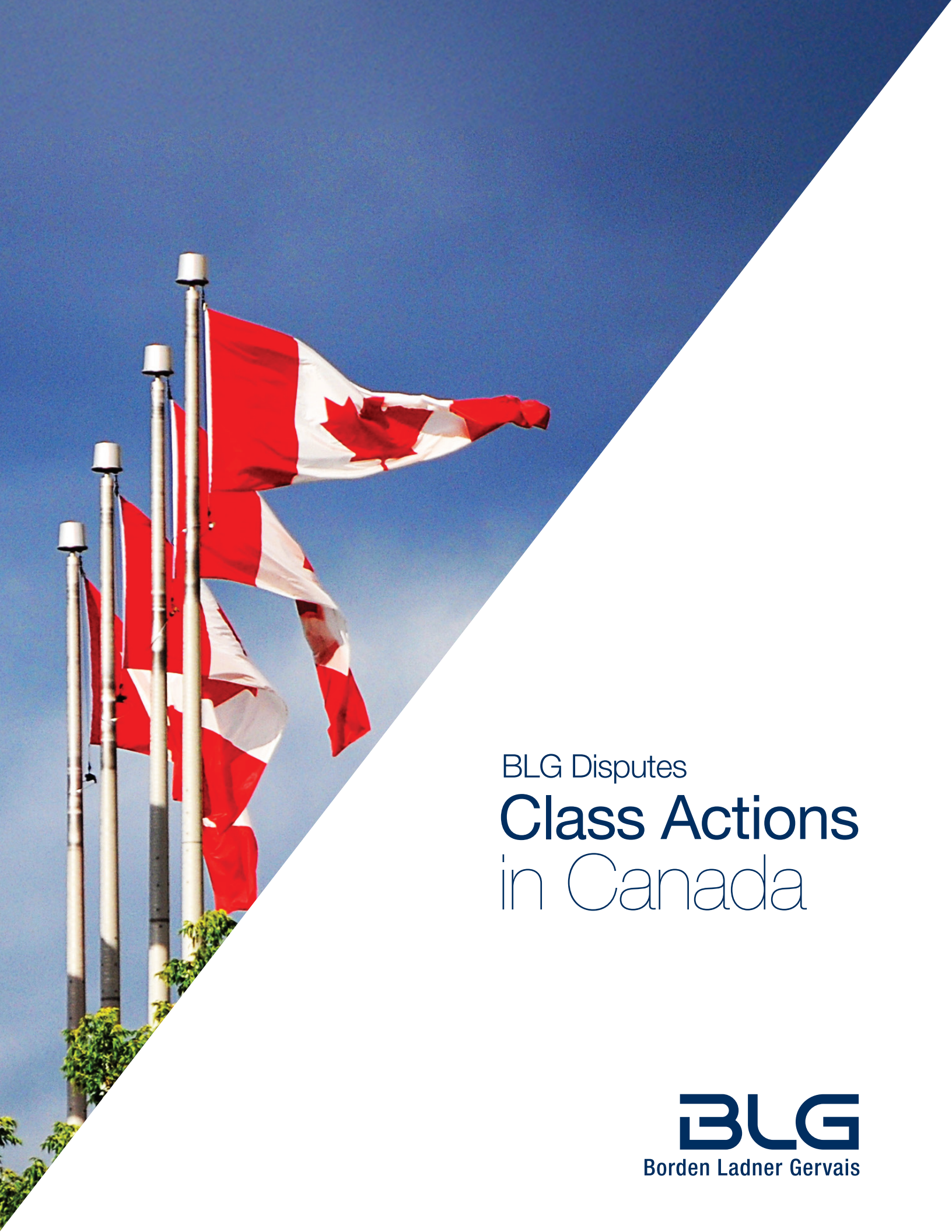

BLG Disputes

Class Actions in Canada

BLG

Borden Ladner Gervais

Common Types of Class Action Claims

Virtually all types of claims can be the subject of class actions in Canada. Some types of claims are more frequently filed than others, including:

