plaintiff to instruct the solicitor or control the litigation or otherwise impair the solicitor-client relationship; and (iii) the funder is financially able to satisfy an adverse costs award in the proceeding, to the extent of the indemnity provided under the agreement.

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.

"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

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 are different in a number of respects between Canada and the 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.

	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 (except for class proceedings started in Ontario from October 2020 onward)
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 multidistrict litigation 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

New Developments in Class Actions Procedure

2020 was a significant year for class actions reform, particularly in Ontario. Ontario's *Class Proceedings Act* was enacted in 1993, and it had not been the subject of major reforms since that time. However, following a thorough report released by the Law Commission of Ontario in July 2019, in December 2019, the Ontario government introduced Bill 161, the *Smarter and Stronger Justice Act*, 2019. This bill was enacted into law in the summer of 2020, and the proceedings applicable to class actions came into force effective October 1, 2020. Some of the key reforms to the *Class Proceedings Act* are as follows:

- Changes to the Certification Test – The amendments now require a plaintiff to show at certification that:
  a) a class proceeding is superior to all reasonably available means of determining the entitlement of the class members to relief or addressing the impugned conduct of the defendant, including, as applicable, a quasi-judicial or administrative proceeding, the case management of individual claims in a civil proceeding, or any remedial scheme or program outside of a proceeding (the "superiority" requirement); and
  b) the questions of fact or law common to the class members predominate over any questions affecting only individual class members (the "predominance" requirement).
- Mandatory Dismissals for Delay – After the amendments, a proposed class proceeding would be dismissed within a year of the Statement of Claim being filed unless the plaintiff has filed their certification motion, the parties have agreed to a timetable for filing of the certification motion, or the court has ordered that the proceeding not be dismissed and establishes a timetable.
- Reform to Carriage Motions – The amended *Class Proceedings Act* provides that carriage motions have to be brought within 60 days of the issuance of the first action. The Act also provides that such decisions are final and cannot be appealed. Finally, the Act also provides that the costs of carriage motions are not to be recouped by class counsel.
- Provisions to Deal with Multi-Jurisdictional Actions – Multi-jurisdictional class actions are a significant phenomenon across Canada, and it is now commonplace for there to be several proposed class actions dealing with the same subject matter commenced in different provinces. The LCO recommended, and the amendments to the *Class Proceedings Act* include, provisions designed to coordinate such multi-jurisdictional class actions.
- Encouraging Preliminary Motions – The amendments include a provision that specifically affirms that courts should support pre-certification motions that could dispose of the action or narrow the issues to be determined or evidence to be filed at certification.
- Strengthening the Settlement Approval Process – The amendments include an explicit provision that proposed settlements must be scrutinized as to whether they are fair, reasonable, and in the best interests of the class.
- Improving Appeal Routes – The legislation eliminates appeals to the Divisional Court from certification decisions. It instead provides that any decision on a certification motion may be appealed directly to the Court of Appeal, without any requirement for leave to be granted.
- Cy-Près Orders – The amendments contain a provision to specifically allow for cy-près orders where it is not practical or possible to compensate class members directly.
- Notice – The *Class Proceedings Act* now includes a provision requiring that notices be drafted in plain language.

Importantly, these provisions only apply to class proceedings commenced after October 1, 2020. Earlier class proceedings continue to be subject to the prior version of Ontario's *Class Proceedings Act*. This means that, for the foreseeable future, lawyers and litigants will be operating under two very different class proceedings frameworks in Ontario.

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.

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.

Recent Developments

2020 saw some key decisions regarding certification in the context of securities class proceedings.

