STIKEMAN ELLIOTT

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# CLASS ACTIONS IN CANADA:
# Background, Features and Challenges

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## BACKGROUND

Canada is a federal country with 10 provinces and 3 territories. Under the Canadian constitution – specifically, the *Constitution Act, 1867* – jurisdiction over property and civil rights within each province rests exclusively with the legislature of that province. Similarly, the administration of justice within each province, including the organization of the civil courts and procedure in civil matters, lies within the exclusive competence of that province's legislature.

It follows that contract law, tort law and rules of civil procedure are among the matters with respect to which the provincial legislatures and governments may make laws and regulations.

With the exception of Quebec, each Canadian province has a common law legal system. Quebec has a civil law system originating from France. It has enacted a comprehensive bilingual civil code, the *Quebec Civil Code*, complemented by a bilingual *Code of Civil Procedure*.

In all provinces, including Quebec, the judicial system is modeled on the British court system with substantial influence from the US. In each province, there is a three-tier civil court structure: Provincial Court (judge alone), Superior Court (judge alone) and Court of Appeal (panel of 3 or 5 judges). In addition, there is a bi-juridical general court of appeal for Canada, the Supreme Court of Canada, made up of nine judges, of whom three must be from Quebec.

The first class action legislation in Canada was enacted in Quebec in 1978. It was based on California legislation and the US Federal Rules. The proclaimed legislative objectives were: judicial economy, access to justice (especially for small claims) and behavior modification for wrongdoers (including punitive damages).

Ontario, the largest province of Canada, adopted a *Class Proceedings Act* in 1992, inspired by the US Federal Rules on class actions. Later on, other common law provinces adopted legislation similar to Ontario's, with some variations.

Nowadays, class action legislation has been enacted in all provinces except Prince Edward Island, the smallest province. In each case, class proceedings must be initiated before a Superior Court. The Canadian *Federal Courts Rules* have also been amended to permit class proceedings with respect to matters falling within the Federal Court's narrow statutory jurisdiction, although this route is rarely used.

The three most active jurisdictions are Quebec, Ontario and British Columbia, where Superior Courts judges devote a substantial part of their time to the management of class actions. In each of these provinces, there are many barristers who specialize in class actions, acting exclusively either for plaintiffs or for defendants. The Canadian class action bar is generally sophisticated and experienced.

Though the class action regimes of the various provinces are similar in most respects, there are a few important distinctions. It is widely acknowledged that the Quebec class action regime is the most friendly for plaintiffs, having the lowest entry level for certification, called «authorization». Many have described Quebec as a "class action heaven". Currently there are about 300 class proceedings pending before the Quebec Superior Court.

The number and range of class proceedings is increasing. Certain broad categories of class actions have been more successful than others in reaching the certification stage. Amongst these are product liability class proceedings, which have been described as the "quintessential class proceeding". Courts are likely to certify these actions on the basis that the determination that a product is defective is a common issue that, because it is often difficult to establish, is well suited for class proceedings. In this area, the Canadian class action is often a copycat of an American proceeding, as Canadian lawyers monitor the Internet and race to be first to file in one or more provinces.

Breaches of specific dispositions of the provincial *Consumer Protection Act* by banks, cellular phone providers and retailers are a major source of class actions. But class proceedings are available for almost all types of civil actions.

Environmental law (toxic torts), competition law (price fixing) and securities law (shareholders' claims for misrepresentation) have become common types of class actions.

## FEATURES

The stages by which a class action proceeds from commencement to certification and ultimately to trial do not differ significantly from province to province.

### 1) Carriage Motion

Sometime there is an important step before certification, called "carriage motion". A carriage motion tends to ensue when more than one firm has filed a class action on behalf on the same group, but with different class representatives. Class actions are a very lucrative business and competition to have carriage of a file can be ferocious.

In Ontario, the Court will decide which firm is most likely to best represent the class considering the lawyers' experience and the resources that they can bring to the case, including proposed experts.