- **Competition**: The federal *Competition Act* governs antitrust claims, as well as certain types of misleading advertising and other competition-related claims. Class actions alleging price-fixing are common in Canada, and often follow claims commenced in the U.S. Notably, however, the *Competition Act* does not provide for treble damages like the U.S. *Sherman Act*.
- **Consumer**: All types of consumer claims have been the subject of class actions in Canada, and the claims are often based on statutory causes of action in the provincial consumer protection legislation. These claims can include misleading advertising/misrepresentation claims, and warranty-type claims.
- **Employment**: Class actions alleging unpaid overtime or seeking other statutory benefits, or alleging that independent contractors have been misclassified and are entitled to benefits as employees, are common across Canada and are often the subject of class actions.
- **Government**: The federal government and provincial governments are often defendants in class actions. These actions often involve all manner of government programs and actions. Some jurisdictions have adopted legislation limiting the scope of permissible claims against governments, which have reduced the number of class actions against the government. Some jurisdictions, such as British Columbia, are seeing a new trend of governments or government entities acting as class action plaintiffs, particularly where the government has special health care costs recovery legislation in place.
- **Franchise**: Class actions by franchisees against franchisors under franchise agreements and/or franchise legislation can arise in most Canadian jurisdictions.
- **Mass Tort**: Tort claims for environmental harms, based on accidents (e.g. plane or train accidents), and historical allegations of institutional sexual assault can be brought against private defendants or government defendants.
- **Privacy**: Class actions arising out of privacy breaches or other privacy-related issues, such as misuse of data, have been common in Canada.

- **Product Liability**: Product liability claims regularly follow developments in the U.S. and recalls issued in Canada. These claims can be based in tort (extra-contractual liability in Québec) or statute, particularly consumer protection statutes.
- **Securities**: Claims for misrepresentation and other shareholder remedies are more commonly filed in Ontario where Canada's largest stock exchange is located. However, the Canadian statutory regimes governing misrepresentation claims, notably the requirement to obtain leave of the court to commence an action for secondary market misrepresentation, have deterred a culture of "strike suits" around transactions like in some U.S. jurisdictions.

Canadian Class Action Jurisdictions

The Canadian Court System

Each of Canada's ten provinces and three territories has its own court system. The provincial and territorial superior courts have general jurisdiction to hear cases on any subject except those that are specifically reserved to another level of court by statute. Unlike the provincial and territorial superior courts, the Federal Court of Canada only has limited statutory jurisdiction, mainly over claims against the federal government, federal ministries and federal Crown agencies/corporations, as well as statutory causes of action created by federal statutes (e.g. the *Competition Act*, which contains statutory causes of action for price-fixing and misleading advertising). The Supreme Court of Canada has ultimate appellate jurisdiction over every Canadian court system.

Nine of the provinces, all the territories and the Federal Court are common law regimes. Québec has a civil law regime for private law. Every province, as well as the Federal Court, has a statutory/regulatory class actions regime. The three territories do not have statutory/regulatory class actions regimes, but common law class actions are available.

Every provincial and territorial superior court, and the Federal Court, can take jurisdiction over a "national" or pan-Canadian class, depending on the circumstances. However, it is also common for a "national" class to cover the nine common law provinces and three territories and exclude Québec residents, with Québec residents being the subject of a separate, Québec-only class action.

Major Class Action Jurisdictions

Four jurisdictions deal with the majority of class actions in Canada: Ontario, British Columbia, Québec and the Federal Court. Each of these jurisdictions have specialized and experienced class actions judges. BLG has offices in every major centre and has extensive experience defending class actions in every major jurisdiction (and most other Canadian jurisdictions too).

- **Ontario (major class actions centre: Toronto)**: Ontario is Canada's most populous province, and Toronto is Canada's largest city. The Toronto Stock Exchange (TSX) is Canada's senior equities exchange. Toronto is the Canadian hub for financial services, manufacturing and technology companies, including the headquarters of the five largest Canadian banks.

Ontario is notable for its loser-pays costs regime in class actions, unlike other major jurisdictions where either there are no costs on certification or minimal costs. Class counsel appear to have started to favour British Columbia or the Federal Court over Ontario for some types of claims, likely because of Ontario's costs regime and defendant-friendly amendments to Ontario's class actions statute (discussed further below).

- **British Columbia (major class actions centre: Vancouver)**: British Columbia is Canada's third most populous province, and Vancouver is Canada's third-largest city. The TSX Venture Exchange, located in Vancouver, is a public venture capital exchange for emerging companies. A number of major Canadian companies are headquartered in Vancouver, notably in the mining and forestry sectors.

  Absent exceptional circumstances, there are no costs awarded on certification motions in British Columbia, and following recent amendments to Ontario's legislation, the British Columbia certification test is perceived to be somewhat more plaintiff-friendly.

