Canada
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Most of the provinces and the Federal Court have adopted class action procedures influenced by the U.S. model, with certification and opt out, but differing rules on costs apply. A significant number of cases are brought, most of which settle. There are unresolved transborder issues.

Keywords: class actions; national class; certification; funding; class proceedings

Canada

Overview of Canada’s Legal System

Canada is a bi-juridical, bilingual nation but one dominated by the common law and adversarial system. In most of the provinces and territories, English is the main language and the legal system is based upon the common law as inherited from Great Britain through the period of colonization. However, in Québec, the French language predominates and the legal system is heavily influenced by civil law as inherited from France. Nevertheless, Québec has adopted aspects of the adversarial (rather than the inquisitorial) system regarding its procedures for civil litigation, in general, and class actions, in particular (Gall 2004, 265).

Canada’s constitutional framework gives provincial superior courts domain over property and civil rights within their boundaries. A Federal Court of Canada also has jurisdiction throughout the country. For a number of reasons, however, primarily due to its limited
subject matter jurisdiction prescribed by statute, the Federal Court’s role in civil litigation is circumscribed.

In both the common law provinces and the Federal Court, rules of civil procedure permit documentary and oral discovery of adverse parties. Some provinces maintain a two-way costs rule (“loser pays”), while others have adopted the no costs rule, by which litigants generally bear their own legal costs.

### Public Debate about Class Actions

During the 1960s and 1970s, halting efforts were made by some courts to expand class actions in response to various pressures from consumer groups, competition advocates, environmentalists, and so on. Québec then led the way legislatively in 1978 when a government of a social democratic caste enacted class action legislation as part of a more general reformist agenda (Bogart 1986-1987, 685-90).

In the rest of Canada, reform efforts regarding class actions during the late 1970s into the 1980s were led by the Ontario Law Reform Commission, which published a massive three-volume report in 1982 advocating broad legislative change. Nevertheless, a period followed during which inertia and opposition to class actions succeeded in keeping reform efforts at bay. Such opposition was both philosophical (class actions inimical to essentials of the judicial function) and led by interests threatened by the shift in power that change could bring (class actions will harm the business community).

In the early 1990s, an activist attorney general broke the logjam through a brokering process involving many of the main interests to be affected by reform (Bogart 1992; Scott 1990). The Ontario legislation was passed in 1993, followed by the British Columbia legislation in 1995. Reform efforts in the latter part of the 1990s in other provinces and in the Federal Court were further strengthened by a Supreme Court of Canada judgment in 2001 that promoted legislative change. As of 2008, class action procedures have been implemented legislatively by the vast majority of provinces and territories, and by the Federal Court of Canada, through amendments to its rules of practice.

### Varieties of Group Litigation

In addition to class actions, the rules of civil procedure in all provinces permit joinder or consolidation of multiple claims. Such claims are most often subject to case management as “complex” cases.

### Certification of Class Proceedings

All relevant legislation requires that leave to proceed with the litigation as a class action be obtained from the court by way of a motion to certify the proceeding as
a class action. The details of the tests for certification differ in each jurisdiction's legislation. Generally speaking, however, five criteria must be satisfied for the action to be certified:

- the pleadings must disclose a cause of action,
- there must be an identifiable class,
- the proposed representative must be appropriate,
- there must be common issues, and
- the class action must be the preferable procedure.

One example of differences in the tests is the “preferability” criterion. In Québec, there is no specific mention of preferability. However, preferability concerns are generally addressed within an express requirement that the action raises identical, similar, or related questions of law and fact, and that the composition of the group makes joinder difficult or impracticable. While Ontario and other provinces require preferability, what the criterion requires is left to the court’s judgment. In British Columbia and other jurisdictions, the legislation provides a nonexhaustive list of factors that the court is to look to in its determination of whether a class action would be the preferable procedure for the “fair and efficient” resolution of the common issues. One of these factors is “whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members.” Judicial authority suggests that this factor can make certification more difficult. Very recent cases decided by Québec’s Court of Appeal have been interpreted as increasing the difficulty of a class action being authorized in that province (Millan 2007).

