



ICLG

The International Comparative Legal Guide to:

Class & Group Actions 2013

5th Edition

A practical cross-border insight into class and group actions work

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Canada



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1 Class/Group Actions

1.1 Do you have a specific procedure for handling a series or group of related claims? If so, please outline this.

Today, virtually all Canadian jurisdictions – nine of the ten provinces – have enacted specific class proceedings legislation, which governs the procedural aspects and oversight of such claims in each province. To date, none of Canada’s three territories have done the same. Most provincial class action legislation is modelled on either the legislative schemes of the statutes in either Ontario or British Columbia, which are generally similar with some subtle differences. Where the procedure is not set out in the provincial statute, the courts have elaborated on the rules and principles applicable. The only Canadian province without class proceedings legislation is Prince Edward Island. In order to bring a claim as a class proceeding, the representative plaintiff, on behalf of the proposed class must apply to have the proceeding “certified” as a class proceeding (or in Quebec, “authorised”). The test is similar in the common law provinces (i.e., other than Quebec which has a civil law system). In Ontario, there is a five-part test to be met, in order to be certified as a class proceeding: (i) the pleadings disclose a cause of action; (ii) there is an identifiable class of two or more persons; (iii) the claims of the class members raise common issues; (iv) it is the preferable procedure; and (v) the representative plaintiff will fairly and adequately represent the class, has a workable litigation plan and has no conflicts with other class members. Once a proceeding is “certified” as a class proceeding, it will proceed to a common issues trial, where the common issues will be determined on evidence. After the common issues trial, assuming no dismissal, any individual issues will be addressed, either as separate trials or through alternative dispute resolution.

1.2 Do these rules apply to all areas of law or to certain sectors only e.g. competition law, security/financial services. Please outline any rules relating to specific areas of law.

Canadian class proceedings legislation applies generally to all areas of law (other than criminal law). However, certain types of litigation are more conducive to class proceedings than others, including: securities law, consumer and competition law, wrongful dismissal, environmental law, product liability, misrepresentation, institutional abuse, price-fixing cases, and pension issues. Furthermore, some specific provincial legislation specifically contemplates class proceedings as a remedy.

1.3 Does the procedure provide for the management of claims by means of class action (whether determination of one claim leads to the determination of the class) or by means of a group action where related claims are managed together, but the decision in one claim does not automatically create a binding precedent for the others in the group?

The procedure in Canada is for the management of all claims at the certification stage to be dealt with together. All class proceedings legislation in Canada stipulates that judgments regarding common issues in class proceedings are binding upon each member of the class that has not opted-out of the proceeding. If a class member opts-out of the action, they will not be bound by the proceeding judgment or entitled to the benefits that may arise from the judgment. Class members who choose to opt-out of the proceeding are free to pursue individual claims against defendants. Different provinces have different rules for opting in or out of a class action. This is addressed below. However once a proceeding has been certified, and a common issues trial held, there may be trials of individual issues, the results of which would bind only that individual.

1.4 Is the procedure “opt-in” or “opt-out”?

Certification orders set out the manner in which, and time within which, class members can opt-out of class membership. Ontario, Quebec, Manitoba, Saskatchewan, Alberta, Nova Scotia and the Federal Court follow an opt-out model whereby all members of a class regardless of residence, are part of the class by default and must elect to opt-out if they do not wish to be a class member.

However, in British Columbia, Newfoundland, and New Brunswick opt-out provisions differentiate between resident and non-resident class members. Resident class members are provided the opportunity to opt-out of the class proceeding, whereas non-resident class members are provided the opportunity to opt-in to the proceeding if they properly fit within the certified class. The opt-in procedure that must be followed by non-residents is set out in the certification order. The manner and time in which a member can opt in, or out of a proceeding depends on the factual circumstances of the action to be tried as well as characteristics of the class. If a non-resident does not opt-in, he or she will not be considered part of the class.

In March 2011, Alberta moved from an opt-in model to an opt-out model with regard to non-resident class members. Notably, the new opt-out provisions stipulate that where class proceedings were certified before March 1, 2011, the old opt-in regime governs and non-resident class members must opt-in in order to participate in the proceedings. The new provisions also permit any party to a class

proceeding certified under the old regime to apply to the court for an order amending the certification order to comply with the new regime.

