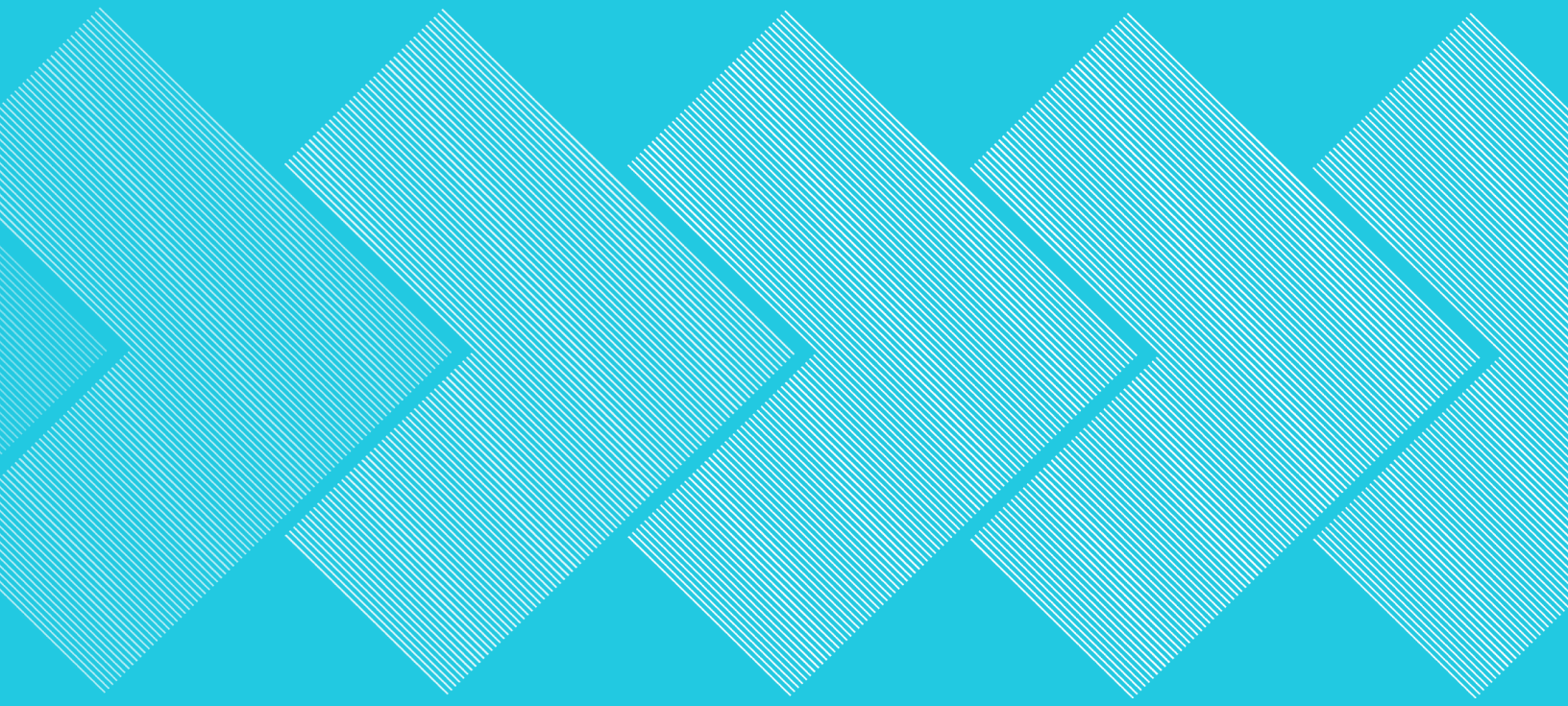
Class Actions in Canada 2022



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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 multidistrict litigation 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 multidistrict litigation 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