There is also divergent authority on whether it is necessary that a representative plaintiff have a personal cause of action against each defendant. In British Columbia, the courts have held that a representative plaintiff can act so long as he or she would fairly and adequately represent the class for the purposes of the certified common issues. This allows for so-called industry class actions to be filed by one individual. On the other hand, jurisprudence in Ontario and Québec has held that there be at least one representative plaintiff with a cause of action against each named defendant.

A defining characteristic of all relevant legislation is the effort to protect the interests of members of the class. Generally, such protection requires a willingness of the court to use the devices available to it in the legislation to ensure that members of the class are treated fairly at all times.

**Representative Plaintiffs and Class Members**

Generally, there is no statutory limitation on the nature of the relief that may be sought, or by whom, so long as the proposed representative plaintiff meets the test prescribed in the act. That said, the vast majority of representative plaintiffs have been individuals seeking monetary relief.
Canadian jurisdictions have adopted opt-out regimes, although a few, most notably British Columbia, require those who are otherwise members of the class but who are not resident in the province to opt in. In the absence of a generally applicable arrangement for national classes an opt-out provision permits, at least in some circumstances, class actions in those provinces to include members from across Canada. It also reflects the view that most class members are passive and would not otherwise take steps to include themselves in the class proceedings.

Funding and Costs

It is private lawyers—class counsel—who fund the bulk of class actions in Canada. They do so by way of contingency fee agreements with the representative plaintiffs since, in those jurisdictions where cost awards are available, court-ordered party and party costs are not, by themselves, sufficient to attract counsel to act in the proceedings. Under the contingency arrangement, counsel agrees to fund the litigation and recover fees and disbursements only in the event of success in the litigation (either judgment at trial or settlement), and usually for 20 to 40 percent of the recovery. The contingency fee agreement itself must be approved by the court. There is no systematic evidence of the fees successful plaintiffs' counsel are recovering; there is, however, increasing media speculation on this subject.

Courts will consider a variety of factors in determining what counsel fee is reasonable and fair in all of the circumstances, including the time and labor required, the novelty of the legal issues involved, the outcome, and the risk taken by class counsel. Courts have subjected class counsel to considerable effort in justifying the fee sought to be approved. For example, dockets must be submitted to the court and are scrutinized to ensure no overlawyering, no duplication of effort, and a reasonable division of labor between firms and lawyers.

Ontario and Québec also have government funds to which representative plaintiffs may apply for funding of their litigation. In the case of Ontario, funding is for disbursements only; in the case of Québec, there may be funding for both disbursements and legal fees. The funding granted is often very modest, but in addition to the financial support, representative plaintiffs are indemnified by the fund against adverse costs orders. In exchange, the fund collects a percentage of any judgment or settlement obtained in the class action.

Somewhat unexpectedly, the Class Proceedings Fund in Ontario is little used. In part, this is due to the small number of applicants. In 2007, only three applications for funding were made, two of which were approved. The total amount of money awarded to applicants in 2007 (including monies paid in respect of previous years’ awards) was only $257,209. Interviews of a sampling of leading class action lawyers indicate that the primary reasons plaintiffs do not seek funding more often are the low approval rate by the Class Proceedings Committee (which assesses the merits of an action in determining whether to grant financial support), the minimal amount of funding granted, and the relatively exorbitant
share of the ultimate settlement or judgment amount that is levied by the fund.\textsuperscript{24}

Despite its intended objective of facilitating access to justice by overcoming the significant financial barriers to class proceedings faced by representative plaintiffs, the Class Proceedings Fund in Ontario has not fulfilled its promise.

Quite apart from the funding barrier faced by prospective representative plaintiffs is the additional barrier of an exposure to an adverse costs award if the defendants succeed at certification or trial (in provinces with the two-way costs rule). Canadian courts have, in the main, been sensitive to the impact large costs award against plaintiffs will have on the viability of class actions. Courts have acknowledged the role that class actions play in increasing access to justice in the judicial system, by stating that “large cost awards against unsuccessful plaintiffs will have a chilling effect and likely discourage meritorious class actions.”\textsuperscript{25} Nevertheless, some significant costs awards have been made against unsuccessful plaintiffs,\textsuperscript{26} and some commentators believe the pendulum may be swinging in the other direction as a result of the Supreme Court of Canada’s 2007 decision in \textit{Kerr v. Danier Leather}.\textsuperscript{27}