1.5 Is there a minimum threshold/number of claims that can be managed under the procedure?

All provinces other than Quebec require that there be an identifiable class of at least two or more persons in order to achieve class proceeding certification (note, however, that while all referenced provinces specifically refer to an identifiable class “of two or more people” Saskatchewan’s legislation makes reference only to “an identifiable class,” although in practice this difference in wording has been moot). The representative plaintiff is required to establish that there is an identifiable group of class members sharing objectively ascertainable characteristics. The fewer the number of class members the less amenable the court will be to certifying a class action as there may be other preferable alternatives to class proceedings like individual litigation or joinder and consolidation of claims.

Quebec’s *Code of Civil Procedure* (C.C.P.) does not establish a minimum number of class members necessary to achieve certification. Instead, it provides that a class action will be authorised where the composition of the group or class would make other procedural channels more difficult or impractical.

1.6 How similar must the claims be? For example, in what circumstances will a class action be certified or a group litigation order made?

The presence of “common issues” between the parties is the driving rationale for class proceedings, on the basis that it is deemed to be more efficient for persons with common issues to have these issues resolved in one action rather than in a multiplicity of proceedings. The establishment of common issues between class members is perhaps the most critical component to the success of a motion for certification of a class proceeding. However, while the presence of common issues is a prerequisite for achieving certification, common issues need not be determinative of liability to obtain certification. Establishing that a class proceeding is the preferable procedure for advancing a claim is the second most important criteria. The common issues will not result in the action’s certification if they do not significantly advance the claims of class members. In *Western Shopping Centres v. Dutton*, the Supreme Court of Canada articulated the proper grounds for determining common issues. That is, claims of class members do not need to be identical, but rather must share a “substantial common ingredient”, where the issue’s resolution is necessary to the resolution of each class members’ claim.

All Canadian jurisdictions other than Quebec define “common issues” as:

- a) common but not necessarily identical issues of fact; or
- b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts.

Article 1003(a) of Quebec’s *C.C.P.* requires that certification of a class proceeding will occur where the recourses of the members raise identical, similar, or related questions of law or fact.

Once it is established that there are issues common to all class members, the representative plaintiff must then establish that a class proceeding is the most appropriate route in which to resolve these common issues. The court’s determination is usually made with reference to considerations such as judicial economy and alternative procedural routes that may resolve the common issues more

expeditiously. In Quebec, the representative plaintiff is not required to discharge this onus as is the case in the other provinces, though the court will examine the same considerations when determining whether to certify the proposed class.

1.7 Who can bring the class/group proceedings e.g. individuals, group(s) and/or representative bodies?

Individuals are able to institute class actions in all Canadian jurisdictions. Regarding representative bodies, all provincial legislation, with the exception of Ontario, provides that representative bodies may bring class proceedings only if a substantial injustice would result to the class if the representative body were denied representative status. Ontario’s *Class Proceedings Act* does not directly address the issue of class representation by a representative body.

Quebec is the only Canadian jurisdiction which clearly addresses the issue of representative bodies instituting class proceedings, and permits it so long as: a) one of its members is a member of the class on behalf of which the organisation intends to bring a class action; and b) the interest of the member is linked to the objects for which the organisation has been constituted.

1.8 Where a class/group action is initiated/approved by the court must potential claimants be informed of the action? If so, how are they notified? Is advertising of the class/group action permitted or required? Are there any restrictions on such advertising?

Once certification is granted, court-approved notice from the representative plaintiff must be provided to the class members in accordance with the requirements of the applicable legislation. Generally, the court will make a notice order setting out when, and by what means, notice shall be given. Courts will base the notice requirements upon a variety of factors, including, but not limited to, the cost of giving notice, the number of class members and the nature of the relief sought. For example, where a class is large and the membership of the class is unknown, the court will often consider publication in the mass media (i.e. newspaper ads, etc.) as a means of providing notice, provided that it is sufficient in scope. The courts are given significant latitude in determining how notice will be given, or whether it needs to be given at all. The most reliable method of giving notice is by mailing notice directly to the class members.

Notice of certification is often the first official notice that class members receive concerning class actions. As such, notice of certification is typically drafted carefully so as to comply with statutory requirements as to the contents of the notice. This ensures that class members are fully informed as to their rights and obligations as class members. Notice should set out the common issues that are to be determined within the class proceeding and how class members can obtain further information.