In Quebec, the Court will apply the first to file rule and will stay subsequent class proceedings related to the same group (*lis pendens*). However the representative in the subsequent filing may challenge the priority rule by showing that it is not in the best interest of the class (for example, when the first firm rushed to file in order to position itself without any intent to proceed but to wait for a settlement in another jurisdiction).

### 2) Certification

Certification is widely considered the most important stage in a class proceeding. According to recent judgments from the Supreme Court of Canada, it should be a relatively low threshold. But for defendant's lawyers, it is an opportunity to test the plaintiff's case and to have it summarily dismissed.

Generally, certifications are fiercely contested and not infrequently end up before an appellate court. Much of the class action jurisprudence in Canada is focused on the certification/authorization requirements. Resolving a hotly contested class action certification may take a few years.

In Ontario, the procedure is for the plaintiff to file a class statement of claim and then to seek its certification. To succeed, the representative plaintiff must establish that:

1. The Statement of Claim discloses a cause of action;
2. There is an identifiable class of two or more persons;
3. The claims of the class members raise common issues of fact or law;
4. A class proceeding would be the preferable procedure for the determination of those common issues; and

5. The proposed class representative can fairly and adequately represent the interests of a class in accordance with a workable plan and does not have a conflict of interest with other class members with respect to the common issues that will be raised.

In Quebec, the proceedings begin with a motion by the person or special interest organization that wants to act as class representative, to authorize the bringing of the class action and to be ascribed the status of representative of the proposed class (which class may include individuals, corporations and other organizations). The petitioner must show that:

a) the claims of the members of the class (may include in addition to natural persons, legal persons, partnerships, associations and other groups) raise identical, similar or related issues of law or fact;

b) the facts alleged appears to justify the conclusions sought;

c) the composition of the class makes it difficult or impracticable to apply the rules for mandates to sue on behalf of others or for consolidation of proceedings; and

d) the class member appointed as representative plaintiff is in a position to properly represent the class members (representative plaintiff may be a legal person, partnership, association or other group, even without being a member of the class if the director, partner or member designated by that entity is a member of the class).

In Quebec, though the assessment of each of these criteria involves some discretion, the judge must authorize the class action if all of them are met.

In Quebec, contrary to Ontario, there is no preferable procedure test so the judge has no residual discretion to refuse to certify, for example because resulting proceedings would be disproportionate with the expected results.

In Quebec, British Columbia, Alberta, Saskatchewan and Manitoba, class proceedings may be directed against multiple defendants without the necessity of a juridical link between the representative and each of the defendants. It is sufficient that the common issue is shared and that there are members of the class having a cause of action against each of the defendants.

The Supreme Court of Canada has ruled that these requirements for certification/authorization establish a relatively low threshold, even more so in Quebec further to amendments to Quebec legislation that eliminated the requirement that the plaintiff's representative file an affidavit and which restricted the ability of defendant to file counter-evidence.

For securities class actions (misleading report or failure to report a material fact), a similar clause in the various provincial *Securities Act*s (there is no federal Securities Act) provides that no such class action for damages should be authorized unless the judge deems that it is in good faith and that there is a reasonable possibility that it will be resolved in favour of the group. This additional requirement is designed to ensure that unmeritorious litigation, and the time and expense it imposes on defendants, is avoided or brought to an end early in the litigation process.

### 3) Notice Period

Shortly after certification, notice must be given to class members by proper means (newspaper advertisement; Internet, etc.).

The members of the proposed class then have the right to opt out and to seek their own personal remedy through an individual claim.

Those not opting out within the allotted time period will be bound by the class action judgment.

In British Columbia, during the notice period, non-residents may opt-in if the class is defined as including them. In Quebec and Ontario, the class may, in proper cases under private international law rules, include residents of other provinces (a national class) and even of the rest of the world.

### 4) Preparation for trial

Once a class action is certified, there is a high likelihood of a settlement (about 50%). Any settlement will have to receive a court approval in order to be binding upon the class.