While some scholars and practitioners argue that the case will be read narrowly and limited to its particular facts—a wealthy representative plaintiff who could have brought an individual action for hundreds of thousands of dollars in stock losses but instead commenced a class action—the impact of this decision remains to be seen in light of the broad language used by the Court. In awarding costs against the representative plaintiff, Justice Binnie stated that “it should not be assumed that class proceedings invariably engage access to justice concerns to an extent sufficient to justify withholding costs from the successful party.”\textsuperscript{28}

**Frequency and Outcomes of Class Actions**

Although precise numbers are not available, the research of some commentators reveals at least 287 proposed class proceedings were filed in Ontario between 1993 and April 2001.\textsuperscript{29} A survey of the proceedings reported to the Canadian Bar Association’s National Class Action Database in 2007 reveals that approximately 145 actions were commenced, the majority in Ontario, British Columbia, or Québec.\textsuperscript{30} These figures mark a significant increase in class proceedings over the past decade.

**Notice to Class Members**

Generally, notification is not required before a proposed class action is commenced. In practice, however, informal notice of potential class members’ claims is often given. Plaintiffs’ counsel have become increasingly sophisticated in their ability to publicize class proceedings even before the certification motion is decided. Most of the prominent class action firms issue press releases upon commencement of their actions and devote Web sites to them where updates on the status of the litigation are posted.\textsuperscript{31}
Class proceedings legislation provides that notice may be given to class members at each pivotal stage of the proceeding, including certification of the action as a class proceeding, settlement approval hearings, and the trial of the common issues. The content of the notice as well as the manner in which it is published must be approved by the court, usually by the judge case managing the proceeding. The court may also dispense with notice altogether. Direct mailing and publishing in newspapers are the preferred methods of giving notice, but television and radio advertisements and sending the notice to third parties who have access to class members are also becoming more common.

Increasingly, the form and content of notice have become more sophisticated and closely scrutinized by the courts. Plaintiffs’ counsel are paying greater attention to the effectiveness of notice to the class in the affidavit material submitted to the court on certification and in support of a settlement. In some instances, counsel have retained “class-notification experts” to design notice programs and provide the court with sworn evidence as to the expected efficacy of the notice program.

Generally, the court will require that all class members be given notice of the hearing at which a proposed settlement is to be considered by the court, even though no statute requires such notice outside of Québec. Class members are entitled to appear at the hearing and object to the fairness or adequacy of the proposed settlement.

Case Management

Case management is widely used in class actions and mandated by the Ontario CPA. Courts use their powers in case management to prevent this complex form of litigation from becoming unwieldy and to protect the interests of class members.

Generally, in the common law provinces, the same judge hears every pretrial motion in class action, including the motion for certification. These same provinces are divided, however, as to the role of case management judges and whether they should preside over the trial of the common issues. In some provinces, such as Ontario, the case management judge does not preside at the trial of the common issues unless the parties agree. Others, such as British Columbia, have no such prohibition.

In the absence of provision for national class actions, courts have used their case management powers to coordinate class actions in different provinces that involve the same subject matter. Courts have attempted such coordination on a consent basis among the parties and judges who are involved. At the same time, courts are cognizant of their inability to impose binding coordinating orders on an extraprovincial court when consent is not forthcoming.
Resolution of Class Actions

Few statistics are available on the number of cases that settle, either before or after certification or the common issues trial. Anecdotally, it appears that less than 5 percent of all class actions go to trial, a rate that is consistent with ordinary litigation.\(^\text{40}\) Settlements are negotiated by counsel for the parties, sometimes with the assistance of a judge (not the case management judge) as mediator. Representative plaintiffs are rarely at the negotiating table and, in fact, need not endorse the settlement themselves before a court will approve it on behalf of the class.\(^\text{41}\)

Class counsel have a fiduciary duty to the class and must keep their interests paramount when engaged in settlement discussions.\(^\text{42}\) The judge at the settlement approval hearing is charged with ensuring that the proposed settlement is “fair, reasonable and in the best interests of those affected by it.”\(^\text{43}\) The court does not, however, review the settlement “with an eye to perfection”; rather, the court must be satisfied that the settlement falls “within a zone or range of reasonableness” for the class as a whole.\(^\text{44}\)