In British Columbia, Alberta, Saskatchewan, Ontario, Newfoundland, and New Brunswick, the legislation provides that notice should also set out the time in which a person who is not a resident of that province may opt into or out of the class action (depending on whether the particular province uses an opt-in or opt-out model for non-residents – see question 1.4). In Quebec, there is no requirement to inform prospective members of the proposed class of the commencement of class action proceedings. However, once the class action is authorised, court-approved notice must be published to notify the members of the described class of their right to opt-out of the class and of the formalities to be followed, as well

as the time limit for requesting such exclusion. A notice is also required when class proceedings are settled or otherwise disposed of, and also when final judgments are rendered.

1.9 How many group/class actions are commonly brought each year and in what areas of law e.g. have group/class action procedures been used in the fields of: Product liability; Securities/financial services/shareholder claims; Competition; Consumer fraud; Mass tort claims, e.g. disaster litigation; Environmental; Intellectual property; or Employment law.

The Canadian Bar Association has devised a database that tracks class actions Canada-wide. However, its utility is hampered by the fact that it relies on voluntary disclosure from counsel to accumulate its records. Therefore, while the database has provided a mechanism to search current class action lawsuits, it does not provide a comprehensive listing of all class action lawsuits currently underway in Canada.

In Ontario, court directives have been issued requiring claims to be filed in the appropriate local registry, as well as in the Class Proceedings Registry at the Civil Intake Office in Toronto.

There are many substantive areas of law available for class action, including: (i) environmental law; (ii) consumer law; (iii) products liability; (iv) misrepresentation; (v) wrongful dismissal and employment; (vi) institutional abuse; (vii) pensions; (viii) price fixing; (ix) franchise law; and (x) human rights and discrimination.

One area of law where recent legal developments may encourage increased class litigation is securities law. Provincial securities statutes set out statutory causes of action for misrepresentation that deem the plaintiff to have relied on the misrepresentation. By eliminating the need for each individual plaintiff to prove reliance, legislators have made securities cases more amenable to class litigation. In 2005, amendments to the Ontario *Securities Act* created a statutory right of action for misrepresentations disseminated in the secondary securities market. Though there is limited case law interpreting the statutory causes of action, recent decisions in Ontario suggest that the courts are increasingly open to certifying class proceedings on the basis of the deeming provisions.

1.10 What remedies are available where such claims are brought e.g. monetary compensation and/or injunctive/declaratory relief?

A class action may seek declaratory, injunctive, monetary and other forms of relief. There are no limitations as to the types of remedies that can be sought. The legislation provides for the possibility of the assessment of aggregate damages, which, when coupled with a disgorgement request, is an ever increasing claim by plaintiffs.

In 2001, the Supreme Court of Canada explicitly stated in *Rumley v. British Columbia* that punitive damages can be appropriately addressed as a common issue in a class proceeding.

2 Actions by Representative Bodies

2.1 Do you have a procedure permitting collective actions by representative bodies e.g. consumer organisations or interest groups?

Almost all provinces in Canada have rules permitting representative action, however the ability of a representative body to bring a class action varies by Canadian jurisdiction. The Supreme Court of Canada has held that, in provinces without class action legislation,

representative actions can be brought under provincial procedural rules pertaining to representative actions. The rules that apply to such proceedings are to be determined on a case-by-case basis. In Quebec, the *C.C.P.* authorises representative groups to institute class proceedings subject to requirements therein.

2.2 Who is permitted to bring such claims e.g. public authorities, state appointed ombudsmen or consumer associations? Must the organisation be approved by the state?

Where actions brought by representative bodies are permitted (see question 1.7 above), there is no requirement that such a body have provincial approval. The approach taken to determine whether a representative body can bring a claim is no different than the approach taken in determining whether a class should be certified. The court should be satisfied that there is a cause of action, there are common issues being raised, that a representative action is preferable to individual actions and last, that the interests of the members will be represented fairly and adequately.

2.3 In what circumstances may representative actions be brought? Is the procedure only available in respect of certain areas of law e.g. consumer disputes.

A representative action may be brought in all circumstances in which a regular court action may be commenced and there are no restrictions with respect to the areas of law in which representative actions can be pursued (see question 2.2 above).

2.4 What remedies are available where such claims are brought e.g. injunctive/declaratory relief and/or monetary compensation?

