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A Summary of Canadian Class Action Procedure and Developments

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I. The Canadian Court System and Class Actions

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 (*e.g.*, small claims courts, which hear civil matters involving claims below a set monetary amount). As a result, virtually all civil claims, including class 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. In the past, actions in Federal Court were generally limited to those in which the federal government or a federal ministry or Crown agency (such as Health Canada) was a party to the claim. More recently, class actions have been brought in the Federal Court against private parties, where the claims are based on the alleged breach of a federal statute, such as the *Competition Act*.

Class actions are recognized 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 specializing 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.

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 authorized 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 Québec, class action 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.

Thus far, the Canadian jurisdictions with comprehensive class action legislation are Québec (1978), Ontario (1993), British Columbia (1995), Saskatchewan (2002), Newfoundland (2001), Manitoba (2002), the Federal Court (2002), Alberta (2004), New Brunswick (2006) and Nova Scotia (2008). Prince Edward Island's legislature introduced legislation in 1997 but the bill was not passed.

II. The Types of Cases Filed and Relief Sought in Canada

Virtually any claim seeking collective redress can be filed as a class action in Canada. There is no category of claims that has 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 claims regarding 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 and agreements between customers and financial institutions, 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.

As class proceedings are regarded as procedural, the entitlement to assert claims for relief is derived from common law, statutes (both federal and provincial) and the *Code of Civil Procedure* in the Province of Québec. 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 (*i.e.*, general damages). Claimants may also seek damages for specific pecuniary losses sustained (*i.e.*, 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. In three 1978 decisions referred to as the "Andrews Trilogy", the Supreme Court of Canada capped non-pecuniary damages at C$100,000 (adjusted for inflation). With inflation as of early 2018, the present value of a catastrophic claim is in the order of C$375,000. Most jurisdictions also 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 (such as through the restitutionary principle of waiver of tort) 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 (Québec) are commonly 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, other than in Québec, tend to be more modest than in the US: in the tens or hundreds of thousands of dollars, rather than in the millions.

Québec is somewhat of an outlier: Québec courts have been generous in awarding punitive damages in class action proceedings. Punitive damages have therefore become a significant component of damages claims and awards in Québec class proceedings, especially in consumer cases. The conditions for claiming punitive damages are different in Québec civil law than at common law in the rest of Canada. At common law, punitive damages can be awarded in any civil suit in which the plaintiff proves that the defendant's conduct was "malicious, oppressive and high handed [such] that it offends the court's sense of decency." The requirement that the plaintiff demonstrate misconduct that represents a marked departure from ordinary standards of decency ensures that punitive damages will be awarded only in exceptional cases. In Québec civil law, punitive damages are not a common law penalty but a measure provided for in the *Civil Code of Québec*. Article 1621 of the *Civil Code of Québec* permits courts to award punitive damages if they are "provided for by law" (i.e. authorized by an enabling statute), in which case they "may not exceed what is sufficient to fulfil their preventive purpose."

In the common law provinces and Québec, 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.

Regulators do not directly play a role in connection with class actions. However, many class action claims in Canada are commenced following an investigation by a securities or other regulator, 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.

III. Managing Multiple Class Filings in Canada

There is no formal process in Canada for the consolidation of multiple class action filings as between provinces. However, national class actions (*i.e.*, 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 constitutional framework for pan-national class actions or 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 many of the common law provinces themselves, multiple court filings are managed either consensually as between plaintiffs' 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 Québec, the first representative plaintiff to file an application to authorize a class action is typically granted carriage. All other motions are thereby stayed.

