

# Class Actions

*Contributing editors*

Joel S Feldman and Joshua E Anderson



2016

GETTING THE  
DEAL THROUGH

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# Class Actions 2016

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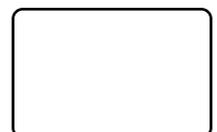


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# Canada

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## 1 Outline the organisation of your court system as it relates to collective actions. In which courts may class actions be brought?

Each Canadian province and territory has its own court system. Each province's and territory's courts of superior jurisdiction have inherent jurisdiction to hear cases on any subject except those that are specifically limited to another level of court by statute (eg, small claims courts, which hear civil matters involving claims below a set monetary amount). As a result, virtually all civil claims, including class actions or collective actions, may be brought in these provincial or territorial superior courts.

In addition, Canada has a parallel federal court system. The Federal Court of Canada has civil jurisdiction, limited to matters identified in specific federal statutes, including class actions against the federal government or a federal ministry or Crown agency. Except to the extent that the federal government or a federal ministry or Crown agency (such as Health Canada) is a party to the claim, collective actions will be heard by provincial or territorial courts.

## 2 How common are class actions in your jurisdiction? What has been the recent attitude of lawmakers and the judiciary to class actions?

Class actions are recognised by both the judiciary and the various levels of government in Canada as a means of addressing actions which would not otherwise be pursued because of economic or other social impediments, and thereby provide access to justice for a broader range of persons, improve efficiency in handling mass wrongs and modify the behaviour of wrongdoers. There is an active and growing bar of plaintiffs lawyers specialising in class proceedings. The number of class action filings has increased over the past decade as these plaintiffs lawyers have gained experience and increased coordination among themselves and with US plaintiffs' counsel.

## 3 What is the legal basis for class actions? Is it derived from statute or case law?

All Canadian jurisdictions can support class actions as a result of the Supreme Court of Canada's decision in *Western Canadian Shopping Centres v Dutton*, [2001] 2 SCR 534 (*Dutton*). This case effectively authorised class proceedings in all Canadian jurisdictions and provided them with a procedural blueprint. Most provinces have provincial class proceedings statutes (or, in the case of Quebec, collective recourse provisions in its Code of Civil Procedure). Prince Edward Island, and the three Canadian territories, however, still rely on *Dutton* for the structure of their class actions regime. The federal court system has class action procedures enshrined in its Rules of Court.

The jurisdictions in Canada with comprehensive class action legislation, thus far, are Quebec (1978), Ontario (1993), British Columbia (1995), Saskatchewan (2002), Newfoundland (2002), Manitoba (2002), the Federal Court (2002), Alberta (2004), New Brunswick (2007) and Nova Scotia (2008). Prince Edward Island's legislature introduced legislation in 1997 but the bill was not passed.

## 4 What types of claims may be filed as class actions?

Virtually any claim seeking collective redress can be filed as a class action in Canada. There is no category of claims that have been determined to be per se inappropriate for class action litigation by the courts.

Typical claims brought before the provincial courts include constitutional challenges and the activities of government entities, statutory interpretation, consumer claims, some contractual disputes and negligent misrepresentation claims, securities claims, insolvency proceedings, environmental claims, competition law claims, contractual disputes with public utilities, claims related to contractual interpretation of insurance policies, certain labour and employment disputes, real property disputes, patent, trademark and copyright disputes, franchising disputes, and mass tort claims.

In the Federal Court, actions against the federal government or its ministries have sought to address matters in relation to issues over which the federal government has exclusive jurisdiction such as regulatory matters.

## 5 What relief may be sought in class proceedings?

As class proceedings are regarded as procedural, the entitlement to assert claims for relief are derived from common law, statutes (both federal and provincial) or the Code of Civil Procedure in the Province of Quebec. The intention of the tort damages regime in Canada is to place claimants in the position they would have been in but for the injury or loss sustained as a result of the cause of action which is the subject of the claim. Plaintiffs in class actions need not seek common damages, however; the statutes do permit the courts to address, under the conditions set out in various pieces of legislation, the assessment of damages by the use of statistical evidence and aggregate assessments, neither of which would otherwise be permissible in individual litigation.

Claimants who have suffered an injury may seek to assert claims for damages for pain and suffering (ie, general damages). Claimants may also seek damages for specific pecuniary losses sustained (ie, special damages) as well as losses expected to be sustained in the future. Claimants also typically assert claims for financial losses including loss of income, both past and future, loss of opportunity, loss of profits, cost of medications, medical treatment, care expenses, and property damage.