There is no difference between the available remedies under representative actions and class actions; therefore there are no limitations as to the types of remedies that can be sought. A representative action may seek declaratory, injunctive, monetary or other forms of relief.

In Quebec, injunctive relief has been found to be inapplicable to class action procedures.

3 Court Procedures

3.1 Is the trial by a judge or a jury?

In all provinces but Quebec, class action suits generally proceed to trial by a judge alone, though there is no explicit prohibition against class actions tried by jury.

Under Quebec civil law all civil proceedings, including class actions, are trial by judge only.

3.2 How are the proceedings managed e.g. are they dealt with by specialist courts/judges? Is a specialist judge appointed to manage the procedural aspects and/or hear the case?

The court plays a large role in the case management of a class action proceeding, as dictated by legislation. The court's role usually begins prior to the certification application, when a case management judge is appointed. Generally, the judge who makes a certification order will be the same judge who hears all other

applications in a class action before the trial of the common issues. In most provinces it is not necessary that the certification judge also preside at trial. In Ontario, the certification judge cannot preside at the trial of the common issues, unless by consent of the parties. Conversely, in Quebec, the certification judge will also preside at the trial of the common issue.

Some jurisdictions in Canada have a segment of the bench devoted to class actions. However, beyond Ontario and Quebec, most jurisdictions do not.

3.3 How is the group or class of claims defined e.g. by certification of a class? Can the court impose a 'cut-off' date by which claimants must join the litigation?

The Supreme Court of Canada has held that a proper class definition is one of the four essential conditions of a class proceeding. A class must be defined in a manner that permits class members to be aware of the rights at issue in a proceeding, while ensuring their proper identification as members of the class. The class must therefore be defined in objective terms, without resulting in a definition that is overly broad. An overly broad definition will frustrate the efficiency of a class proceeding, thereby contravening its fundamental purpose.

Class definitions must also bear some rational relationship with the common issues of the claim and must be defined without reference to the merits of the case.

The court generally imposes a "cut-off" date for claimants to opt in or out of a certified or settled class proceeding, as discussed above.

3.4 Do the courts commonly select 'test' or 'model' cases and try all issues of law and fact in those cases, or do they determine generic or preliminary issues of law or fact, or are both approaches available? If the court can order preliminary issues do such issues relate only to matters of law or can they relate to issues of fact as well, and if there is trial by jury, by whom are preliminary issues decided?

Counsel are allowed to bring a "test" case so as to determine questions of law. Counsel may find it useful to use an individual claim to launch a test case in order to probe the merits of the litigation without complicating the proceeding. Using the outcome of the test case as a gauge, it may be determined that a class proceeding should be commenced, as additional cases might be capable of efficient resolution or some of the serious litigation issues may be narrowed.

Pre-certification determinations of law may be made by the case management judge. Prior to the commencement of the motion for certification, a defendant may elect to attack the claim on one or more grounds. If successful, the costs of defending the proceeding may be significantly reduced.

In Quebec, all issues are decided by a judge and may be determined prior to certification, either by application or action.

3.5 Are any other case management procedures typically used in the context of class/group litigation?

Due to the significant size of many class action claims, as well as the publicity accompanying these claims, case management procedures tend to be implemented in class action proceedings. Schedules are often developed to deal with pre-certification motions, the exchange of materials, and for examinations to be conducted in advance of motions. While class action legislation is

procedural in nature and does not substantively change the law in any Canadian jurisdiction, because of the time and costs invested in these proceedings, the court is given a broad discretion to manage class actions where it feels such intervention is necessary.

Multi-jurisdictional class proceedings give rise to unique case management challenges. In an effort to address these challenges, the legislature of Alberta recently introduced amendments to its class proceedings legislation. The Alberta amendments stipulate that where a class proceeding commenced in another province is the same or similar to a proceeding commenced in Alberta, the court must decide whether it would be preferable to have common claims and issues resolved in the out-of-province proceeding. Alberta's amendments are consistent with the Supreme Court of Canada's call to legislators in *Canada Post Corp. v. Lépine* to establish a framework for managing jurisdictional disputes in the "spirit of mutual comity". At present, Alberta and Saskatchewan are the only two provinces with class proceedings legislation that specifically address multi-jurisdictional issues. It remains to be seen whether other jurisdictions in Canada will follow suit.