In Alberta, Saskatchewan, and now British Columbia (amendments proposed to come into force on 1 October 2018)[1], the class proceeding legislation specifically requires proposed representative plaintiffs to provide notice of proceedings to other representative plaintiffs in other jurisdictions with alleged claims or issues of the same or similar subject matters. Such representatives would have the right to appear at the certification hearing and make

[1] These changes impacted how non-residents of British Columbia are included in class proceedings and how multi-jurisdictional proceedings should be handled under British Columbia procedure. All references in this article to British Columbia procedure are to the amended procedures which will be in force as of 1 October 2018.

submissions. As well, the court must consider whether, at certification, it is preferable to resolve the claim (or any part of it) in another jurisdiction in Canada. These provisions are based on the Uniform Law Conference of Canada's model Uniform Class Proceedings Act amendments of 2006.

The Canadian Bar Association (CBA) has also introduced a number of initiatives to promote coordination between overlapping actions and to address issues concerning identification of multiple class action filings both within a province or territory and as between provinces and territories. The CBA, following a recommendation by a uniform law conference of Canada's Working Group on Multi-jurisdictional Class Actions, 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. In Québec, the *Code of Civil Procedure* requires a central registry allowing lawyers and the general public to obtain information on all the class actions instituted in the province and providing access to key pleadings, judgments, and notices to the class.

In addition to the database, the CBA National Task Force on Class Actions was created to draft protocols to assist in resolving the issue of overlapping multi-jurisdictional class actions. The resulting Judicial Protocol for the Management of Multi-Jurisdictional Class Actions was passed at the CBA Council meeting on August 14, 2011. The protocol focused primarily on the approval and administration of multi-jurisdictional class settlements. In 2016, the Task Force was reconstituted and, following consultations, it revised the protocol to provide best practices for case management. The updated protocol facilitates coordination between actions and case management judges by creating a notification mechanism to inform courts and litigants across the country about the existence and progress of overlapping class actions. It goes further than the database by requiring plaintiffs' counsel to develop a "Notification List", listing all known counsel and judges in overlapping proceedings that must be provided at each case conference. The protocol permits a case management judge to contact a judge managing an overlapping action if the parties agree or to convene a hearing and receive submissions if the parties do not agree with contacting another case management judge. The parties may also request a joint case management hearing, among other things. The protocol was adopted by the CBA on February 15, 2018. While the protocol represents "best practices" and is not mandatory, it provides a roadmap for coordinating pan-national class action proceedings.

Direction may also be found in the decision of the Supreme Court of Canada in *Endean v. British Columbia*, 2016 SCC 42, where the Court held that in pan-national class action proceedings over which the superior court has subject-matter and personal jurisdiction, a judge of that court has the discretion to hold a hearing outside his or her territory in conjunction with other judges managing the related class actions in other jurisdictions, provided that the judge will not have resort to the court's coercive powers in order to convene or conduct the hearing and that the hearing is not contrary to the law of the place in which it will be held. Although *Endean* related to the proposal that three justices, from British Columbia, Ontario and Québec, be present in-person together in a single common court room to hear motions relating to the settlement of the class action, it is likely that such an approach will be endorsed for other common applications or motions, where appropriate.

IV. Class Action Procedure – Common Law Provinces and Québec

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 Québec, proceedings are commenced by way of an application to authorize the filing of a class action. All class action filings in Canada are proposed class actions until the action is certified by the court or in the case of Québec, the application for authorization 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, Québec, 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.

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.

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 Québec, in addition to natural persons, legal persons established for a private interest, partnerships, and associations or other groups not endowed with legal personality may be members of a class provided certain conditions are met.

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.

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 differ depending on the jurisdiction in which the class action was brought and the province in which they reside.

Virtually all jurisdictions in Canada follow the requirement that once a class action is certified (or authorized in Québec), 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 Provinces of New Brunswick and Newfoundland and Labrador, 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 New Brunswick and Newfoundland and Labrador, 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 authorization order in Québec) will set the date by which rights to opt out or opt in will expire. Typically this is 30 to 60 days after notice is published.

In all Canadian jurisdictions other than Québec, proceedings 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 Québec, class actions are not individual actions that become class actions if certified, but are proceedings initially filed on behalf of the whole class. They may be struck entirely if the application for authorization is denied.