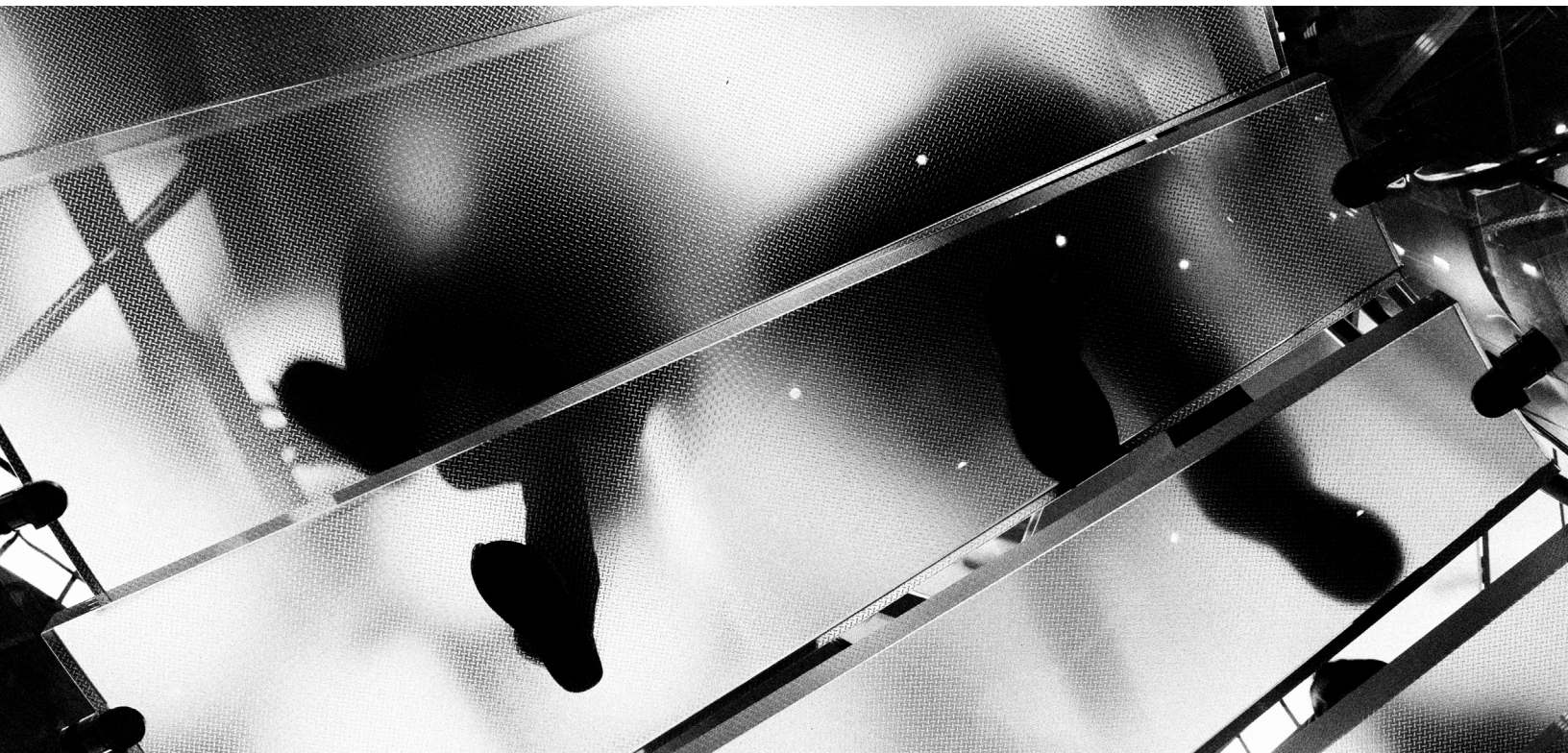
The existence of parallel proceedings in different provinces increases the complexity of the case as a whole. For example, it may mean multiple certification motions and, if a case is settled, multiple settlement approval hearings. Often the parties attempt to streamline the litigation by agreeing that 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 may include placing an advertisement in one or more national or major regional newspapers, web-based or social media advertising and, depending on the size of the class, some form of direct notification to class members by mail or email. 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.