In *Wright v Horizons ETFS Management (Canada) Inc*, the Ontario Court of Appeal set aside the motion judge's decision and certified an investor class action. The plaintiffs owned units in the proprietary derivatives-based exchange-traded fund created by the defendant, Horizons. They brought a claim against Horizon after the fund collapsed, arguing Horizons was liable for making misrepresentations in its prospectus in negligence and under s 130 of the *Securities Act*. On the certification motion, Justice Perell held that it was plain and obvious that Horizon owed no duty of care to the class and s 130 of the *Securities Act* was inapplicable, as the fund was offered over stock exchanges, not directly to investors. The Court of Appeal reversed this decision. First, the Court accepted that there may be a novel duty of care owed by Horizon to the class to create and sell a fund that was suitable for investors. Second, the Court held that the units held by the class were commingled with other ETF units, and the class through no fault of their own did not know whether a purchase involved a primary or secondary market sale.

In *LBP Holdings Ltd v Hycroft Gold Corporation*, the Ontario Divisional Court overturned the Ontario Superior Court's decision and certified the class action. In this case, the class consisted of the investors, who acquired shares in Hycroft Gold Corporation from the underwriters in a secondary public offering. The plaintiff alleged that the underwriters made a misrepresentation in issuing their statutorily mandated certificate that the disclosure in the prospectus was true. (A related statutory misrepresentation claim had been certified against Hycroft and two of its executives.) The sole issue on the appeal was whether a class proceeding was the preferable procedure. The certification judge had held that the negligent misrepresentation claim was not appropriate for a class proceeding because of the individual issues and unmanageability associated with this claim. The Divisional Court allowed an appeal and held that in light of the class action certified against Hycroft, it was preferable to also certify the claim against the underwriters, given the common factual narrative and numerous common issues between the claims.

2020 saw the application of settled securities law in the context of class proceedings. For example, in *Whitehouse v BDO Canada LLP*, the plaintiffs were the individual unitholders in the Crystal Wealth Management System Ltd mutual funds. These unitholders lost their life savings, and they blamed BDO Canada LLP, the auditor of Crystal Wealth, who issued clean audit opinions for eight years. The plaintiffs alleged that the management of Crystal Wealth misappropriated assets worth over $100 million and had BDO done proper audits, the fraud would have been discovered sooner. The Ontario Superior Court refused to certify the class proceeding based on the principles from the Supreme Court of Canada's decisions in *Hercules Managements Ltd v Ernst & Young* and *Lavendar v Miller Bernstein LLP*.

Competition Class Actions

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. No class actions can be brought in respect of any unilateral conduct, such as abuse of dominance (the Canadian equivalent of monopolization) or resale price maintenance. Moreover, unlike in the United States, damages under Canada's *Competition Act* are not trebled.

Canadian competition law is more plaintiff-friendly than American antitrust law in other respects. For example, 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, the Supreme Court of Canada confirmed in its 2019 decision in *Pioneer Corp v Godfrey* that umbrella purchasers also have a cause of action in Canada. In addition, the Supreme Court also confirmed in that case that the two-year limitation period in the *Competition Act* is subject to the principle of discoverability and that the doctrine of fraudulent concealment can delay the running of the limitation period under the *Competition Act*. This latter aspect means that defendants may be faced with historical claims and that it will be difficult to defend those.

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

In *Mancinelli v Royal Bank of Canada*, Justice Perell showed that even post-*Godfrey*, the Court will not shy away from narrowing plaintiffs' proposed class-definitions. The original set of 18 defendants comprised virtually all the controlling entities in the global foreign exchange market, and all but four settled prior to certification. The eleven-year class period covered approximately $20.1 quadrillion in trading. The plaintiffs "guesstimated" up to 5% of these transactions were subject to the defendants' alleged price-fixing conspiracy to manipulate foreign exchange trading, though they limited their claims to a maximum of $1 billion. The plaintiffs alleged that representatives from the defendants carried on their conspiracy in chat rooms named "The Cartel", "The Bandits' Club" and "the Mafia", all of which were formed for the purpose of carrying out the conspiracy.

Mancinelli is significant for its approach to the identifiable class criteria. While Justice Perell accepted that those who directly purchased foreign exchange products from the defendants or their intermediaries were, by and large, an identifiable class, he did not certify the subclass of direct purchasers from non-defendant financial institutions or indirect investors (i.e. those who did not directly participate in foreign exchange trading, but held an interest in entities that did).