In all Canadian jurisdictions other than Québec, 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).

Québec is an outlier in terms of procedure. The test for authorization of class proceedings in Québec 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.

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, Québec 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 contextual, textual and purposive approach to the interpretation of the relevant statute when making a determination of the arbitration agreement's enforceability. The outcome of this statutory and contractual analysis may result in some claims being referred to arbitration, while others are allowed to continue in the courts: see, for example, *Seidel v. Telus Communications Inc.*, [2011] 1 S.C.R. 531, 2011 SCC 15 in the consumer protection context or *Heller v. Uber Technologies Inc.*, 2018 ONSC 718 in the employment law context.

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.

V. Class Certification Criteria and the Litigation Process

A. The 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: carriage motions (which firm will have carriage of the action for the plaintiffs); motions for leave to bring secondary market statutory claims under certain provincial Securities Acts; pleadings motions, summary judgment motions (prior to or at the same time as certification); and jurisdiction motions;
- 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 pleadings must disclose a cause of action; the pleading will be struck only if it is plain and obvious that it discloses no reasonable cause of action and cannot succeed. While this is not a high threshold, some novel claims will have no prospect of success: see, for example, *Koubi v. Mazda Canada*, 2012 BCCA 310.

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, other than the proper pleadings requirement. 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 (and in some jurisdictions is required to file evidence in response). In some jurisdictions, the parties are entitled to conduct oral cross-examinations upon the evidence in the affidavits filed in support and in opposition to class certification (discussed further below, as this varies across the country), 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 Newfoundland and Labrador, and New Brunswick); and
- such other relief deemed appropriate by the court.

Pre-certification document production is generally granted in only exceptional cases. Because the certification stage is intended to be procedural, the threshold for production is high enough to protect that process from becoming bogged down by evidence that goes to the merits. In some provinces (e.g. Ontario, Saskatchewan, and Nova Scotia), the courts have been willing to make exceptions where evidence will assist in making a determination on certification, particularly in medical product liability cases; see for example *Dine v. Biomet*, 2015 ONSC 1911 and *Sweetland v. Glaxosmithkline Inc.,* 2014 NSSC 216 (CanLII). The court's ability to do so is grounded in provisions in class action legislation granting the court broad discretion to make orders or impose conditions respecting the conduct of the proceeding.

There is no pre-certification oral discovery in class proceedings in Canada. Generally, the only examination that may be permitted in the common law provinces and territories is a cross-examination upon filed affidavits. Leave to conduct a cross-examination is not required in some jurisdictions. In others, like British Columbia and Saskatchewan, absent agreement of the parties to a cross-examination, leave must be granted by the court. Discovery on the merits of the litigation is not permitted prior to the class certification motion.

B. Québec

In Québec, as previously mentioned, class actions are not individual actions that become class actions if certified, but are proceedings initially filed on behalf of the whole class. They may be struck entirely if the application for authorization is denied. The test for authorization of class proceedings in Québec is similar to that in the common law jurisdictions, with some significant differences.

In Québec, the test for authorization of the class proceeding requires the court to determine whether:

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

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

- filing of an application for authorization;
- initial case management hearing and request for leave to bring motions such as leave to examine the representative plaintiff and for leave to adduce relevant evidence or a motion raising jurisdictional issues;
- oral arguments contesting the application to authorize the bringing of a class action (the *Code of Civil Procedure* specifically provides that applications for authorization can only be contested orally) ; and if granted,
- giving of notice of authorization and running of the opt-out period;
- filing of a motion to institute class proceedings;
- documentary and oral discovery;
- filing of a statement of defence;
- trial of the common issues; and
- determination of any individual issues on individual causation damages; and
- The *Code of Civil Procedure* clearly provides that the existence of parallel class actions in other jurisdictions does not constitute automatic grounds for the stay or discontinuance of the Québec proceedings.