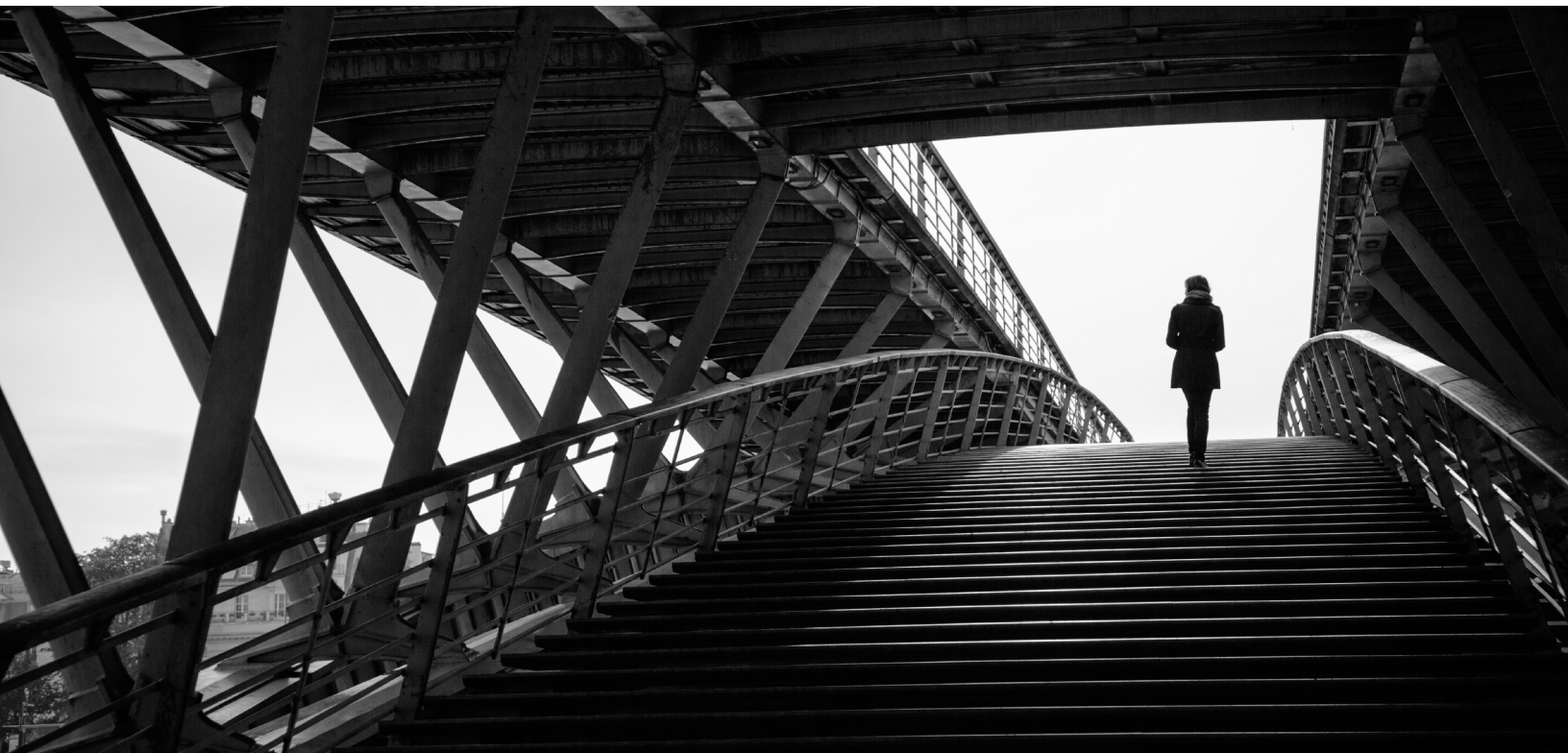
Common Issues Trials

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 in most provinces is that the parties 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. Similarly, in May 2021, the Ontario Superior Court of Justice declined to grant approval to a settlement reached in a class action brought by former Crown wards in *Grann et al v HMQ in Right of the Province of Ontario*. 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. 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. However, those costs awards can still be significant.

In *Hughes v Liquor Control Board of Ontario*, the defendants successfully resisted certification of a proceeding that challenged an agreement that restricted how beer could be sold in certain retail channels. The Court ordered payment of costs to the defendants in that case in the aggregate amount of over $2.2 million. Costs remain highly discretionary, and in many cases the costs awarded have been substantially lower.