Remedies Available to Class Members

There are no limits as to the kinds of remedies available in class actions. With regard to monetary relief, there are elaborate provisions, including for

- the assessment of aggregate awards, including sampling evidence, in appropriate circumstances;\(^\text{45}\)
- participation of individual members of the class for determination of issues particular to them;\(^\text{46}\) and
- distribution of judgments, including by a form of cy près.\(^\text{47}\)

Taking Stock: Assessing the Effectiveness of Representative Litigation

It is difficult to assess the effectiveness of class actions in Canada because of the lack of reliable statistics and rigorous empirical studies. Three generally agreed upon purposes of class actions are improved access to justice, enhanced judicial economy, and increased modification of wrongful behavior. However, the extent to which any of these benefits are actually realized is largely unknown. Moreover, few reliable statistics show the overall costs of class actions.

At the same time, one can venture to suggest that overall class actions are performing at an acceptable level. No concerted criticism would suggest that class actions, in total, are doing more harm than good. While defense counsel have
levied a wide variety of critiques, for example, about the ability and appropriateness of courts of individual provinces certifying national class actions, none of their criticism strikes at the existence of class actions or their legitimacy. In addition, no concerted criticisms or otherwise have come from members of the public regarding lack of actual benefit to class members, an issue about which there should be constant vigilance.

There is considerable debate as to how multiple, overlapping, and/or national class actions are to be conducted and managed. National classes are a substantial complication when members of the class are spread throughout the country and when no one court has clear, generally applicable jurisdiction to entertain class actions.48 Although a number of national classes have certified on an opt-out basis, particularly by the courts of Ontario and Québec,49 it has been asked whether a court of one province can, as a matter of constitutional authority, require a response from extraprovincial class members to free themselves from the effect of the court’s judgment. That question has, to date, not been answered by the Supreme Court of Canada.50

In an attempt to provide for greater coordination and better management of class litigation that involves plaintiffs across the country, the Uniform Law Commission of Canada (ULCC) has produced a set of proposals.51 These proposals recommend that (1) a registry be established for all class actions filed in any Canadian jurisdiction and (2) legislation be passed in all jurisdictions that would specifically require a court, on a certification motion, to take into account factors, set out in the legislation, relating to the national aspect of the action before it and the relevance of any related actions in other jurisdictions. The aspiration is that, when there is potential class litigation that could be certified in several jurisdictions, only one jurisdiction will be certified, but it will be the “preferable” one. Much work remains to be done in terms of these proposals. Having the various jurisdictions cooperate in terms of the registry and pass the legislative amendments will be a daunting task. Nevertheless, the ULCC proposals are an important basis for addressing these difficult issues.52

**APPENDIX**

Due to space constraints, not all of the Canadian class action statutes are listed here. Instead, the Web site addresses linked to the class action statutes for the provinces of Québec, Ontario, and British Columbia are provided below. These are the three provinces that initially enacted class action legislation and also are the jurisdictions where most of this type of litigation is commenced. The legislation of these three provinces has served as models for all other class action legislation enacted in Canada.

The three provinces’ legislation and dates of original enactment are as follows:

In the case of Québec and Ontario, other relevant legislation addressing funding mechanisms also exists. The links to the applicable legislation are as follows:

- In Québec, An Act Respecting the Class Action, R.S.Q., c. R-21, is available online at the Canadian Legal Information Web site: http://www.canlii.org/qc/laws/sta/r-2.1/20070516/whole.html. This act established a fund named the “Fonds d’aide aux recours collectifs.”
- In Ontario, the Law Society Act, R.S.O. 1990, c. L.8, , c. 7, as am. by Law Society Amendment Act (Class Proceedings Funding), 1992, S.O. 1992, c. 7, s. 3 is available online at the Government of Ontario E-Laws Web site: http://www.e-laws.gov.on.ca/DBLaws/Statutes/English/90108_e.htm#BK139. Sections 59.1 to 59.5 deal with Ontario's Class Proceedings Fund.