The Canadian Bar Association recently published a Judicial Protocol which seeks to partially fill the gaps noted by the Supreme Court. While it does not provide a mechanism to determine jurisdiction or class counsel's carriage of claims on a national basis, it mandates communication between counsel and judiciaries of different class actions to facilitate multi-jurisdictional class proceedings and provides for coordinated settlement approvals.

3.6 Does the court appoint experts to assist it in considering technical issues and, if not, may the parties present expert evidence? Are there any restrictions on the nature or extent of that evidence?

While courts in most jurisdictions are able to appoint experts to assist with the consideration of technical issues, it is generally not the role of the court to appoint experts, but rather it is the role of the parties to do so in the manner provided by the Rules of Court.

3.7 Are factual or expert witnesses required to present themselves for pre-trial deposition and are witness statements/expert reports exchanged prior to trial?

On a motion for certification, the evidence is generally tendered by affidavit, and while the affiant may be cross-examined in advance, they will not appear in court. In a common issues trial, only the representative party may be examined for discovery without leave of the court. Pursuant to the Rules of Court, the parties are also required to exchange expert reports or a written statement of the expert prior to trial.

3.8 What obligations to disclose documentary evidence arise either before court proceedings are commenced or as part of the pre-trial procedures?

There is no general obligation to provide a full list of documents prior to certification. However, documents relevant to the issues of the certification hearing will be required. Once a proceeding is certified, the Rules of Court of each jurisdiction will determine the extent of document production. Generally, parties are required to produce all relevant documents in the possession, control or power of the party, so long as privilege is not an issue. In Quebec, production is limited to documents that parties have alleged in their procedures and intend to refer to at trial.

3.9 How long does it normally take to get to trial?

Class action proceedings generally take several years to progress all the way through trial. There are many factors involved in taking a class action to trial, including the case management systems in particular jurisdictions and the actions of the parties. More than one trial is often necessary to resolve all the issues involved in a class action. However, it should be noted that outside Quebec class action trials are still rare and most proceedings settle before trial, upon certification, although this trend appears to be changing.

3.10 What appeal options are available?

Every party has the right to appeal the certification order, judgment of the common issues, and any award of monetary relief. With exception to individual claims, all rights of appeal must be exercised by the representative plaintiff. However, if the representative plaintiff proves unwilling or unable to appeal the decision, another party may take their place with leave of the court.

There are, however, different requirements for leave to appeal between jurisdictions. For example, in Ontario, a party may appeal as of right from an order refusing certification, whereas appeals of orders granting certification may only be brought with leave of the court. In Saskatchewan, Manitoba, New Brunswick and Newfoundland, leave is required regardless of whether the order granted or refused certification.

There is no right to appeal orders determining individual claims, with the exception of Federal Court and Alberta actions. In British Columbia, Saskatchewan, Newfoundland, Manitoba, Alberta, New Brunswick and Nova Scotia, any party or class member may appeal an individual order provided that leave is obtained by a judge of the Court of Appeal.

4 Time Limits

4.1 Are there any time limits on bringing or issuing court proceedings?

Each class member will have a designated time period to pursue his or her individual claims against the defendant before it is barred by a limitation period. The running of a limitation period against class members will be suspended in favour of class members on the commencement of a class proceeding and will resume depending on the occurrence of particular events including dismissal of the proceeding, certification, or decertification.

4.2 If so, please explain what these are. Does the age or condition of the claimant affect the calculation of any time limits and does the court have a discretion to disapply time limits?

Each of the Canadian provincial class proceedings statutes contain provisions which suspend or “toll” the running of most limitation periods in favour of class members during the course of a class proceeding in respect of their particular jurisdictions. There is no similar tolling provision in the class proceedings section of the Federal Court Rules.

In all provinces, the limitation period will begin to run again once the proceeding, or the class member’s participation in it, has ended. This could occur in a number of contexts, including when: (i) the member opts out of the proceeding; (ii) an amendment is made to the certification order which has the effect of excluding the member

from the class proceeding; (iii) a decertification order is made; (iv) the class proceeding is dismissed without adjudication on the merits; (v) the class proceeding is discontinued or abandoned with the approval of the court; and (vi) the class proceeding is settled with the approval of the court.

Generally speaking, class members should not rely on the mere filing of a potential class proceeding to protect against the expiry of a limitation period, and should take appropriate action to ensure that their particular interests are protected from expiring limitation periods.