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. Litigation funding is becoming increasingly common in Canada, with a number of providers willing to backstop costs awards and provide funding for disbursements.

The amendments to Ontario's *Class Proceedings Act* that came into force in October 2020 formalized 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. 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

In 2021, counsel on both sides of the class actions bar continued to grapple with major changes in this area, most notably the amendments to Ontario's *Class Proceedings Act* which 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.
- **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.
- **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.
- **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.
- **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*.

Although the new provisions have been in force for over a year, most of them have received little judicial consideration. For example, the first decision under s. 29.1 (the new dismissal for delay provision) was only released in January 2022. In that case, *Bourque v Insight Productions*, slightly over a year had passed since the case was deemed to have been commenced pursuant to transitional provisions in the Act with a timetable or certification record being delivered, and the defendant moved to dismiss the case for delay. While the Court dismissed the action, the Court also expressly held that the same action could be filed by a different representative plaintiff.

There remains uncertainty as to what the impact of many of the new provisions will be, particularly those that change the certification test. Anecdotally, there has been a trend of plaintiff's firms deciding to start their cases in other provinces instead of Ontario, with British Columbia being a popular jurisdiction. It remains too early to tell whether this is a short-term blip prompted by the current uncertainty or whether it will be a long-term trend.

Securities Class Actions

Securities law class actions in Canada take a number of forms. Each province and territory'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 statutory secondary market claim 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.

Recent Developments

The Ontario case of *Wong v Pretium Resources* provided a rare decision of a *Securities Act* secondary market misrepresentation claims on the merits following competing summary judgment motions. The core issue was whether the defendant gold mining company's failure to disclose the negative opinions of one of its mining consultants amounted to an omission of a material fact. The Court held that based on all the evidence, the alleged misrepresentation was not a material fact that required disclosure. Rather, the Court held that the information was unreliable, and information must be sufficiently reliable before it is material. In the alternative, the Court held that the defendants had established the "reasonable investigation defence" in s. 138.4(6) of Ontario's *Securities Act*.

The Ontario leave and certification decision of *Badesha v Cronos Group* also dealt with the requirement of materiality of the misrepresentation. The Plaintiff asserted just under 8,000 separate misrepresentations across three quarters of interim financial statements and MD&As, and sought a declaration that each misrepresentation was separate and gives rise to its own liability limit under the statute. The Court held that there was insufficient evidence to hold that each distinct misrepresentation was material. The Court was not persuaded by the Plaintiff's argument that the mere fact of a restatement of a financial statement is proof of materiality, holding that "materiality is in the eye of the investors, not the accountants."

This past year also saw a series of cases out of the British Columbia Supreme Court: *Tietz v Cryptobloc Technologies Corp*, which constitutes that Court's first substantive dealings with the secondary market misrepresentation regime. The Court held that the test for leave in British Columbia is the test articulated by the Supreme Court in *Theratechnologies inc v 121851 Canada inc*.

Finally, in *Baldwin v Imperial Metals Corporation* and *Drywall Acoustic Lathing and Insulation, Local 675 Pension Fund v Barrick Gold Corporation*, the Courts grappled with the statutory requirement in secondary market liability to have a "public correction" of the misrepresentation. The *Securities Act* grants a cause of action for secondary market liability to "a person or company who acquires or disposes of the issuer's security during the period between the time when the document was released and the time when the misrepresentation contained in the document was publicly corrected." The Superior Court had denied leave in both cases on the basis that the Plaintiff had failed to plead a public correction. The Plaintiffs appeal in each case, and the Ontario Court of Appeal allowed their appeals. The Court of Appeal held that public correction was a necessary part of the cause of action, but its role at the leave stage is "modest". The exact role of public correction was left in both decisions for another day, but what is certain following both decisions is that it is going to be a rare case where leave can be denied on the basis that there is no reasonable possibility that a trial court would find that there has been a public correction of the pleaded misrepresentation.

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 (Part VI) of the *Competition Act*, which includes horizontal price-fixing cartels and fraudulent advertising. No class actions can be brought in respect of 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 and indirect purchasers can advance claims for the overcharge paid as a result of a price-fixing conspiracy. In its 2019 decision in *Pioneer Corp v Godfrey*, the Court confirmed that umbrella purchasers may have a cause of action, though such other recent case law emphasizes that the harm caused to umbrella purchasers must be provable.