For the Federal Courts Rules, SOR/98-106, see the Department of Justice statutes online:


Notes

2. Ontario Law Reform Commission, Report on Class Actions, vols. 1, 2, 3 (Toronto, Canada: Ministry of the Attorney General, 1982). One of the authors of this paper, W. A. Bogart, was a consultant to the Commission during the currency of the class action project.
3. For philosophical objections, see Cromwell (1983) and Glenn (1986). For harm to the business community, see Macdonald and Rowley (1984).
6. See Québec Act. 1003(a) C.C.P.; see also Branch (2007, 4-37).
7. Class Proceedings Act, 1992, S.O. 1992, c. 6 [Ontario CPA], s. 5(1)(d). In Hollick v. Toronto (City), [2001] 3 S.C.R 158 at paras. 27-31, the Supreme Court of Canada articulated three principles that ought to guide the court’s determination of preferability, including that it be construed broadly and capture both whether the class proceeding would be a fair, efficient, and manageable method of advancing the claim and whether a class proceeding would be preferable to other procedures such as joinder, test cases, consolidation, and any other means of resolving the dispute.
10. See, for example, Campbell v. Flexicell Corp. (1996), 25 B.C.L.R. (3d) 329 (S.C.), aff’d [1997] B.C.J. No. 2477 (C.A.) (QL) (court of appeal noting at para. 42 that there is “no requirement that there be a representative plaintiff with a cause of action against every defendant; the legislation simply requires that there be a cause of action . . .”).
12. Such devices include appropriate representation of the class as a criterion for certification (see, e.g., Ontario CPA, s. 5(1)(e)); provision for creation of subclasses (s. 8(2)); notice to the class in a number of circumstances so that class members can take any action that is prudent to protect their interests (ss. 17-22); provision for opting out by class members (s. 9); intervention by class members to make any relevant representations with regard to their interests (s. 14(1)); appeals by class members if such an appeal is not otherwise taken by the representative plaintiff (s. 30); protection of members of the class from the running of limitation periods during the currency of the class action (s. 28); procedures for determination of any issues, should the class be successful on the common issues, that are individual to class members and for calculation and distribution of any monetary relief (ss. 23-27); requirement of approval by the court of any settlement or discontinuance (s. 29); and case management procedures (s. 36).

13. Some jurisdictions, however, impose limitations on corporations and other artificial entities serving as representative plaintiffs: see Québec Arts. 999, 1048 C.C.P. See also Branch (2007, 4-14).

14. Ontario CPA, supra note 7 at s. 9; Québec Art. 1005 C.C.P., Québec Art. 2848 C.C.Q.

15. BC CPA, supra note 8 at s. 16(1).

16. Less often, class counsel arranges for a consortium of third-party investors to fund the litigation by way a loan to the representative plaintiffs, repayable only in the event of success in the litigation. See, for example, Nantais v. Telectronics Proprietary (Canada) Ltd. (14 September 1995), Windsor 95-GD-31789 (Ont. Ct. (Gen. Div.) [unreported]). See also “Investors Betting Lawsuits Will Bring Big Payoffs,” Toronto Star, February 22, 1998, p. A3.

17. Ontario CPA, supra note 7 at ss. 32(3), 33.

18. See, for example, Kirbyson (2007).

19. For a recent example where the list of factors is discussed, see White v. Canada (Attorney General), [2006] B.C.J. No. 760 at para. 27 (S.C.) (QL).

20. Rose v. Pettle, [2006] O.J. No. 1612 (S.C.J.) (QL) (reducing base fee on the basis of “significant duplication of work and an otherwise unnecessary expenditure of lawyers’ time” (para. 8)).

21. Law Society Act, R.S.O. 1990, c. L.8, as am. by Law Society Amendment Act (Class Proceedings Funding), 1992, S.O. 1992, c. 7, s. 3. In Québec, if a cost award is made against the representative plaintiff and he or she is unable to pay, the defendant may then apply to the Québec Fund for payment. The Fund then becomes subrogated to the defendant’s rights as against the unsuccessful representative: see An Act Respecting the Class Action, R.S.Q. c. R-21, s. 31, as cited in Branch (2007, 8-7, n. 45).