The limitation period generally does not run while a person is a minor or is incapable of commencing a proceeding in respect of the claim because of his physical, mental or psychological condition.

Recent cases indicate that where leave is required to commence an action under the *Securities Act* in Ontario, an application seeking leave does not suspend the limitation period, until leave is, in fact, granted.

4.3 To what extent, if at all, do issues of concealment or fraud affect the running of any time limit?

Fraud can result in the postponement of a limitation period until the plaintiff becomes aware of the claim and has an opportunity to seek appropriate advice as to the likelihood of the party’s claim succeeding. Most provincial limitations schemes operate on a concept of “discoverability”.

5 Remedies

5.1 What types of damage are recoverable e.g. bodily injury, mental damage, damage to property, economic loss?

Generally, all types of damages are recoverable. However, requiring an assessment of damages that is highly individualistic may militate against certification.

5.2 Can damages be recovered in respect of the cost of medical monitoring (e.g. covering the cost of investigations or tests) in circumstances where a product has not yet malfunctioned and caused injury, but it may do so in future?

There is not a significant body of Canadian case law which has addressed this issue. However, in many certified class proceedings representative plaintiffs have claimed damages for costs associated with advanced medical monitoring, demonstrating that Canadian courts are willing to consider such damages. The rationale behind this is that even if a class member has not yet contracted a specific medical ailment, they should still be compensated for the medical monitoring that was required as a result of their increased exposure to the health risk in question.

5.3 Are punitive damages recoverable? If so, are there any restrictions?

Pursuant to *Rumley v. British Columbia*, the Supreme Court of Canada decided that punitive damages are appropriately addressed as a common issue in a class proceeding. As such, punitive damages are recoverable. However, such damage awards are rare and the traditional common law position has been that punitive damages are to be awarded following the determination of the plaintiff’s compensatory damages. Punitive damages are only

awarded where a defendant's conduct is so malicious and oppressive that it offends the Court's sense of decency.

5.4 Is there a maximum limit on the damages recoverable from one defendant e.g. for a series of claims arising from one product/incident or accident?

There is no maximum limit on the damages recoverable from one defendant.

5.5 How are damages quantified? Are they divided amongst the members of the class/group and, if so, on what basis?

There is no single method of quantifying damages. Methods include: one sum paid to all the class members on a proportional basis; individual assessments of damages for each class member based on a general finding of liability; and the requirement that individual actions be brought to determine subsequent issues of liability. The court is free to determine how damages will be quantified based upon the size of the class and the amount of damages awarded. Recently, courts have been willing to order a "disgorgement" of either revenue or profit from defendants based on the alleged bad conduct.

5.6 Do special rules apply to the settlement of claims/proceedings e.g. is court approval required?

Court approval is required before there may be any disposition of a class action, including a settlement, because of the numerous interests and rights involved. A court will approve a settlement if it finds that the settlement is fair, reasonable and in the best interests of those affected by it. In making this determination the court considers the: (i) likelihood of recovery or success; (ii) amount or nature of discovery evidence; (iii) settlement terms and conditions; (iv) recommendation and experience of counsel; (v) future expense and likely duration of litigation; (vi) recommendation of neutral parties, if any; (vii) number of objectors and nature of objections; (viii) presence of good faith and the absence of collusion; (ix) degree and nature of communications by counsel and the representative plaintiffs with class members during the litigation; and (x) information conveying to the court the dynamics of, and the positions taken by the parties during the negotiation.

A settlement will often create a fund or other mechanism by which class members will be compensated. A notice of settlement is required to be distributed to all potential class members, or made public by way of advertisement (discussed above). Class members may then choose to opt-out of the settlement, if they so desire.

Recent amendments to Alberta's class proceedings legislation require court approval even for settlements that occur before certification.

6 Costs

6.1 Can the successful party recover: (a) court fees or other incidental expenses; (b) their own legal costs of bringing the proceedings, from the losing party? Does the 'loser pays' rule apply?

Different provinces have different costs rules in the context of class proceedings.

In Ontario, the general "loser pays" rule applicable to civil proceedings applies to class proceedings as well, leaving the loser responsible for a portion of the successful party's costs. However, the

Ontario Class Proceedings Act and Quebec's *Code of Civil Procedure* provide that only the representative plaintiff is responsible for any adverse cost award so, the liability of other class members is restricted to the costs arising from their individual claims. The representative plaintiff is almost always indemnified by class counsel.