In *Pioneer*, the Supreme Court of Canada also confirmed 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 that limitation period. This latter aspect means that defendants may be faced with historical claims.

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

Recent Developments

2021 was a notable year in Canadian competition law because of the number of proposed class actions that failed at or before the certification stage on procedural grounds. This may represent a shift away from courts' liberal approach to certifying class actions and an increased willingness to perform a "gatekeeper" role by more closely scrutinizing class actions at preliminary stages.

In *Jensen v Samsung Electronics Co Ltd*, the Plaintiffs made the rare allegation of conspiracy to restrict supply—in that case, of dynamic random access memory chips. While this case made it to the certification hearing, it was dismissed on the basis that the Plaintiffs failed to adequately plead the existence of an unlawful agreement and failed to provide even the minimal evidentiary basis required to pass the certification test. The Court found there was "not a scintilla of evidence on the record" to support bald allegations of direct communications between the Defendants during which the Plaintiffs alleged the conspiracy was established.

In two cases that were dismissed at the preliminary motions stage, *Latifi v The TDL Group Corp* and *Mohr v National Hockey League*, courts confirmed that buyer-side conspiracies are excluded from the criminal provisions of the *Competition Act* and cannot form the basis of a civil cause of action under the Act. The cases involved similar allegations of conspiracies between employers that harmed employees.

In *Latifi*, a case brought before the British Columbia Supreme Court, the Plaintiffs alleged that a standard clause in Tim Hortons franchise agreements that prevented franchisees from recruiting employees of other franchisors constituted a conspiracy to fix wages. In the Federal Court case *Mohr*, the Plaintiffs alleged a similar conspiracy between Hockey Canada and various hockey leagues and associations to fix the wages of professional hockey players. In both cases, the courts found that employees provide a service and are thus suppliers. As the purchasers of the services, employers cannot be found to have engaged in illegal activity even if they did conspire to fix wages.

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

A recent decision of significance in this area is the Ontario Superior Court's decision in *Price v Smith & Wesson*. In *Price*, the Court recognized a duty of care between a firearms manufacturer and the victims of a shooting for the first time in Canadian history.

By way of background, the victims of a mass shooting brought a claim against Smith & Wesson, the manufacturer of the weapon used by the shooter. The tragic events giving rise to the action took place when Faisal Hussain walked along Danforth Avenue in Toronto randomly shooting and killing two people and shooting and injuring 13 others using a stolen Smith & Wesson handgun. The Plaintiffs (representing the deceased, injured, and their families) alleged that Smith & Wesson had failed to adopt and implement feasible safety measures available to it to prevent the unauthorized use of its firearms. The Plaintiffs claimed, among other things, negligent design. Smith & Wesson moved under Rule 21 to strike the Plaintiffs' claim.

Justice Perell dismissed the motion, holding that the Plaintiffs' cause of action fell within two established categories for negligence claims: goods dangerous per se; and product liability/negligent design. Justice Perell held that the claim was based on a duty of care in relation to the manufacturing and design of a dangerous product, and in the immediate case, Smith & Wesson could have implemented precautions to prevent the shooter from being able to use a Smith & Wesson firearm in the mass shooting. The Court held that Smith & Wesson's duties of design extended beyond the police officers and soldiers for whom the product was designed and refused to confine the duty of care in designing a product to the immediate purchaser or consumer of the product. A key factor for the Court was the development and availability of "authorized user technology".

> "... A manufacturer has a duty to make reasonable efforts to reduce any risk to life and limb that may be inherent in its design, and it is arguable that a risk-utility analysis in the immediate case may demonstrate that there came a time when it was careless for Smith & Wesson not to utilize invented authorized user technology, of which there were many types, some of which Smith & Wesson invented and patented."

Price v Smith & Wesson, 2021 ONSC 1114 at para 104

As this "authorized user technology", which was designed to reduce the risk to life of others due to the unauthorized use of a firearm, was practically available to Smith & Wesson, Justice Perell held that the Plaintiffs' cause of action for negligent design was not doomed to fail.