22. In Ontario, the percentage recovery is 10 percent on top of the amount of funding previously paid by the Ontario Fund to the representative plaintiff: Class Proceedings, O. Reg. 771/92, s. 10(3)(b). In Québec, the amount collected by its Fund varies depending on the method of recovery by the class, and applies in every class action, not just those in which funding has been granted. The Québec Fund has subrogation of any amounts provided and it will typically take 50 to 90 percent of the remaining balance after individual claims on any collective award. Where there is no collective award, the Fund can take in the range of 2 to 10 percent of individual liquidated claims. If a court decides not to proceed with individual claims, the Fund is entitled to 30 to 70 percent of the total award, less lawyers’ fees and costs: Branch (2007, 8-6, n. 43). See also Regulation Respecting the Percentage Withheld by the Fonds d’aide aux recours collectifs, R.R.Q. c. R-21, r. 3.1.


24. See also Branch and Brasil (2007, 4).


26. See, for example, Pearson v. Inco Ltd., [2002] O.J. No. 3532 (S.C.J.) (QL), rev’d (2006), 78 O.R. (3d) 641 (C.A.) ($215,000). In this case, the refusal to certify, and therefore the costs order against the plaintiff, was reversed on appeal.

27. 2007 SCC 44 (appellate courts overturn trial judgment in favor of investors in securities class action).

28. Ibid. at para. 69. For recent comments on the potential impact of the Court’s pronouncements on future class action litigation, see Baert and Guindon (2008).

29. Ibid. at 3. Additionally, information provided by Donald B. Lebans of Branch MacMaster (received directly from the Chief Justice of the Federal Court of Canada) indicates that forty-eight class actions have
been brought in the Federal Court since its class action rules were introduced in 2002 (e-mail communication from Don Lebans of Branch MacMaster to Ian Matthews, June 18, 2007).


32. See, e.g., Ontario CPA, supra note 7 at ss. 17, 29(4).

33. Ibid., s. 17(2).

34. This method of notice has been given in defective medical devices cases, where the notice is given to physicians who presumably pass along the information to their patients (see Andersen v. St. Jude Medical Inc. (3 March 2005), Court File No. 00-CV-195906CP (Ont. S.C.J.) [unreported]) and in shareholder class actions by e-mailing the notice to brokers (see Mondor v. Fisherman, [2002] O.J. No. 1855 (S.C.J.) (QL)).

35. Notice of the proposed $1 billion settlement of the Indian Residential Schools cases was effected in twenty-seven languages and native dialects, in every province and territory of the country, in print, radio, and television advertisements. See Hilsee (2007).

36. See also Winkler (2000), where he commented that case management judges have a “weighty responsibility” and a “broad discretion” in overseeing class actions.

37. Ontario CPA, supra note 7 at s. 34.

38. BC CPA, supra note 8 at s. 14(3).


40. In Québec law, see the statistics stated by Lafond (2006, 35): “There remain very few final judgments in class action cases. The majority of class action cases end by out of court settlement. From 1979 to 2004, 151 actions ended by way of settlement, against 32 judgments favourable to the class” (translation). For statistics up to September 2004 in British Columbia, Québec, and Ontario, see Branch and Montrichard (2005).

41. See, for example, Carom v. Bre-X Minerals Ltd., [2001] O.J. No. 4177 at para. 8 (S.C.J.) (QL) (listing nine factors to be taken into account in determining whether to approve the settlement as fair, reasonable and in the best interests of the class as a whole, including the recommendation of the representative plaintiff, the court commenting that “it is not necessary that all the enumerated factors be present in each case”).

42. Garland v. Enbridge Gas Distribution Inc., [2006] O.J. 4907 at para. 29 (S.C.J.) (QL): “The interests of the class must be paramount when counsel are engaged in negotiations to settle the issues with an opposing party.”


45. Ontario CPA, supra note 7, ss. 23, 24. For a discussion of the recent jurisprudence on aggregate damages, see Baert and Ptak (2008).

46. Ontario CPA, supra note 7, s. 25.

47. Ibid., s. 26.

48. For excellent overviews of these and related issues, see Poltak (2006); Jones (2007).


50. Branch (2007, 11-5, n. 11a). The Manitoba legislation goes further. It expressly contemplates extraprovincial members of the class participating, but it does not require them to opt in: see Class Proceedings Act, C.C.S.M. c. C130, s. 6(3) (this subsection reads, “A class that comprises persons resident in Manitoba and persons not resident in Manitoba may be divided into resident and non-resident subclasses”).

52. See also Howard and Hosseini (2008).

References