In Québec, the representative plaintiff is not required to file an affidavit in support of the application for authorization for the filing of a class action. The application for authorization states the facts giving rise to the proceeding, specifies the nature of the litigation for which the authorization is sought and describes the group on behalf of which the representative plaintiff intends to act. The facts alleged are deemed to be *prima facie* true. The representative plaintiff only bears the lower burden of "demonstration", not the burden of proof based on the preponderance of evidence typically applicable in civil actions.

At the authorization stage, the defendant does not have the right to file a formal, written contestation of the motion, as it can only be contested orally. However, the judge may allow some evidence to be submitted. In Québec there is normally no discovery at the authorization stage. Nevertheless, the court may use its discretion to allow appropriate evidence, which may include an examination of the representative plaintiff. The defendant must specify the content and objective of the evidence they seek and the examinations they want to conduct. The judge will allow the motion where he or she determines that the evidence is relevant for determining the criteria for authorizing the class action.

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

- describes the class whose members will be bound by any judgment;
- 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 (opt out) from the group.

VI. Settlement of Class Actions in Canada

All settlements of class actions in Canada must be approved by the court or courts in which the class action has been brought. The issue for the courts in such cases is 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 which the settlement hearings will

take place. 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, and the court must approve the payment of any fees that are to be paid to class counsel. Particulars of the proposed fees of class counsel are almost always a required disclosure in the notice to class members, and this is frequently one of the aspects of the settlement to which class members object.

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.

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-près distribution to one or more organizations (usually charities connected in some way to the subject matter of the claim).

VII. Appellate Review

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.

Since January 1, 2016, pursuant to the *Code of Civil Procedure*, the defendant now has the right to seek leave to appeal from a judgment authorizing a class action. In *Centrale des syndicats du Québec v. Allen,* 2016 QCCA 621, the Québec Court of Appeal established the applicable test to grant such leave. The Court stated that the test must be "stringent" and appeals must be reserved for exceptional cases. Therefore, the Court will grant leave to appeal where the judgment appears to have an overriding error on its very face concerning the interpretation of the conditions for instituting the class action or the assessment of the facts relating to those conditions, or, further, where it is a flagrant case of incompetence of the Superior Court. This important decision demonstrates the liberal approach adopted by Québec courts, which imposes a low threshold for obtaining authorization to institute a class action. The *Allen* "test" has been confirmed on numerous occasions by the Québec Court of Appeal.

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 and Manitoba, an order certifying or refusing to certify a proceeding as a class action may only be appealed with leave of a justice of the Court of Appeal (which leave may be sought by either party). In New Brunswick, Nova Scotia and Newfoundland leave is required to appeal an order certifying or decertifying a class action.

VIII. Contingency Fees, Costs and Litigation Funding in Class Actions

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 that a copy of the contingency fee agreement must be formally served on the representative plaintiff within 10 days after the

agreement is signed. While contingency fees are generally permitted in all Canadian jurisdictions, the legislation in Ontario expressly authorizes the use of a contingency fee in class actions. Class members are generally advised of the contingency fee arrangements in the notice to class members. The retainer agreement between class counsel and the representative plaintiff ultimately requires court approval.

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, 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 cost. Class members other than the representative plaintiff(s) are not responsible for payment of costs (other than with respect to the determination of their own individual claims). Further, class counsel is permitted to indemnify the representative plaintiff(s) for 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. Newfoundland, Manitoba and the Federal Court have adopted a no-costs approach similar to British Columbia.

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

Saskatchewan, 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 Québec, where there are available funds that, if made use of by the plaintiff, can be looked to for the payment of costs, in these other provinces and territories, no such protection is afforded the representative plaintiff.

Third-party funding of class actions has been permitted in Canada and is subject to approval by the courts. These funding arrangements have been scrutinized 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 Québec 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 and to pay any costs awarded against the plaintiffs. 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 Québec, a public fund named le Fonds d'aide aux actions collectives (FAAC) was created in 1978 to assist with the funding of class proceedings. 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.