This decision has significant implications for manufacturers of dangerous products. Manufacturers should be aware that they may owe a duty of care not only to the purchasers or intended users of inherently dangerous products, but also to those who may be impacted by the products or come into close proximity with them. Claims may arise for negligent design where a defect in a product exists and a safer, economically feasible alternative or addition to the product existed, but was not implemented.

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 contained the *Consumer Privacy Protection Act*. While the proposed legislation died on August 17, 2021 when the federal election was called, it provided a snapshot into the state of privacy reform discussions at the federal level. Of note, the *CPPA* (meant to replace *PIPEDA*) created two private rights of action through which an individual can recover damages for loss or injury they suffered based on contravention of the *CPPA*. Both could be brought in either the Federal Court or the superior court of a province. While statutory privacy law remains in flux at the federal law, Bill C-11 will likely be the starting point for the next iteration of federal privacy legislation.

In *Simpson v Facebook*, the Superior Court of Ontario declined to certify a putative class action against Facebook for the alleged sharing of their personal information with Cambridge Analytica. The Court found that the Plaintiffs—who alleged that Facebook was liable for intrusion upon seclusion—failed to adduce any evidence that a Canadian user's personal data was shared with Cambridge Analytica. While there is a notoriously low burden to meet the test for certification, this decision suggests that Plaintiffs' counsel must adduce evidence that personal information was compromised, even if it was made accessible to a third party.

As it relates to cyberattacks committed by third parties, the Divisional Court recently held that organizations that collect and store personal information cannot be liable for the tort of intrusion upon seclusion if it is the third parties who steal or access that information. In *Owsianik v Equifax Canada Co*, a hacker breached the Defendant Equifax's computer systems and gained access to the personal and financial information of millions of its Canadian customers. The Plaintiffs alleged that Equifax was liable for intrusion upon seclusion because it failed to adequately protect its users' personal information. At certification, Justice Glustein certified intrusion upon seclusion as a cause of action against Equifax. On appeal, the Divisional Court overturned his finding. The majority of the Court found that the tort of intrusion upon seclusion contemplates an intrusion by a defendant, not a third party. Accordingly, it does not apply to custodians of personal information who fail to prevent the intrusion by a third party.

This principle was confirmed by the Superior Court of Ontario more recently in *Del Guidice v Thompson*. In *Thompson*, the Superior Court of Ontario dismissed a proposed class action stemming from Capital One's data breach in 2019. Citing the Divisional Court's decision in *Equifax*, Justice Perell noted that the tort of intrusion upon seclusion was not applicable in the circumstances: the failure to prevent an intrusion does not constitute intrusion. He also took the opportunity to reinforce that the tort of intrusion upon seclusion requires a "mental element of intentionality" or recklessness, which is different than carelessness or wrongfulness. Because the Thompson pleading did not disclose material facts in support of that essential element, the Plaintiffs' cause of action failed.

As major data breaches have and continue to occur, the number of privacy and data security class proceedings will likely continue to grow. In light of the Court's recent guidance on intrusion upon seclusion, it will be interesting to see whether plaintiffs' counsel continue to pursue this cause of action or whether they will pivot to new causes of action recognizing the difficulty they may face in adducing evidence about liability and/or harm.

Employment Class Actions

Over the past year, we have continued to see a growth in employment class actions involving employees' claims for withheld overtime and vacation pay, as well as employee misclassification actions in which employees claim that their working status and applicable benefits have been misclassified under employment standards legislation.

Recent Developments

Some employment cases can be relatively challenging for plaintiffs to certify, as there may not be sufficient commonality between class members. The 2020 amendments to the preferable procedure part of the certification test may also create obstacles in a plaintiff's path to certification. Section 5(1)(d) of the *Class Proceedings Act* establishes that in order to be certified a plaintiff must demonstrate that a class proceeding would be preferable to other reasonably available means of resolving the class members' claims.