2020 has also seen a number of class action claims for alleged anti-competitive conduct initiated against Amazon, one of the world's largest online retailers. Thus far, Amazon has had some success in having some of those cases stayed on the basis of arbitration clauses. For example, in *Williams v Amazon.com, Inc* the Supreme Court of British Columbia recently stayed proposed *Competition Act* claims based on allegations that Amazon agreed with third-party sellers not to compete for the sales of books, music, movies and DVDs on Amazon Canada (though it did allow claims under BC's *Consumer Protection Act* to proceed). Amazon's conditions of use contained an arbitration clause which was governed by the laws of Washington State. The Court followed an earlier Federal Court of Appeal decision finding that *Competition Act* claims are arbitrable. The Court declined to find the arbitration clause void, inoperative or incapable of performance due to the prospect that the arbitrator might lack jurisdiction to award damages under s 36 of the *Competition Act*. The Court accepted that the arbitrator might proceed under the *Competition Act*, or if not, there were potential remedies for the impugned conduct available under the law of Washington. Whether such deference will continue to be afforded to arbitration clauses following *Heller v Uber* remains to be seen.

Product Liability Class Actions

Courts have also been dealing with a plethora of product liability class actions. Such claims can be framed as a claim 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.

Recent Developments

The most significant development in this area for manufacturers and distributors is the decision of the Supreme Court of Canada in *1688782 Ontario Inc v Maple Leaf Foods Inc*, which deals with the scope of a manufacturer's duty of care. That matter was a class action brought by franchisees of the "Mr. Sub" fast-food chain against Maple Leafs Foods. Maple Leaf had had a listeria outbreak at a meat-processing facility, and the franchisees contended that they were entitled to compensation for economic loss suffered as a result. After the case was certified as a class action, Maple Leaf moved for summary judgment, arguing that it did not owe Mr. Sub franchisees a duty of care.

At first instance, the motion judge dismissed Maple Leaf's summary judgment motion. The motion judge held that Maple Leaf's relationship with the franchisees fell within a recognized duty of care to supply a product fit for human consumption. That decision was reversed by the Ontario Court of Appeal. The Court of Appeal held that although Maple Leaf owed a duty to consumers to supply a product fit for consumption, the scope of that duty did not extend to the economic losses of franchisees. The plaintiffs sought and were granted leave to appeal to the Supreme Court of Canada.

In a decision released in November 2020, the majority of the Supreme Court affirmed the Court of Appeal's decision that a duty of care did not exist. The Court found that the franchisees were not analogous to consumers who are owed a duty to ensure the safe supply of a product. A duty of care in respect of the negligent supply of shoddy goods or structures is predicated upon a defect posing a real and substantial danger to the plaintiff's personal or property rights. Any danger posed by the supply of meats from Maple Leaf which arose from possible listeria contamination was a danger only to the ultimate consumer. No such danger was posed to the franchisees. The *Maple Leaf Foods* decision confirms that the concept of duty of care continues to play a meaningful role in limiting defendants' liability.

2020 also saw a partial rollback of the certification of what is likely Canada's first product liability class action relating to cannabis. In *Downton v Organigram Holdings Inc*, the plaintiff had consumed cannabis that was the subject of a recall because it apparently contained unauthorized pesticides. The plaintiff alleged that she and other class members had suffered adverse health consequences from using the cannabis. The Nova Scotia Supreme Court certified the case as a class action in early 2019. However, in 2020, the Nova Scotia Court of Appeal allowed an appeal by the defendants and significantly rolled back the scope of what had been certified.

> "While this Court has recognized that pure economic loss may be recoverable in certain circumstances, there is no general right, in tort, protecting against the negligent or intentional infliction of pure economic loss... Economic loss caused by ordinary marketplace competition is not, without something more, actionable in negligence."

1688782 Ontario Inc v Maple Leaf Foods Inc, 2018 ONCA 407 at para 66

Privacy and Cybersecurity Class Actions

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.