The claims for non-pecuniary damages in cases of personal injury will include an amount to compensate for the pain and suffering sustained by the plaintiff, loss of amenities of life and loss of expectation of life. General damages claims are capped at C\$100,000 (adjusted for inflation). With inflation, the present value of a catastrophic claim is in the order of C\$350,000.

Most jurisdictions provide a statutory cause of action for family members of injured or deceased plaintiffs.

It is also not uncommon in class actions to seek a restitutionary remedy in the nature of a disgorgement of profits and to assert an entitlement to have the court assess damages on an aggregate basis, except where proof of individual injury is required, such as in the case of personal injury claims.

Claims for punitive damages, aggravated damages and moral damages (in Quebec) are regularly asserted as part of class action claims. Punitive damages are available where the court finds the defendant's conduct to be sufficiently reprehensible. Such awards in Canada tend to be modest: in the tens of thousands of Canadian dollars, rather than in the millions.

## 6 Is there a process for consolidating multiple class action filings?

There is no formal process in Canada for the consolidation of multiple class action filings as between provinces. However, national class actions (ie, those that certify a class of members that reaches nationwide, rather than

solely within the province in which the action is certified) are increasingly common. In the absence of a formal multi-district litigation management system, national class actions serve to limit duplication of costs and effort and reduce the likelihood of inconsistent rulings in different Canadian jurisdictions.

Within the common law provinces themselves, multiple court filings are managed either consensually as between plaintiff's counsel or by the courts through a determination of which law firm or law firms will be granted carriage of the litigation. If a carriage motion is brought and determined by the court, all other proceedings filed within the province or territory will be stayed. In the province of Quebec, the first law firm to file a motion to authorise a class action is typically granted carriage. All other motions are thereby stayed.

To address issues concerning identification of multiple class action filings both within a province or territory and as between provinces and territories, the Canadian Bar Association (CBA), following a recommendation by a uniform law conference of Canada's Working Group on Multi-jurisdictional Class Actions has created a National Class Action Database.

The database is a repository for information about the existence and status of class actions across Canada so that the public, counsel and courts need only look to one source for this information, and without cost to them. It lists all proposed class actions filed in Canada after 1 January 2007 that are sent to the CBA. Once posted, the action remains on the database unless it is dismissed as a class action by the court. While most Canadian jurisdictions have issued practice directions requiring counsel to complete a database registration form and submit their claims to the CBA, at present filings with the CBA are largely voluntary and therefore the database cannot be guaranteed to be a complete listing of all class actions filed in Canada.

A CBA National Task Force on Class Actions was launched to create protocols to assist in resolving the issue of overlapping multijurisdictional class actions. The Class Action Judicial Protocols Resolution was passed at the CBA Council meeting on 14 August 2011. The protocols seek to address: the management of multi-jurisdictional class actions; court-to-court communications in Canada and US cross-border class actions; and a notice protocol regarding coordination of notice to classes in multi-jurisdictional class proceedings.

## 7 How is a class action initiated?

A class action may be initiated by the filing of a statement of claim (which can be filed in any common law province or territory), an application (in Ontario, New Brunswick and Nova Scotia) or a petition (in British Columbia, Saskatchewan, Alberta and Newfoundland) which proposes that a class proceeding be certified. In the Quebec, proceedings are commenced by way of a motion to authorise the filing of a class action. In Canada, all class action filings are proposed class actions until the action is certified by the court or in the case of Quebec, the motion for authorisation is granted.

In Ontario, the claim must be filed with both the appropriate court registry and the Class Proceedings Registry at the Civil Intake Office in accordance with a practice direction. Pursuant to directions in Nova Scotia, Quebec, Ontario, Saskatchewan, Alberta, British Columbia, the Yukon and in the Federal Court, claims must also be filed with the Canadian Bar Association's National Class Action Registry. See question 6.

Unless required by statute, formal notice prior to commencement of a class proceeding is not required. Typically formal notice is required in the case of proceedings against the Crown and in securities actions.