For example, in *Curtis v Medcan Health Management Inc*, the Ontario Superior Court refused certification on the basis that the Plaintiffs had not satisfied the preferable procedure criterion. In that case, in 2019 after being informed by a Medcan employee that he had not been paid the vacation pay and public holiday pay required under the *Employment Standards Act*, Medcan realized it had been miscalculating vacation and holiday pay for its employees for over 15 years. In March 2020, Medcan paid current and former employees vacation and holiday pay owing for the previous two years, pursuant to the *Limitations Act*, 2002. In April 2020, the Plaintiffs of the proposed class action brought claims against for unpaid vacation pay and public holiday pay pursuant to the *Employment Standards Act*. In refusing certification the Court found that due to the limitations issues, there was no possibility of an aggregate assessment of their claims. As such, a common issues trial would only delay the resolution of the class members' claims by way of individual trials.

Another noteworthy development in this area comes from *Brown v Procom Consultants Group Ltd*, where the Court addressed the issue of discoverability in employee misclassification class actions. In that case, the Plaintiff's proposed class action alleged that Procom mischaracterized the prospective class members as independent contractors, when they ought to have been classified as employees and therefore subject to certain statutory entitlements under the *Employment Standards Act* including vacation pay, holiday pay and overtime pay. The Plaintiff brought a motion to substitute a new representative plaintiff, which Procom resisted on the basis of the *Limitations Act*, 2002.

> "Workers are not necessarily required to conduct independent research as to their employment status, and therefore discoverability of a misclassification may be delayed until the worker can reasonably know that they have been misclassified."

In granting the motion and allowing the Plaintiff to substitute a new representative plaintiff, the Court held that employees may rely on the representation of an employer who represents they are an independent contractor and acts consistently with that representation. Workers are not necessarily required to conduct independent research as to their employment status, and therefore discoverability of a misclassification may be delayed until the worker can reasonably know that they have been misclassified. This will continue to be a challenging area, as employers may face claims going back well beyond the two-year basic limitation period.

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. 2021 saw a number of new consumer protection class actions filed across Canada, including cases against car and car parts manufacturers for alleged defects, new claims against technology companies, and claims implicating the door-to-door sales industry. The ongoing COVID-19 pandemic will likely continue to give rise to new consumer claims arising from the disruption, such as claims against airlines in respect of cancelled trips, against universities for cancelled classes, and against insurers for business interruption insurance claim denials. This especially is the case as limitation periods loom for actions arising from disruptions in the early days of the pandemic.

Recent Developments

A recent decision of significance in this area is the British Colombia Court of Appeal's decision in *Pearce v 4 Pillars Consulting Group Inc*. In *Pearce*, the Court applied the Supreme Court of Canada's decision in *Uber Technologies Inc v Heller* to certify a class action, despite the presence of a waiver in a standard form contract signed by the Plaintiffs precluding class proceedings.

By way of background, the Defendants provided debt structuring services that included helping debtors draft consumer proposals to present to licensed insolvency trustees, with the goal of having the trustees present the consumer proposal to the debtors' creditors. However, the Defendants were unlicensed and charged fees in excess of those charged by licensed and regulated professionals in the industry. The fees were also payable regardless of whether any debt structuring was achieved.

The Plaintiffs commenced a class action alleging that the Defendants operated in violation of the *Business Practices and Consumer Protection Act* and the *Bankruptcy and Insolvency Act*. On the certification application, the Defendants sought to strike out the Plaintiffs' claim on the basis that it was not plain and obvious that their activities breached *BPCPA or BIA*, and more interestingly, sought to stay the claims of all class members whose contracts contained a wavier prohibiting class proceedings against the Defendants. The Court dismissed the Defendants' application and the British Columbia Court of Appeal dismissed an appeal.

Of particular interest was the Court's analysis of the class action waiver clause in the standard form contract between the parties. The Court of Appeal determined that the waiver clause was unenforceable because it was unconscionable and contrary to public policy considerations. With respect to unconscionability, the Court held that "a clause that effectively prohibits a party's ability to have recourse to a justice system to enforce their agreement undermines the administration of justice, the rule of law, democracy and commercial certainty." The Court found that the clause did not effectively communicate the consequences of agreeing to it, particularly that it failed to communicate that a class action may be the only economic and viable way to bring claims arising from wrongs committed by the Defendants. Finally, the Court found that the provision had the practical effect of blocking access to justice. As such the Court concluded that the class action waiver was unconscionable and invalid.