Recent Developments

In November 2020, Canada introduced Bill C-11, which contains the proposed *Consumer Privacy Protection Act*. If enacted, it will create two private rights of action in ss 106(1) and (2) through which an individual can recover damages for loss or injury they suffered based on contravention of the Act. Both can be brought in either the Federal Court or the Superior Court of a province.

In order to bring the statutory cause of action, the Privacy Commissioner must have either made a finding under the Act that an organization had not complied with its terms, or breached a compliance agreement it entered into with the Privacy Commissioner. Alternatively, plaintiffs have a cause of action where an organization has been convicted of certain offences enumerated in the Act. Broadly, the offenses deal with reporting, notice and record-keeping requirements respecting data breaches, mishandling personal information, taking action against an employee with respect to avoiding its obligations under the Act, contravening an Order of the Privacy Commissioner, or obstructing an investigation made under the Act.

The statutory causes of action may be easier for plaintiffs to prove than the traditional common law torts like negligence or intrusion upon seclusion. However, since the Act requires the Privacy Commissioner to make findings in order to ground one of the causes of action, organizations are clearly incentivized to enter into and abide by a compliance agreement with the Privacy Commissioner.

The common law of privacy also saw important developments in 2020. In *Yenovkian v Gulian*, Ontario recently recognized the privacy tort of publicly placing a person in a false light. It requires: (a) the false light in which the plaintiff was placed would be highly offensive to a reasonable person; and (b) the defendant had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed. From a class actions perspective, the utility of the tort remains to be seen.

As major data breaches have and continue to occur, the number of privacy and data security class proceedings will likely continue to grow. For example, this year's breach of the Government of Canada Branded Credential Service and Canada Revenue Agency is already the subject of at least one putative class proceeding in the Federal Court. The plaintiffs allege that wrongdoers obtained their private information in connection with the Canada Emergency Response Benefit or Canada Emergency Student Benefit payments.

> "... an infringement of privacy can be "highly offensive" without being otherwise harmful in the sense of leading to substantial damages. The offensiveness is based on the nature of the privacy interest infringed, and not on the magnitude of the infringement."

Stewart v Demme, 2020 ONSC 83 at para 79

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

The biggest case of 2020 in Canadian employment law class actions is *Heller v Uber Technologies*, which deals with the enforceability of arbitration clauses in the employment law class action context.

In his proposed class action against Uber group of companies, David Heller, an 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 and stayed the proceeding. The Ontario Court of Appeal reversed this decision and gave the green light for the case against Uber to proceed in Ontario.

The Supreme Court of Canada ultimately affirmed the Court of Appeal decision and held that Uber's arbitration agreement with its drivers was unconscionable and invalid, particularly in light of the US $14,500 up-front administrative fees. While the Court recognized that courts should respect arbitration agreements, it noted that respect for arbitration is based on it being a cost-effective and efficient method of resolving disputes. When arbitration is realistically unattainable, courts should intervene.

Another key case from 2020 was the Ontario Superior Court of Justice's decision in *Fresco v Canadian Imperial Bank of Commerce*. In this case, current and former non-management, non-unionized employees brought an action against CIBC for unpaid overtime. In this case, the bank's overtime and hours-of-work recording practices were systemic or institutional impediments, and thus the plaintiffs were successful in certifying the class action.

This case is notable in part because after 12 years of protracted litigation, the plaintiffs were finally successful in establishing liability on a summary judgment motion and certifying the issue of aggregate damages. However, there will undoubtedly be appeals, and it will likely still be sometime before the litigation concludes.

> "Respect for arbitration is based on it being a cost-effective and efficient method of resolving disputes. When arbitration is realistically unattainable, it amounts to no dispute resolution mechanism at all."

Uber Technologies Inc v Heller, 2020 SCC 16, para 97

Consumer Protection Class Actions

Class actions under provincial consumer protection statutes and other related claims on behalf of consumers remain an active source of litigation across Canada. 2020 saw a number of new consumer protection class actions filed across Canada, including cases against car and car parts manufacturers for alleged defects as well as new claims against technology companies. The COVID-19 pandemic has also given rise to new consumer claims arising from the disruption, such as claims against airlines in respect of cancelled trips.