- **Québec (major class actions centre: Montréal)**: Québec is Canada's second most populous province, and Montréal is Canada's second-largest city. Montreal is a major manufacturing, transportation and pharmaceutical centre. The majority of Québecois speak French, and Montreal is one of the largest French-speaking cities in the world.

  Québec's French language, unique civil law system, and plaintiff-friendly statutory regime make Québec (mainly Montreal) a very active class action jurisdiction. Many Canadian class actions will involve parallel claims with a "national" claim in a common law province (usually Ontario or British Columbia) and a "Québec-only" claim in Québec (discussed further below). Québec also has a number of uniquely consumer-friendly laws that lead to some "Québec-only" claims without "common law" parallels.

- **Federal Court (major class actions centres: Ottawa, Toronto, and Vancouver)**: The Federal Court of Canada is a national court and can sit in any major Canadian centre. Unlike the U.S. Federal Court, the Federal Court of Canada only has a limited subject-matter jurisdiction focused on claims against the federal government and claims under federal statutes. Notably, Canadian antitrust law is governed by the federal Competition Act, so claims alleging price-fixing can be brought in the Federal Court (though they can also be brought in provincial superior courts). Federal Court judges are cross-appointed to sit on the Canadian Competition Tribunal, so they have a particular expertise in competition matters.

While these four jurisdictions deal with the majority of Canadian class actions, class actions have been commenced in the superior courts of a number of other provinces. Some notable class counsel use these jurisdictions to commence claims in parallel to claims in major centres to obtain settlement leverage.

Responding to Class Actions in Multiple Jurisdictions

There is no Canadian equivalent to the U.S. Multi-District Litigation (MDL) system to resolve overlap between proposed class actions in different jurisdictions. Overlapping actions in multiple jurisdictions can be dealt with by:

- Agreement between proposed class counsel, and designate one action as the "lead" action.
- Application by defendants to stay all but one "lead" proceeding.
- The Court carving out overlap as part of the certification in some proceedings.

Some provinces have adopted legislative provisions intended to streamline multi-jurisdictional class proceedings, but judges retain significant discretion and they have been hesitant to stay proceedings in their province in favour of proceedings in another province. Many of these provincial regimes are based on, or refer to, the proposed protocols the Canadian Bar Association (CBA) has promoted for multi-jurisdictional class actions. The CBA also maintains a database for multi-jurisdictional class actions, but the CBA protocols and database are not mandatory. Consequently, it remains common for defendants to face multiple proceedings advancing in parallel in multiple jurisdictions.

In common law jurisdictions, where there are multiple overlapping claims commenced in the same jurisdiction, if class counsel do not agree to consolidate their claims, the court will choose one claim to go forward and stay the rest in a “carriage” motion. This issue does not arise in Québec, as it is a “first-to-file” jurisdiction. The first firm to file a class action will lead the case, subject to limited exceptions. There are therefore no carriage debates in Québec.

Procedure in Class Actions

Timeline of a Class Action

For class proceedings, the main stages of the litigation (aside from any appeals or settlement) will generally consist of the following procedures in the common law provinces:

- Plaintiffs commence the litigation by publicly filing a claim with the court (called a Statement of Claim in Ontario or a Notice of Civil Claim in British Columbia, similar to a U.S. complaint).
- Pre-certification motions, including motions related to jurisdiction, arbitration or evidentiary issues for the certification motion.
- Defendants file a substantive pleading in response to the claim (called a Statement of Defence in Ontario, or Response to Civil Claim in British Columbia, similar to a U.S. answer). This can be delayed until after certification, but courts have generally been moving toward requiring defendants to file a defence prior to certification.
- Exchange of motion materials for the certification motion, and arguing the certification motion. In British Columbia, defendants wishing to contest certification must file affidavit evidence disclosing all evidence material to the certification test. Some jurisdictions do not require any affidavit evidence. Cross-examination on filed affidavits is as of right in some jurisdictions, while only with leave in others.
- If the certification motion is successful, giving notice to class members and a period for class members to opt-out of the class.
- Documentary production and oral examinations for discovery (like U.S. depositions).
- Trial of the certified common issues.
- Trial of any individual issues, including individual issues of causation and damages.