The class proceeding legislation in Saskatchewan, British Columbia, Manitoba, and Newfoundland provides that, barring any special order, each province's respective trial court and court of appeal shall not award costs against any party at any stage of a class action proceeding, including certification applications and appeals, whether successful or not. The same applies under the Federal Court Rules. Costs can be awarded, however, where the court finds that a party has engaged in vexatious, frivolous, or abusive conduct at any time, has taken unnecessary steps to delay proceedings or increase costs or for any other reason, or where there are exceptional circumstances such that it would be unjust to not award costs. If such costs are awarded, the court has the discretion to award these costs in the manner it deems appropriate and only the representative plaintiff is liable for these costs, with the exception of the determination of individual claims, similar to Ontario and Quebec's legislation.

Alberta's legislation simply provides that costs will be awarded in accordance with their provincial Rules of Court. New Brunswick's legislation, similar to Alberta, provides that costs will be awarded according to their Rules of Court, though it also follows other provinces and adds that class members other than the representative party will not be liable for awarded costs. Nova Scotia legislation also refers to their Rules of Court as the guiding mechanism behind costs in addition to stating that only the representative party will be liable for costs. However, Nova Scotia's legislation is different than other provinces' legislation in that it adds that the court may apportion costs against parties according to the extent of their liability.

6.2 How are the costs of litigation shared amongst the members of the group/class? How are the costs common to all claims involved in the action ('common costs') and the costs attributable to each individual claim ('individual costs') allocated?

Where damages are awarded to the whole plaintiff class in the form of an aggregate payment, counsel for the representative plaintiff may apply to the court to obtain approval for the agreement respecting fees and disbursements. If the court approves the agreement, it then determines the amount to be paid to the solicitor and that amount becomes the first charge on the aggregate settlement fund or monetary award. If damages are not awarded in one aggregate sum but on individual bases, fees and disbursements will be collected after all the claims have been decided, as each individual class member will be responsible for his/her share of the fees.

6.3 What are the costs consequences, if any, where a member of the group/class discontinues their claim before the conclusion of the group/class action?

If a member discontinues their claim before the conclusion of the class action, there are no consequences to the member as individual members are not liable for costs not relating to their own individual claim.

6.4 Do the courts manage the costs incurred by the parties e.g. by limiting the amount of costs recoverable or by imposing a 'cap' on costs? Are costs assessed by the court during and/or at the end of the proceedings?

Generally, there is no "cap" on costs. Costs are assessed subject to

provincial tariffs at the conclusion of proceedings. However, it is possible in some jurisdictions for successful parties in pre-trial motions to have costs awarded to them before the end of proceedings.

7 Funding

7.1 Is public funding e.g. legal aid, available?

Both Ontario and Quebec have created funds that will aid in the funding of a class action. In Quebec, the *Fond d'aide aux recours collectifs* can provide for a portion of legal fees and disbursements upon written request. Ontario has established the Class Proceedings Fund to assist with the financing of disbursements. Rather than providing legal fees, the purpose of the Fund is to provide disbursement support for plaintiffs in class proceedings, and to make payments to defendants for awarded costs where the plaintiff has received financial support from the fund. Plaintiffs must apply to the fund before funding will be granted.

7.2 If so, are there any restrictions on the availability of public funding?

Both the Ontario and Quebec funds require applications and have strict criteria which must be satisfied before funds are provided. Not all class actions that apply for public funding receive it due to these qualifications. In Quebec, however, an applicant may appeal a funding refusal.

7.3 Is funding allowed through conditional or contingency fees and, if so, on what conditions?

In all provinces, counsel are permitted to enter into a contingency fee agreement with a representative plaintiff. Contingency agreements must generally be approved by the court, though approval by the court is not necessary in Quebec.