However proceedings directed against a government or a public body tend to proceed to trial on the merits.

The post-authorization process does not differ from that of other complex civil trials, including filing of a plea, an extensive discovery process (including some members of the group), filing of expert reports and statistical evidence, gaining access to relevant records of government agencies, filing an amended statement of claim and plea, and other miscellaneous procedural steps.

This process, which usually takes years to complete, requires a case management protocol that must either be agreed upon by the parties or imposed by a judge.

During this lengthy process, significant changes of course can occur; for example, a decertification, a redefinition of the class or a replacement of the representative.

### 5) The Trial

At some point along the line, the case will be ready for trial. Experience shows that its length may vary from a week to a few years (for example, in the tobacco case).

In Canada, a class action trial is always before a judge siting alone without a jury.

So far, almost 100 cases have proceeded to trial, about two-thirds of them in Quebec.

### 6) The Judgment

The judgment will dispose of the common issues and the recovery process (individual recovery, collective recovery, punitive damages, other remedies).

The success rate is about 60% for plaintiffs.

### 7) The Appeal

The judgment is subject to an appeal as of right to the provincial court of appeal and subsequently, with leave, to the Supreme Court of Canada.

The likelihood of an appeal remains high. It is not uncommon for a highly contested class action to last about 10 years when appeals are included.

### 8) The Recovery Process

The trial court is responsible for the management of the recovery process (public notice, court appointed claim officer, etc.).

In some instances, the recovery process will be transformed into a cluster of mini-trials.

The number of members that will file evidence of a personal claim is low to very low. A take-up rate of 10 to 15% in consumer class proceedings is considered a success. Many class action proceedings ends up with a large unclaimed amount that will be disposed of according to a Court order (often called a Cypres order).

## CHALLENGES

### National Class

Since the legislature of a Canadian province has no jurisdiction to affect rights beyond the limits of its boundaries, a judgment rendered in a province is treated like a foreign judgment in the other provinces for enforcement purposes (except if rendered pursuant to a federal legislation).

Nevertheless, a provincial superior court may agree to certify a class that includes non-residents when it can assert jurisdiction according to private international rules. For example, if the defendant corporation is a resident of the province, the superior court can entertain a claim by a non-resident in order to have a similar and comprehensive outcome.

As a matter of fact, national classes have been, and continue to be, certified in Ontario and Quebec (both provinces do not require opting-in for extra-provincial residents). About 90 national class proceedings are now pending before the Quebec Superior Court, at various stages.

But it remains that the enforcement of the eventual settlement or judgment outside the province may be difficult. Case law contains a few examples of a national class judgment/settlement not being enforced by a court of another province, often for lack of proper notices of proceedings.

In order to avoid these problems, national law firms that specialize in class actions often commence multi-jurisdictional proceedings by filing identical actions concurrently in several provinces or by filing a national class proceeding in Ontario with an exclusion for specific provinces, usually Quebec and British Columbia.

Once a defendant has appointed a lawyers in all the jurisdictions, a substantial amount of discussion will occur to decide which file is to proceed. After that determination, the others proceedings may be put in abeyance. Unlike the United States Federal Courts, the Canadian judicial system does not have an MDL (multi-district litigation) mechanism for dealing with cases across multiple provinces. Class actions remain a strictly provincial matter in Canada (except for the odd case before the Federal Court).

Once a settlement is reached, if any, it is submitted to all the courts involved for approval. So far, judges of different jurisdictions have shown a willingness to collaborate and accommodate.

But if there is no settlement, the complexity increases. To avoid redundancy, should the judges participate in a joint hearing? Can they?

## Lawyer-Driven Class Proceedings

A review of court orders shows that plaintiff's lawyers collect between 25% and 40% of the settlement amount or of the amount awarded by judgment. This may represent a huge amount of money.