## 8 What are the standing requirements for a class action?

Class actions in Canada are typically commenced with one or more named individuals as the class representatives. Most class action legislation requires that the action be commenced by a person resident in the province in which the action is issued. In Quebec, in addition to natural persons, corporations, partnerships and associations may serve as class representatives, only if they have fewer than 50 employees during the 12 months preceding the filing of the motion for authorisation, and a designated member falls within the proposed class definition and the interest of the member is not connected to the objects of the entity. Pursuant to the new Code of Civil Procedure, which is expected to come into force in January 2016, businesses with more than 50 employees will also be allowed to serve as class representatives.

The issue of standing in Canadian class actions has largely been one of entitlement of the representative plaintiff to issue claims naming parties as

defendants against whom the representative plaintiff does not have a cause of action. There has not been uniform resolution in Canada with respect to this issue. Whether or not the representative plaintiff must be able to personally assert each of the causes of action against each of the named defendants differs from province to province.

## 9 Do members of a class have to opt in or opt out of the action? Are class members notified that an action has been commenced on their behalf and, if so, how?

No notice to class members is provided until the claim in respect of which they are a class member is certified as a class proceeding. At that point, the rights and obligations of class members differs depending on the jurisdiction in which they reside.

Virtually all jurisdictions in Canada follow the requirement that once a class action is certified (or authorised in Quebec) a person who wishes to be excluded from the class must take a positive step and opt out of the class proceeding. However, in the Province of British Columbia, New Brunswick and Newfoundland, resident class members must formally opt out and non-residents who wish to participate in the class action must opt in.

Once a class action has been certified by the court, a notice is required to be published to allow members of the class to determine whether they wish to opt out of the class action or for non-residents of British Columbia, Newfoundland, Saskatchewan, Alberta and New Brunswick to opt in to a class action certified in those provinces. Notice is published typically by various forms of media advertising based on recommendations made to the court through expert evidence regarding a notice plan, which requires approval by the court. The certification order (or authorisation order in Quebec) will set the date by which rights to opt out or opt in will expire. Typically this is 30 to 60 days following notice being published.

## 10 What are the requirements for a case to be filed as a class action?

As discussed in question 11, in all Canadian jurisdictions other than Quebec, class actions are initially filed by way of a statement of claim and do not become a class action until they are certified by way of motion brought by the proposed representative plaintiffs. Fundamentally, a statutory class action is an individual action to which members of a plaintiff class are added at the moment the action is certified as a class proceeding. Accordingly, at the filing stage, there is no assessment of whether a potential class action meets the necessary threshold for certification. Typically, however, the pleadings of proposed class actions will assert the basis for the class action, identify the proposed class, etc.

In Quebec, class actions are not individual actions, which become class actions if certified, but are rather class actions from the very inception of the action. They may be struck entirely if the motion for authorisation is denied.

A plaintiff class in Canada need only be capable of clear definition and have two or more members. There is no 'numerosity' threshold to meet to justify a class proceeding, although in examining the class the court will have regard to whether the certification of a class action will be a preferable procedure for the fair and efficient resolution of the common issues. Similarly, there is no 'predominance' threshold. Canadian courts are satisfied to certify a class action simply to resolve a few issues relevant to advancing the litigation of individual members of the class (known as a 'common issues' trial).

Quebec is an outlier in terms of procedure. The test for authorisation of class proceedings in Quebec is similar to that in the common law jurisdictions, with some significant differences. For example, the court need not consider whether a class proceeding is preferable to another form of proceeding. It is merely necessary for the moving party to show that joinder and representative proceedings with the mandate of class members are both impracticable.

## 11 How does a court determine whether the case qualifies for a collective or class action?

### Common law provinces and territories

Generally speaking, class action statutes in the common law provinces and the federal courts have five requirements for an individual action to be certified as a class action:

- the pleadings must disclose a reasonable cause of action;
- there must be a class capable of clear definition;
- there must be issues of law or fact common to all class members;

- a class action must be the preferable procedure to advance the litigation of the class members; and
- the representative plaintiff must adequately represent the interests of the class.

In all of the common law provinces and territories in Canada, once a statement of claim (or application or petition) is filed and served, the case can be brought before the court for determination if the case qualifies as a class action. Procedurally, this requires that the party proposing to certify the action as a class proceeding must serve and file a motion with supporting affidavit evidence and a statement of law and fact in support of the motion for certification.

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

- commencement of the litigation through the issuance of a statement of claim;
- pre-certification motions with leave of the court, which may include motions to determine which firm will have carriage of the action for the plaintiffs, for leave to bring statutory claims under the Securities Act, striking pleadings, challenging of jurisdiction, or seeking security for costs;
- file a responsive pleading either voluntarily or by order of the Court;
- exchange of certification motion materials and argument of the certification motion;
- giving of notice of certification and running of the opt-out period;
- documentary and oral discovery;
- trial of the common issues; and
- trial of any individual issues on individual causation and damages.