In Québec, the notable difference is that plaintiffs commence a proposed class proceeding by publicly filing an application for authorization to institute a class proceeding on behalf of the entire class. The plaintiff is only required to file their formal claim, and the defendants are only required to file a substantive defence, if the class action is authorized (similar to certification). In Québec, class action litigation follows a slightly different path:

- Filing of an application for authorization;

- Initial case management hearing and preliminary motions. In Québec, the defendants cannot file evidence as of right to challenge the authorization, they must seek permission to do so by way of an application for leave to examine the representative plaintiff or for leave to adduce relevant evidence. Jurisdictional issues may be raised either prior to the authorization or during the authorization hearing depending on the scope of the jurisdictional challenge. Note that as it concerns multi-jurisdictional class actions, the *Code of Civil Procedure* is clear to the effect that they do not constitute an automatic ground for the stay or discontinuance of the Québec proceedings;
- Oral arguments contesting the application to authorize the bringing of a class action (the *Code of Civil Procedure* specifically provides that applications for authorization can only be contested orally, which does not preclude the parties from filing written argument briefs); and, if granted,
- Filing of an Originating Application;
- Giving of notice of authorization and running of the opt-out period;
- Documentary and oral discovery;
- Filing of a statement of defence;
- Trial of the common issues; and
- Determination of any individual issues on individual causation and damages, if necessary.

The following sections discuss some of the major stages in class actions in more detail.

Pre-Certification Motions

Pre-certification motions are available in principle in all jurisdictions in Canada. They are more rare than in the U.S., though there is greater latitude for such motions in Ontario than in other provinces. Judges generally have discretion over scheduling motions and can refuse to hear motions until after certification, though some provinces have adopted legislative amendments to push courts to hear potentially dispositive motions (e.g. motions for summary judgment), or motions that can narrow the issues on certification, before certification. These motions can include:

- **Jurisdiction**: Motions by defendants to stay the proceeding for lack of personal jurisdiction over the defendant.
- **Arbitration**: Motions to stay the court proceeding in favour of arbitration, where the claims are covered by an arbitration agreement. These motions are increasingly common where claims relate to online services that are governed by terms of use containing an arbitration clause. Canadian courts are generally arbitration-friendly, though they will not enforce arbitration agreements in certain circumstances, including where the arbitration agreement is unconscionable or where a statute specifically exempts a type of claim from arbitration (notably claims under consumer protection statutes).
- **Evidentiary issues**: In Québec, the defendant can only file evidence in response to the authorization (certification) motion with leave of the court, so these types of motions are common in Québec.
- **Litigation funding**: Third-party litigation funding is also becoming increasingly common, particularly in the loser-pays costs jurisdictions in Canada. Many major international litigation funders are active in Canada. Some provinces also have public funding organizations, like the Class Proceedings Fund in Ontario or the *Fonds d'aide aux action collectives* in Québec, which can provide funding based on applications from class counsel. Like other funders, these public funders are generally entitled to recover a portion of any judgment or settlement. Third party litigation funding agreements in class actions require court approval, generally by way of a pre-certification motion. Courts have refused to approve funding agreements that contemplate the funder receiving too great a proportion of any settlement or judgment.

Motions on the sufficiency of the initiating pleading are generally dealt with at certification as the requirement to plead a reasonable cause of action is one of the criteria in the certification test in common law provinces, although a motion to strike the claim may be sequenced in advance where such a motion may be dispositive of the entire claim. In any event, the pleading standard in Canada is lower than in the U.S. In common law provinces, a pleading is generally deemed sufficient unless it is "plain and obvious" that it discloses no reasonable claim. This is a lower standard than the *Twombly/Iqbal* plausibility standard.

Pre-certification document production is not the norm and is granted only in exceptional cases. Because the certification stage is intended to be procedural, the threshold for production is high enough to protect that process from becoming bogged down by evidence that goes to the merits. In some provinces (e.g., Ontario, Saskatchewan, and Nova Scotia), the courts have been willing to make exceptions where evidence will assist in making a determination on certification, particularly in medical product liability cases.

There is no pre-certification oral discovery in class proceedings in Canada. The only examinations that may be permitted in the common law provinces and territories are cross-examinations upon filed affidavits and, in some cases, cross-examinations of non-party witnesses pursuant to summons issued in accordance with the rules of court. As mentioned above, leave to conduct a cross-examination is not required in some jurisdictions. In others, like British Columbia and Saskatchewan, absent agreement of the parties to a cross-examination, leave must be granted by the court. Discovery on the merits of the litigation is not permitted prior to the class certification motion.