An emerging concern is the purely lawyer-driven class action. The class representative is selected (and sometime paid) by a law firm willing to make money on a claim for which nobody is really seeking justice. You may end up with a settlement setting aside money essentially for lawyers.

Should a court refuse certification failing evidence of a real class seeking justice?

## Punitive Damages

In order to prevent reoccurrences, the court may grant punitive damages. Some question the right of plaintiff's lawyers to a share of these damages. Are they becoming private prosecutors, entitled to collect fines? Should a portion of the punitive damages be remitted to the government?

## Should common issues predominate?

Another concern is related to the dividing line between common issues and individual issues, for example when a common issue exists but at the end of the day will not lead to a resolution of the claims but to a cluster of individual trials.

Should the common issues be determinative of, significant to or somewhat relevant to the final outcome?

## State Funding

Because most class actions are costly, lawyers are reluctant to initiate class proceedings where the cause of action appears weak.

In Quebec, a special not for profit funding organization exists. It pays for experts, costs and a portion of the lawyers' fees. Its financing comes from a share of any settlement or judgment.

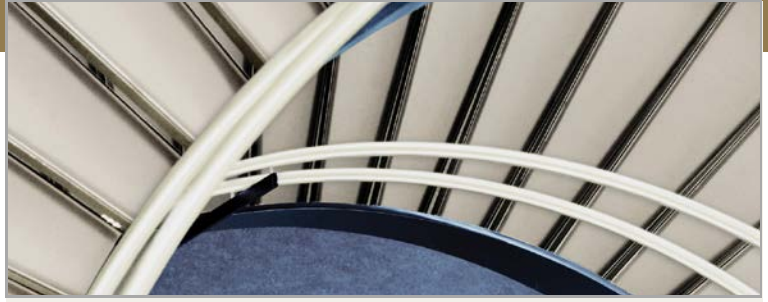
Private financing is now becoming available from investment groups speculating on the outcome of the class action proceedings.

## CONCLUSION

The Canadian class action system is reaching maturity and case law is substantially developed. Class actions involve all areas of civil litigation.

Class actions represent a major field of practice for Canadian barristers, divided between those acting for plaintiffs, often acting on a contingency basis, and those representing defendants.

There is no indication that this is going to change. To the contrary, class action proceedings are generally perceived as the only way for most consumers and individuals to have access to justice. So far, the courts have embraced them.



## ABOUT STIKEMAN ELLIOTT'S CLASS ACTIONS GROUP

Stikeman Elliott is a leader in class action defence litigation, with practitioners rated by the *Canadian Legal Lexpert Directory* as both "consistently recommended" and "repeatedly recommended" in this practice area. The firm has a breadth of experience in defending class actions commenced under many different legal causes of action and for clients who fall within many types of industries. The firm's national presence allows it to respond strategically and comprehensively to cases that are commenced in more than one Canadian jurisdiction. Because many Canadian class actions mirror actions commenced in other jurisdictions outside of Canada, Stikeman Elliott's class action lawyers emphasize a cooperative approach in dealing with our legal colleagues in other jurisdictions, creating integrated legal strategies for the benefit of clients.

Stikeman Elliott's class action litigators have the knowledge and experience to identify at the earliest stages the key strategic issues and approaches and to navigate all aspects of defending a class action, from preliminary motions, to the defense of certification, and beyond. The firm's class action counsel have argued some of the leading cases in this developing area of law and have a strong record of success in preliminary challenges and opposing certification of class proceedings. They are also experts in negotiating and implementing complex and creative settlements, including securing court approvals as required across the country. Throughout, our approach is to recognize and frame the business considerations and to achieve the client's objectives in minimizing present exposure and risk of future claims.

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**CanadianClassActionsLaw.com** is Stikeman Elliott's class actions law blog, featuring information and resources on relevant legal developments including:

- Certifications
- Settlements
- Appeals
- Judicial treatment of common causes of action
- Judicial treatment of class proceedings legislation
- Secondary market liability claims and securities class actions
- Consumer protection, product liability, competition class actions and more!

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