Essentially, the motion for certification will set out the proposed class definition and the common issues together with other applicable requests including the appointment of a class representative or representatives and the approval of a notice plan for the certification. The moving party must demonstrate through affidavit evidence filed in support of the motion that there is 'some basis in fact' for each element of the certification test. The respondent to the motion is entitled to file affidavit evidence together with a statement of fact and law in opposition to the certification motion. The parties are entitled to conduct oral cross-examinations upon the evidence in the affidavits filed in support and in opposition to class certification, following which each party to the motion will serve and file their statement of fact and law with the court. The parties will then appear before the court for a formal hearing of the motion for certification and present oral argument in favour and in opposition to class certification. The judge hearing the motion will render a determination of the motion with written reasons for the decision whether or not to certify the action as a class proceeding and will also address the other requests in the motion materials. Those items required to be addressed for certification include:

- a description of the class;
- appointment of the class representative;
- the relief sought by the class;
- the common issues certified by the court;
- the time and manner to opt out of the class (or opt in for British Columbia, Newfoundland, Saskatchewan, Alberta and New Brunswick); and
- such other relief deemed appropriate by the court.

### Quebec

In Quebec, class actions are not individual actions that become class actions if certified, but are class actions from the inception of the action. They may be struck entirely if the motion for authorisation is denied. The test for authorisation of class proceedings in Quebec is similar to that in the common law jurisdictions, with some significant differences.

In Quebec, the test for authorisation of the class proceeding requires the court to determine whether:

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

In Quebec, class action litigation follows a slightly different path:

- filing of a motion for authorisation;
- initial case management hearing and request for leave to bring motions such as leave to examine the representative plaintiff and for leave to adduce evidence;
- argument of the motion to authorise the bringing of a class action;
- giving of notice of authorisation and running of the opt-out period;
- delivery of a formal authorised class claim and service of a response;
- documentary and oral discovery;
- trial of the common issues; and
- trial of any individual issues on individual causation and damages.

In Quebec, the petitioner is not required to file an affidavit in support of the motion to authorise the filing of a class action. The motion for authorisation states the facts giving rise to the proceeding, specifies the nature of the litigation for which the authorisation is sought and describes the group on which the representative plaintiff intends to act. The facts alleged are deemed to be prima facie true. The class representative only bears the lower burden of demonstration, not the burden of proof typically applicable in motions.

At the authorisation stage, defendants do not have the right to file a formal, written contestation to the motion. The motion can only be contested orally, but the judge may allow relevant evidence to be submitted. Defendants have to file a motion to adduce appropriate evidence, which may include leave to examine the representative plaintiffs. For evidence to be appropriate, it must allow the judge to verify whether the criteria of authorisation have been met.

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

- describes the group whose members will be bound by any judgment;
- identifies the principal questions to be dealt with collectively and the related conclusions sought;
- orders the publication of a notice to the members; and
- specifies the date after which a member can no longer request exclusion from the group.

### 12 How does discovery work in class actions?

There is no pre-certification discovery in class proceedings in Canada. The only examination permitted in the common law provinces and territories is a cross-examination upon the affidavits filed in support of, and in opposition to, class certification, and is typically confined to an examination on the evidence set out in the affidavit. Leave to conduct a cross-examination is not required in the common law provinces and territories. Discovery on the merits of the litigation is not permitted prior to the class certification motion.

In Quebec there is normally no discovery at the authorisation stage. Nevertheless, the court may use its discretion to allow appropriate evidence, which may include an examination of the representative plaintiff. The respondents must specify the content and objective of the evidence they seek and the examinations they want to conduct. The judge allows the motion where he or she determines that the evidence is relevant for determining the criteria for authorising the class action.

Discovery on the merits of the litigation is not permitted prior to the class certification motion or in the case of Quebec, the motion for authorisation being granted. Once an action is certified as a class proceeding, the applicable procedural rules for production of documents and the conduct of oral examinations for discovery will be followed.

### 13 Describe the process and requirements for approval of a class-action settlement.

All settlements of class actions in Canada must be approved by the court or courts in which the class action has been brought. The principles guiding the courts in such cases are whether the proposed settlement is fair, reasonable and in the best interests of the class.