The unanimous Court also held that the class action waiver was unenforceable due to public policy considerations as the clause "significantly interferes with the administration of justice" and "has the practical effect of precluding the respondent, and class members, from having access to a dispute resolution process in accordance with the law for claims arising from the relationship between these parties." The Court also noted that the waiver could result in the waste of judicial resources by requiring all class members to pursue individual claims, limit access to justice by preventing proposed class members from sharing legal costs, and frustrate the behavioral modification purpose of class proceedings as it was unlikely the Plaintiffs would pursue their claims individually. Ultimately, the Court held that the waiver interfered with access to the courts to such a degree that it was contrary to public policy and unenforceable.

This decision indicates that courts may be more willing to find these types of class action waivers unenforceable. Those seeking to rely on such clauses should therefore take steps to ensure that the clauses and their impact are fully explained to contractual counterparties. However, an understanding of the impact will likely not guarantee enforceability, particularly in cases where a clause practically and completely eliminates a counterparty's access to the court system.

Professional and Institutional Negligence Class Actions

Professional and institutional negligence claims have continued to flourish. As with many class actions, these cases can involve power imbalances between otherwise individual complainants and institutional (or institutionally backed) defendants. The relationship between the parties can be one of trust and dependence between the individual (e.g., client or patient) and the professional (e.g., accountant, doctor, or lawyer) or the institution (e.g., government, hospital, or long-term care home). These claims generally include claims for negligence, though depending on the circumstances, plaintiffs may also advance claims for breach of fiduciary duty, breach of trust, and misfeasance in public office.

Recent Developments

While claims against governments have been and continue to be common, the enactment of the *Smarter and Stronger Justice Act,* 2020 has made bringing proceedings against the Ontario Crown more difficult, especially for individual claimants. Several procedural hurdles have been introduced in Schedule 7, which amends the *Crown Liability and Proceedings Act, 2019*; most notably, claimants must satisfy a leave requirement, at their own cost, to advance claims of misfeasance in public office or bad faith.

2021 also saw the Ontario Superior Court of Justice expand the means by which plaintiffs can prove causation in medical negligence class actions. In *Levac v James*, a common issues trial related to the outbreak of meningitis in a pain management clinic, the Court relied on epidemiological analysis to infer causation. The Court determined that the defendant physician's infection prevention and control practices were substandard and that his patients had a near-69 times greater risk of developing a serious infection relative to patients not exposed to his practices.

Beyond COVID-19-related class actions, in late 2021, the Court in *New Brunswick v Tidd* certified a class action alleging abuse, mistreatment, and neglect, between 1954 and 2017, at the Restigouche Hospital Centre. The class, which included all persons who were admitted to or resided at Restigouche Hospital Centre, as well as persons with claims for loss of care, guidance and companionship, was successful in certifying issues of systemic negligence, breaches of fiduciary duty, and breaches of *Charter* rights.

"The enactment of the *Smarter and Stronger Justice Act,* 2020 has made bringing proceedings against the Ontario Crown more difficult, especially for individual claimants. Most notably, claimants must satisfy a leave requirement, at their own cost, to advance claims of misfeasance in public office or bad faith. actions, general actions, and consolidation with other arbitrations are not allowed."

A series of class actions were recently decided in favour of offenders subjected to solitary confinement. Recently, the Court of Appeal for Ontario decided the appeals of two summary judgments, representing i) a class of offenders with serious mental illness who were placed in administrative segregation and ii) all offenders in federal custody who were involuntarily subjected to prolonged administrative segregation. While the Court overturned a claim for systemic negligence in one of the appeals, damages for breaches of ss. 7 and 12 of the *Charter of Rights and Freedoms* were upheld in both.

Looking forward, institutional class actions related to the COVID-19 pandemic will likely continue to be prominent in 2022. Several class actions have commenced against governments and private institutions related to the spread of the COVID-19 virus in long-term care homes.

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.

33
Expert litigators with a class actions practice.

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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 are extremely able to advise on other provincial jurisdictions."

Chambers Canada

Expert Strategy

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

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

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

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