Recent Developments

A decision with a significant impact in this area and many others will be the Supreme Court of Canada's decision in *Atlantic Lottery Corporation v Babstock*, which held that plaintiffs have no cause of action for waiver in tort.

By way of background, the plaintiffs had brought a proposed class action against the Government of Newfoundland and Labrador in respect of the operation of video lottery terminals. The plaintiffs alleged that video lottery terminals were inherently dangerous and deceptive. They framed their claim primarily to seek a gain-based remedy quantified by the profits that the Atlantic Lottery Corporation had earned by licencing video lottery terminals. The claims advanced were for waiver of tort, breach of contract, and unjust enrichment.

At first instance, the Atlantic Lottery Corporation applied to strike the plaintiffs' claim on the basis that it disclosed no reasonable cause of action and sought certification of the claim as a class action. At first instance, the claim was certified as a class action, and the Atlantic Lottery Corporation's application to strike was dismissed. The Court of Appeal essentially affirmed the application judge's decision and allowed the claims to proceed.

The most important takeaway from the Supreme Court of Canada's decision is that waiver of tort is not an independent cause of action under Canadian law. This had been subject to significant disagreement in lower courts. At its most general, the basic concept of waiver of tort is that a plaintiff could advance a claim for some tortious wrongdoing by the defendant that would allow the plaintiff to recover the defendant's profits from that wrongdoing. At a high level, there were two broad schools of thought regarding what waiver of tort could be. One view was that waiver of tort was essentially remedial, such that a plaintiff that had established a particular cause of action could then "waive the tort" and instead recover the defendant's benefit. A second view was that waiver of tort was a freestanding cause of action that could allow a plaintiff to recover the defendant's gains from the misconduct, without evidence of the plaintiff themselves having suffered any loss.

In its decision, the Supreme Court of Canada unequivocally decided that waiver of tort was not an independent cause of action. The Court's primary reasons for rejecting waiver of tort as an independent cause of action were conceptual. The Court noted that proof of damages is an essential element of negligence. The Court held that it would be a fundamental transformation to the law of negligence to allow a disgorgement-based claim in the absence of any proof of damages. The Court accepted that while some causes of action, such as breach of fiduciary duty, allowed for the disgorgement of profits in the absence of proof of any damage to the plaintiff, the Court held that this was not appropriate for claims like negligence.

While plaintiffs' lawyers will be unhappy with the door being closed on waiver of torts, they will find some consolation in the Supreme Court's unwillingness to stay class actions based on arbitration clauses. In 2019, the Supreme Court of Canada had appeared to be equivocal on this issue, with a majority of the Supreme Court in *Wellman v TELUS Communications Company* staying claims of business customers in a proposed class action on the basis of an arbitration clause. However, the Court's more recent decision in *Heller v Uber Technologies* (described in more detail above) shows a greater willingness to override unfair arbitration clauses where the effect of doing so will be to preclude a class action.

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.

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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.

Our Class Action Litigators

Tom Curry
416-865-3096
tcurry@litigate.com

Brian Kolenda
416-865-2897
bkolenda@litigate.com

Monique Jilesen
416-865-2926
mjilesen@litigate.com

Peter Griffin
416-865-2921
pgriffin@litigate.com

Lawrence E. Thacker
416-865-3097
lthacker@litigate.com

Paul-Erik Veel
416-865-2842
pveel@litigate.com

Peter J. Osborne
416-865-3094
posborne@litigate.com

Andrew Parley
416-865-3093
aparley@litigate.com

Brendan F. Morrison
416-865-3559
bmorrison@litigate.com

Rebecca Jones
416-865-3055
rjones@litigate.com

William C. McDowell
416-865-2949
wmcdowell@litigate.com

Jonathan Chen
416-865-3553
jchen@litigate.com

Matthew Sammon
416-865-3057
msammon@litigate.com