In order to seek approval of a settlement, the plaintiff must prepare a plan of notice to be given to the class describing the settlement and advising of the date and location of the hearing to approve the settlement, the procedure and time for delivery of objections and advise of the right to attend in person at the hearing whether or not it is the intention of the class member to object to the settlement. The notice plan must be approved by the court or courts before whom the settlement hearings will take place.

### Update and trends

In Ontario, the Law Commission of Ontario (LCO) has been asked to undertake a review of Ontario's Class Proceedings Act (1992). The LCO has been tasked to examine whether the legislation is working as expected and it notes that many unforeseen challenges have been noted in academic papers, at conferences, professional associations, social media and other communities.

The review will also consider challenges beyond the four corners of the legislation, such as the sustainability of the Class Proceedings Fund, concerns around self-dealing and challenges in relation to national actions. The following issues have been specifically identified for review (although the LCO advises this is non-exhaustive):

- certification;
- class action funding:
  - counsel fees;
  - adverse costs awards;
  - class proceedings fund; and
  - commercial litigation funding (third-party funders);
- limitation periods;
- opt-in or opt-out model;
- notice;
- take-up rates;
- remedies, including waiver of tort, *cy près*;
- forfeiture;
- settlements;
- ADR/arbitration;

- abuse of class actions: strike suits;
- test cases, joinder, mass actions;
- national class actions; and
- international class actions.

It is anticipated that following further consultation with appropriate stakeholders, the LCO will ultimately generate a report that will contain recommendations for amendment to the Class Proceedings Act (1992).

Quebec recently adopted the new Code of Civil Procedure, which is expected to come into force in January 2016. The reform of the Code of Civil Procedure does not make fundamental changes to the ground rules for class actions, but it codifies certain practices while making some innovations. The following three features are the most significant changes:

- businesses with more than 50 employees will be allowed to act as class representatives;
- the judge will not be allowed to grant a motion to stay a class action brought in Quebec or the discontinuance thereof unless it is demonstrated that such an application is not contrary to the interests of justice and that the interests of the Quebec members will be better served if the class action is allowed to proceed in a jurisdiction other than Quebec; and
- respondents will have a right to appeal with leave from judgments granting motions for authorisation to institute a class action.

The order approving a notice plan will also set out the time within which written objections to the settlement must be delivered.

The party seeking approval of the settlement must then prepare a formal motion to seek approval of the settlement and file evidence in support of the settlement. Typically an affidavit of the representative plaintiff will be filed as one of the pieces of evidence in support of this motion. Shortly before the settlement hearing the moving party will also prepare and file a statement of fact and law in support of the approval of the settlement. At the hearing, the moving party will provide oral argument in support of the approval of the settlement and seek to demonstrate to the court that the settlement is fair, reasonable and in the best interest of the class. Objectors may appear in person and argue why they oppose the settlement to which the moving party and the respondent to the motion may respond orally. The court then renders its decision and provides written reasons for its determination whether to approve the settlement.

An order approving the settlement will address acceptance of the terms reflected in the settlement agreement reached between the parties and address the appointment of any third parties necessary to administer or adjudicate the claims of class members. The order will also address any further requirements for notice of the approval of the settlement to be given to class members.

The settlement also encompasses the mechanism and amount of payment of the fees of class counsel. The motion to approve the settlement also encompasses approval of the payment of these fees. Particulars of the proposed fees of class counsel are almost always required to be disclosed in the notice to class members and is frequently one of the aspects of the settlement to which class members object.

#### 14 May class members object to a settlement? How?

As noted above, prior to the settlement hearing a class member may file a written objection to the settlement in the manner prescribed in the order of the court or courts giving notice of the settlement hearing. At the hearing itself, any objector may appear in person to provide oral argument in opposition or in support of the approval of the settlement.

#### 15 What is the preclusive effect of a final judgment in a class action?

A final judgment or a dismissal order resulting from a settlement in a class action will bind all of the members of the class to the relief in the judgment. A final judgment in a class action will preclude the commencement of any further proceedings in respect of the issues in the class action. Once approved, settlement agreements will almost always include comprehensive releases similarly precluding further proceedings.

#### 16 What type of appellate review is available with respect to class action decisions?

In Ontario, an order certifying an action as a class proceeding may only be appealed with leave of the court whereas an order denying class certification can be appealed as of right. The test for leave includes a consideration that the matter to be addressed before the court is one of public importance. Ontario's appellate review includes an appeal to an interim appeal court, namely the Divisional Court of Ontario and thereafter to the Ontario Court of Appeal.