7.4 Is third party funding of claims permitted and, if so, on what basis may funding be provided?

Recently, an Ontario court appears to have answered this question in the affirmative. In *Dugal v. Manulife Financial Corporation*, the court approved a third party litigation funding agreement whereby the foreign third party investor agreed to cover any adverse costs awarded against the representative plaintiff in exchange for a 7% share of the proceeds resulting from successful litigation or settlement, subject to an upper limit. In addition, in Ontario, third party funding agreements must be approved by the court pursuant to a motion brought by the plaintiffs. In *Fehr v. Sun Life Assurance Co. of Canada*, Justice Perell held that third party funding agreements are not categorically illegal on the grounds of champerty or maintenance, although a particular third party funding agreement might be illegal as champertous or on some other basis. To date, case law suggests that third party agreements may reimburse a third party either by a fixed amount or a percentage of the damages provided the action is successful.

In approving litigation funding agreements, the courts have emphasised access to justice concerns. Such concerns are particularly relevant in Ontario, where the general “loser pays” rule applies to class proceedings. The high costs of class proceedings impose significant financial burdens on representative plaintiffs and indemnifying class counsel so as to discourage parties with

legitimate claims from bringing action. The courts have generally viewed third party funding agreements as a means of managing the costs of class proceedings and thus improving access to justice. It remains to be seen if courts in provinces with no-costs regimes will be as accepting of these forms of third party funding.

8 Other Mechanisms

8.1 Can consumers' claims be assigned to a consumer association or representative body and brought by that body? If so, please outline the procedure.

Consumer claims can be assigned to an association or representative body in the same way any other claim can be brought by a representative body (see questions 1.7 and 2.2 above).

8.2 Can consumers' claims be brought by a professional commercial claimant which purchases the rights to individual claims in return for a share of the proceeds of the action? If so, please outline the procedure.

Consumers' claims cannot be brought by a professional commercial claimant.

In Quebec, a person may acquire litigious rights in accordance with the general rules of purchase and sale under Quebec Civil Law.

8.3 Can criminal proceedings be used as a means of pursuing civil damages claims on behalf of a group or class?

Restitution orders created in a criminal court may be registered as a judgment in any civil court in Canada and are enforceable. There are no specific legislative provisions, however, relating to restitution orders being used in class action proceedings.

8.4 Are alternative methods of dispute resolution available e.g. can the matter be referred to an Ombudsman? Is mediation or arbitration available?

Courts have determined that while a class action may be available to a specific class, it may not be the most preferable procedure. As such, numerous alternatives to class proceedings have been noted and used, including: intervention by non-parties, appointment of a single judge to case manage and direct two or more cases, consolidation of cases, application for interpretation of contracts, and the determination of issues before trial. Other options include representation orders, test cases, claims adjudication/settlement procedures, or referral to an Ombudsman.

8.5 Are statutory compensation schemes available e.g. for small claims?

Class actions are not within the jurisdiction of small claims courts.

8.6 What remedies are available where such alternative mechanisms are pursued e.g. injunctive/declaratory relief and/or monetary compensation?

All remedies are available when parties agree to be bound by alternative mechanisms.

9 Other Matters

9.1 Can claims be brought by residents from other jurisdictions? Are there rules to restrict 'forum shopping'?

Generally, claims may be brought by any individual subject to jurisdictional challenges under the Rules of Court. However, in British Columbia, Newfoundland, Saskatchewan and New Brunswick there must be a representative plaintiff who is a resident of the respective province.

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Mr. Byers is a member of the Metropolitan Toronto Lawyers' Association and is a member and former director of The Advocates' Society. He is also a member of the Insolvency Institute of Canada. He has participated in numerous panels and conferences as a speaker on topics as diverse as injunctions, certificates of pending litigation and matrimonial litigation. Mr. Byers is co-author of the "Canada" chapter in the *International Comparative Legal Guide to Class and Group Actions 2011* (Global Legal Group, September 2010), and the text *Creditors' Remedies in Ontario* (Toronto: Butterworths, 1994).

9.2 Are there any changes in the law proposed to promote class/group actions in Canada?

No. Each province has its own legislation, which may, of course, be updated from time to time, but there is no indication at this time that any significant changes are contemplated.

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Ms. Lang has spoken and written on numerous topics in respect of securities litigation, class action litigation and general litigation practice. She also acts as editor of her firm's Class Action blog. Ms. Lang served on the Toronto Advisory Committee for the Civil Justice Reform Project led by Justice Coulter Osborne (2006-2007) and sat on the board of directors of the YWCA Toronto (2005-2009). She is the past chair of the Young Advocates Committee of the Advocates' Society. She also sits on the board of The Canadian Stage Company, and is an Advisory Board Member to Young Women in Law.

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