Certification Motion (Common Law)

The common law provinces and territories, and the Federal Court, all have similar tests for a plaintiff to meet for the action to be certified as a class proceeding. Most common law jurisdictions have "opt-out" class actions regimes, so that if the court grants certification all the class members will be automatically bound by judgment on the common issues (and settlement) unless they pro-actively opt-out using a specified procedure.

The plaintiffs' burden on certification is lower than in the U.S. In certain circumstances defendants will consent to certification, though it is also common for defendants to vigorously resist certification. Parties often file a significant volume of affidavit evidence on the certification motion, including expert evidence (notably related to damages).

The certification tests in the common law jurisdictions consider the same five criteria:

1. **Cause of action**: The claim must disclose a reasonable cause of action. This is a low bar. The court will assume the facts pleaded to be true (unless ridiculous), and the plaintiff will succeed at this step unless it is "plain and obvious" that the claim as pleaded is doomed to fail.

2. **Identifiable class**: The evidence must show "some basis in fact" that there is an identifiable class of two or more persons. The proposed class definition cannot be merits-based, and must be rationally connected to the common issues.

3. **Common issues**: The evidence must show "some basis in fact" that: (1) the proposed common issues are common to the class members, and (2) the proposed common issues exist. The evidentiary threshold to establish existence is low, so to avoid impermissible attempts to try the merits at certification. To certify damages as a common issue, plaintiffs generally file expert evidence of a workable methodology to calculate damages on an aggregate basis.

4. **Preferable procedure**: The evidence must show "some basis in fact" that a class action must be preferable to alternative types of proceeding, considering access to justice, behaviour modification and judicial economy. In Ontario, the legislation was recently amended to require a class action to be "superior" to all "reasonably available means" to determine class members' entitlement to relief, and the common issues must predominate over individual issues. These are arguably defendant-friendly amendments.

5. **Representative plaintiff**: The evidence must show "some basis in fact" that a proposed representative plaintiff must adequately represent the interests of the class, and present a workable litigation plan.

The "some basis in fact" evidentiary standard is a low bar for plaintiffs, though it requires some evidence. Defendants can defeat certification by showing "no basis in fact", which is a high bar. Generally, Canadian courts are more plaintiff-friendly on certification than U.S. courts.

If the court grants certification, the plaintiffs are required to notify the class members either directly (where possible), by publishing notices (e.g. online or in press releases), or a combination of both. Presumptively, the cost of notice rests upon the plaintiff under the legislation, but this burden can be shifted to defendants.

In opt-out jurisdictions, the certification order will be followed by a period in which class members can opt-out of the class pursuant to procedures specified in the notice. After the opt-out deadline, all class members that have not opted-out will be bound by judgment on the common issues and any settlement.

Application for Authorization (Québec)

In Québec class actions are not individual actions that become class actions if certified, but are proceedings initially filed on behalf of the whole class. They may be struck entirely if the application for authorization is denied. The test for authorization of class proceedings in Québec share some similarities with common law jurisdictions, with some notable differences. The test for authorization of the class proceeding requires the court to determine whether:

- the recourses (i.e., claims) of the members raise identical, similar, or related questions of law or fact;
- the facts alleged seem to justify the conclusions sought (an "arguable case");
- the composition of the class makes joinder difficult or impracticable; and
- the proposed representative plaintiff is in a position to represent the members of the class adequately.

In Québec, the representative plaintiff is not required to file an affidavit in support of the application for authorization the filing of a class action. The application for authorization states the facts giving rise to the proceeding, specifies the nature of the litigation for which the authorization is sought and describes the group on which the representative plaintiff intends to act. The facts alleged must be taken as true, unless there are speculative, opinions, or purely hypothetical. In which case, they must be supported by a "certain proof" to be taken as true. The representative plaintiff only bears a lower burden of demonstration, not the burden of proof based on the preponderance of evidence typically applicable to civil actions.

At the authorization stage, the defendant does not have the right to file a formal, written response to the motion, as it can only be contested orally. However, the judge may allow some evidence to be submitted. In Québec, there is normally no discovery at the authorization stage. Nevertheless, the court may use its discretion to allow appropriate evidence, which may include an examination of the representative plaintiff. The defendant must specify the content and objective of the evidence they seek to adduce, and the examinations they want to conduct. The judge allows the motion where they determine that the evidence is necessary to assess the authorization criteria.

These specific rules, and the low threshold given the "arguable case" criteria in case law, make it challenging to obtain the outright dismissal of class actions at the authorization stage in Québec.