In Quebec, as of 1982, the Quebec legislature determined that there would be no right of appeal from an order granting authorisation of a class action. Conversely, persons excluded from the class may appeal as of right. In addition, where authorisation is denied there is a right of appeal although this entitles the defendant to argue issues rejected by the trial court without being in violation of the rules relating to inability to appeal. However, pursuant to the new Code of Civil Procedure, which is expected to come into force in January 2016, defendants will have the right to seek leave to appeal from judgments granting authorisation of a class action.

In British Columbia, Alberta and the Federal Court, there is an appeal as of right whether or not the class action is certified. In Saskatchewan, Manitoba, New Brunswick, Nova Scotia and Newfoundland both parties are required to seek leave to appeal from a justice of the Court of Appeal to be entitled to pursue appellate review.

#### 17 What role do regulators play in connection with class actions?

Regulators do not directly play a role in connection with class actions. However, many class action claims in Canada are commenced following an investigation or an adverse determination or admission before an administrative tribunal, a recall of a product following a regulatory investigation or a change in warnings or labelling. To the extent access to information from a regulator is permitted it is typically subject to freedom of access legislation and privacy laws. There is no direct correlation between a class action settlement, typically without any admission of liability, and a future regulatory action. In Canada, it is not unusual for regulatory action to precede the filing of a class action.

#### 18 What role does arbitration play in class actions? Can arbitration clauses lawfully contain class-action waivers?

Canada is an arbitration-friendly jurisdiction. The Supreme Court of Canada has affirmed that arbitration clauses should be enforced absent legislative direction to the contrary and has repeatedly called for judicial deference to be shown to arbitrators to determine their own jurisdiction. Each unique arbitration clause and class-action waiver will be interpreted on a statute-by-statute basis, with the understanding that the courts will allow freedom of contract to prevail over the procedural right to class

actions. Enforcement of an arbitration clause is unlikely in the face of claims under provincial consumer legislation which expressly prohibits such clauses (Ontario, Quebec and Alberta unless ministerial approval is obtained) or where legislation creates a general right to commence a court action for relief in respect of conduct regulated by the statute. Courts must take a textual, contextual and purposive approach to the interpretation of the relevant statute when making a determination of the arbitration agreement's enforceability.

With regards to challenges to an arbitrator's jurisdiction, the general rule is for the question to be first resolved by the arbitrator. It would be acceptable for a court to depart from this general rule only if the challenge is based on a question of law, or questions of mixed law and fact requiring only superficial consideration of the documentary evidence.

Courts have involved arbitrators in components of class proceedings, to address issues such as the determination of individual damages and legal fees owing by a defendant. Such determinations require final approval by the court.

#### **19 What are the rules regarding contingency fee agreements for plaintiffs' lawyers in a class action?**

In the common law provinces, the legislation requires that the retainer agreement between class counsel and the representative plaintiff must be in writing and address the terms on which payment will be made, the estimated fee and the basis on which the fee will be paid. The Alberta legislation specifically requires that contingency fee arrangements be in writing, witnessed and formally served on the representative plaintiff within 10 days. While contingency fees are generally permitted in all Canadian jurisdictions, the legislation in Ontario expressly authorises the use of a contingency fee in class actions. The retainer agreement between class counsel and the representative plaintiff ultimately requires court approval.

As noted in question 13, class counsel fees in the context of a settlement must be approved by the court approving the settlement.

#### **20 What are the rules regarding a losing party's obligation to pay the prevailing party's attorneys' fees and litigation costs in a class action?**

The rules regarding costs are specific to each province's applicable legislation and rules of practice.

In Ontario, the usual 'loser pays' system of costs applies. However, absent class members (ie, those who are not a representative plaintiff) are not responsible for payment of costs and the court may also examine whether the case was a test case, a novel point of law or a matter of public interest in order to exercise its discretion to depart from the normal rules as to costs.

British Columbia has adopted a 'no costs' approach to class actions. Barring any special order of the court, no costs are awarded to either party in relation to the certification motion, the common issues trial or any appeals. Costs will apply in relation to appeals to the Supreme Court of Canada pursuant to its rules. The no-costs rule applies only if the action is certified as a class action. If not certified, then, subject to the exercise of discretion the normal loser pays rule relating to costs will apply. Saskatchewan, Newfoundland, Manitoba and the Federal Court have adopted a no-costs approach similar to British Columbia.