Plaintiffs are not able to sell their claim to another party. As with funding by third-parties, discussed above, 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 skepticism.

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.

IX. Updates and Trends

Legislative, regulatory, or judicial developments related to class actions on the horizon.

In *Douez v. Facebook, Inc.*, 2017 SCC 33, the Supreme Court of Canada considered whether to enforce a forum selection clause in favour of the courts of California, which, if enforced, would result in the stay of a consumer class action in British Columbia regarding alleged breaches of privacy. The Supreme Court held that the plaintiff had established strong reasons not to enforce the clause. In particular, the grossly uneven bargaining power between the parties and the importance of adjudicating quasi-constitutional privacy rights in the province are reasons of public policy that are compelling, when considered together, are decisive. As well, the interests of justice, the comparative inconvenience and expense of litigating in California, all supported a finding of "strong reasons". As a result, the consumer class action was allowed to proceed in British Columbia. The effect of this decision remains to be seen, but it is expected that businesses will need to carefully consider any forum selection and choice of law causes in consumer agreements, particularly those online, for enforceability.

In *Endean v. British Columbia*, 2016 SCC 42, the Supreme Court of Canada considered whether superior court judges (provincial and territorial) could hear motions outside of their home province or territory. The context of this decision was a national settlement of three concurrent class actions that was subject to the supervision of three provincial courts. The Supreme Court confirmed that the Class Proceedings Acts in Ontario and British Columbia granted judges discretionary powers to manage proceedings, including the power to sit outside their home province. In doing so, the Supreme Court confirmed that the Class Proceedings Acts are to be interpreted broadly, in accordance with their purpose of enhancing access to justice. The effect of this decision on other outstanding issues relating to multi-jurisdictional class actions remains to be seen.

In *Vaeth v. North American Palladium Ltd.*, 2016 ONSC 5015, the Ontario Superior Court of Justice stayed an individual action that overlapped with a proposed class proceeding. The court held that it had the jurisdiction to temporarily avoid a multiplicity of proceedings. Thus, pending the outcome of the certification and leave motion in the class action, the court held that the "fairest, most efficient, and sensible way to coordinate and administer the multiplicity of proceedings" was to stay the individual action until the status of the class action crystallized. This decision may impact how class actions and their parallel individual proceedings are addressed by Canadian courts.

In Québec, the representative plaintiff's burden of proof is only one of "demonstration": three recent Court of Appeal decisions (*Sibiga c. Fido Solutions inc.*, 2016 QCCA 1299 ; *Charles c. Boiron Canada inc.*, 2016 QCCA 1716 ; *Asselin c. Desjardins Cabinet de services financiers inc.*, 2017 QCCA 1673 (leave to appeal to the Supreme Court pending)) have confirmed the low threshold which must be met in order for an application for authorization to be granted, and caution that the authorization stage of a class proceeding should not be confused with the hearing on the merits of the case. In these decisions, the Court of Appeal warned against engaging in an analysis of the allegations of the application for authorization and evidence filed in support thereof as though it were being evaluated on the merits, and confirm that the role of an authorization judge is to establish whether the petitioner has an arguable case – nothing more

In February of 2018, the Court of Appeal in *Gagnon c. Audi Canada inc.*, 2018 QCCA 202, confirmed that the service of foreign defendants in accordance with the requirements of the Hague Convention is mandatory under the *Code of Civil Procedure*. This should be welcome news for foreign defendants whose States are parties to the Hague Convention.

Lastly, significant changes are expected in respect of the management of class actions filed in the District of Montreal. As of September 1, 2018, a dedicated group of ten judges, overseen by a coordinating judge, will be assigned exclusively to hearing class actions at the authorization stage (preliminary motions and authorization hearing). The aim of this reform is to ensure that cases proceed quickly at the authorization stage, and that the authorization of class actions are overseen with judges who have a particular expertise and knowledge of this procedural vehicle.

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