As in the other provinces, the judge hearing the motion issues a written decision as to whether to authorize the bringing of the action as a class proceeding. If the class action is authorized, the judgment granting the motion:

- describes the class whose members will be bound by any judgment; and
- identifies the principal questions to be dealt with collectively and the related conclusions sought (i.e. common issues).

At a later stage, the Court will order the publication of a notice to the members and specifies the date after which a member can no longer request exclusion (opt out) from the class.

Documentary and Oral Discovery

If the class action is certified (or authorized), the parties are generally required to negotiate a discovery or litigation plan that defines the scope of documentary and oral discovery.

In most common law jurisdictions, parties have a general obligation to produce all relevant, non-privileged, documents in the party's power, possession or control, subject to proportionality. Relevance is generally based on the pleadings and the certified common issues. Notably, if the court has not certified damages as a common issue, a defendant may not be required to produce damages-related data and documents before the common issues trial, though courts can order production that is relevant to the claim as a whole.

In class actions in Québec, documentary production is based on requests from the opposing party, limited by relevance to the resolution of the common questions, privilege and proportionality.

Oral examinations for discovery are generally more limited in Canada than in the U.S. In most jurisdictions the default is that each party must only produce one witness to be examined, and some jurisdictions have time limits for examinations. However, corporate witnesses often have an obligation to seek information in the corporation's possession, power or control (i.e. the witness's evidence is not limited to their personal knowledge), which may result in several requests that will need to be answered and may be the source of follow-up questions.

Common Issues Trial and Individual Issues

Common issues trials are rare in common law Canada because most class actions settle. They are somewhat more common in Québec because the authorization threshold is so low. The judge can only grant judgment on the certified common issues, though plaintiffs can seek to amend the common issues in certain circumstances. It is also possible for the common issues trial judge to certify aggregate damages even if damages were not originally certified. The judgment on the common issues will bind all class members that did not validly opt-out.

In some provinces the case management judge either must be, or may be, the common issues trial judge, whereas in other provinces the case management judge cannot hear the common issues trial without consent of the parties. Civil jury trials are not available in Québec. Though civil jury trials are available in British Columbia and Ontario in certain circumstances, common issues trials in class actions are most likely to be heard by a judge alone.

If the plaintiff is successful on the common issues trial and any individual issues remain (e.g. causation and/or damages), the common issues trial judge has discretion to direct a process to determine the individual issues, including individual trials or an expedited process.

Settlement and Mediation

Mediation

The vast majority of Canadian class actions result in a settlement. Mediations using an independent neutral third-party mediator (usually a retired judge) are common at any stage in Canadian class actions, including before or following certification depending on the case. Common issues trial judges will generally expect the parties to attempt to mediate in advance of a common issues trial, though mediation is generally not mandatory in class actions.

Individual Settlement with the Representative Plaintiff

In some jurisdictions like British Columbia, prior to certification, the defendant can settle with the individual proposed representative plaintiff (or the plaintiff's claim can be discontinued) without leave of the court. In other jurisdictions, while a defendant can settle with the individual proposed representative plaintiff, any discontinuance of the action or the substitution of a representative plaintiff may require leave.

Settlement Approval

All Canadian jurisdictions require court approval for class action settlements that are intended to bind the class. Though the specific factors can vary by jurisdiction, generally the court will consider whether the proposed settlement is fair, reasonable and in the best interest of the class. Class members must be given notice of the settlement, and have the opportunity to object to the settlement at the hearing. Settlements in class actions generally presume a significant payment to class counsel as a contingency fee, generally in the range of 25-35% of the total amount payable to the class. Class counsel fees are also subject to court approval.

If a defendant settles before certification, the class action will commonly be certified for settlement purposes on consent of the settling defendant, so that the settlement will bind the entire class. In these cases, the settlement can only be approved after notice of the certification has been distributed and class members have been given the opportunity to opt-out.

Settlement Administration

Canada has a well-developed market for class actions administration firms who can administer and distribute complex settlements, and courts often retain a supervisory jurisdiction over settlement administration. Where a settlement involves a defendant paying a set amount from which class members can make claims, and there are funds remaining after the claims deadline, it is common for the court to award the remainder of the settlement amount to be paid to one or more charities in what is known as a "*cy-près* distribution". Some provinces also require portions of settlements to be paid to provincial class actions foundations/funds that support future class actions.

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