Quebec applies a 'loser-pays' rule similar to that of Ontario. However, its tariff of costs payable in a class action are vastly reduced to minimise the impact of an adverse costs award on parties, including on appeals.

Alberta, New Brunswick, Nova Scotia and the territories all adopt the 'loser pays' systems under their Rules of Court. Like Ontario, absent class members are not held responsible for costs. Unlike Ontario and Quebec, where there are available funds that, if made use of by the plaintiff, can be

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looked to for the payment of costs, in these other provinces and territories, no such protection is afforded the representative plaintiff.

### **21 Is third-party funding of class actions permitted?**

Third-party funding of class actions has been permitted in Canada and is subject to approval by the courts. These funding arrangements have been scrutinised by the courts in several provinces and have on occasion been turned down on the basis of public policy in relation to the terms of the funding agreement. Courts have generally held that third party funding agreements should be approved where they are in the best interest of the class. While the defendant may be granted standing on the motion to approve the third party funding agreement, such standing is limited in scope.

In addition to third-party funding by private entities in Quebec and Ontario, there are also other sources of funding available to representative plaintiffs. In Ontario, the Law Foundation of Ontario through its trustees, created a Class Proceedings Fund to assist representative plaintiffs in financing disbursements. This funding is accessible through a formal application process. If the class proceeding is successful or settles the Class Proceedings Fund is entitled to a levy consisting of the amount of its funding plus 10 per cent of the award or settlement, net of expenses incurred in the litigation including counsel fees, administration fees, notice costs and other expenses deducted before the award to class members.

In Quebec, a fund has been created to assist with funding of a class proceeding. As with Ontario's Class Proceedings Fund, an application must be made to the fund by the class representative and approval obtained for funding. Funding can include assistance for the payment of legal fees, expert fees, the costs of notice and other expenses necessary for the bringing of the action. The fund is subrogated to the amount of its funding and is also entitled to a percentage of the award or settlement amount.

### **22 Can plaintiffs sell their claim to another party?**

Plaintiffs are not able to sell their claim to another party. As with funding by third-parties, discussed in question 21, court approval of any such arrangement would be required to ensure that the rules against champerty and maintenance are not violated.

Maintenance is the provision of support or assistance to a litigant by a third party with no interest in the case. Champerty is a form of maintenance that occurs where a third party undertakes to carry on the litigation at his or her own cost and risk on condition of receiving a part of the proceeds of the litigation.

In the class action context, considerations such as motivation for the litigation, whether the sale was in the interests of access to justice, the role of class counsel, etc, will be significant. Where a representative plaintiff has passed all control of the litigation to the third party, the courts are likely to view the arrangement with significant scepticism.

A possible exception is where a claim forms part of a package of assets acquired by a purchaser. The courts have held that property and commercial interests gained in the larger transaction provide the necessary interest to permit a purchaser to continue an action.

### **23 If distribution of compensation to class members is problematic, what happens to the award?**

In the common law provinces and Quebec, the court is permitted to make an award of aggregate damages if the court determines that following the resolution of the common issues there are no issues remaining other than those relating to the assessment of monetary relief if the aggregate award can reasonably be determined without proof by individual class members. If individual causation is required to determine an award of damages, aggregate damages should not be awarded. If awarded, the court may direct the distribution of the aggregate award with or without an individual claims process and may order distribution on a proportional or average basis if the court determines it would be impractical to determine each class member's loss. The court can order the distribution of the award by any means. This can include a credit or abatement, through a third party or paid to a court or some other depository. If a surplus remains at the conclusion of an award, then the court has the power to return any excess to the defendant on the basis that the intention of litigation is to be compensatory. However, the court may also distribute any residual funds in a manner that will benefit the class. This can include a cy-pres distribution.

In situations where there has been a settlement approved by the court and there remains a residual amount following the normal distribution of funds under the settlement agreement, the terms of the agreement, having been approved by the court, will apply with respect to a determination of the distribution of the residual amount. In some cases, any remaining amounts in the settlement fund are returned to the defendants, in others, any remaining amounts are paid out by way of a cy-pres distribution to one or more organisations (usually charities connected in some way to the subject matter of the claim).

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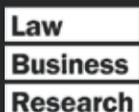
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