Borden Ladner Gervais

A Summary of Canadian Class Action Procedure and Developments

Glenn M. Zakaib | Jean Saint-Onge, Ad. E.

Table of Contents

I. The Canadian Court System and Class Actions

Each Canadian province and territory has its own court system. Each province's and territory's superior courts have jurisdiction to hear cases on any subject except those that are specifically reserved 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 in Canada, 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 narrow civil jurisdiction, limited to matters identified in specific federal statutes, including class actions against the federal government, federal ministries, or Crown agencies. 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, class actions will generally be brought and heard by provincial or territorial superior courts. The Federal Court also shares concurrent jurisdiction with the provincial superior courts in the area of class actions initiated under Section 36(1) of the *Competition Act* RSC, 1985, c. C-34 with respect to certain offences in relation to competition stipulated in Part VI, and more particularly, alleged price-fixing conspiracy claims.

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 permitted class proceedings in all Canadian jurisdictions and provided them with a procedural blueprint. All provinces have now formally adopted class proceedings statutes that set forth various procedural requirements associated with class actions initiated in that jurisdiction (or, in the case of Québec, class action provisions in its *Code of Civil Procedure*). However, the three Canadian territories still rely on *Dutton* for the structure of their class actions regime. The Federal Court has its own 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), Nova Scotia (2008) and Prince Edward Island (2022).

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

Virtually any claim seeking collective redress can be filed as a proposed 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. In 2021, however, the Court of Appeal of Québec refused to authorize a class action against the Canadian government—alleging its omission to act against climate change and essentially demanding legislative action as relief—on the basis that it was political in nature and not justiciable. Further, in Ontario, the government recently passed a statute that significantly limits certain tort claims against the provincial government. In order for these claims to move forward (either individually or as a proposed class action), the Ontario legislature has introduced a leave requirement in which the applicant must show both that the claim has been brought in good faith, and that there is a "reasonable possibility" that the claim would be resolved in the applicant's favour.

Typical class action claims brought before the provincial courts include: constitutional challenges to the activities of government entities, statutory interpretation, consumer claims, contractual disputes and negligent misrepresentation claims, securities claims, environmental claims, competition law claims, claims related to privacy breaches, certain labour and employment disputes including regarding overtime

pay, patent, trademark and copyright disputes, franchising disputes, and mass tort claims, including claims of physical and/or sexual abuse.

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 or, in limited cases, share concurrent jurisdiction with the provinces. As class proceedings are regarded as procedural, the entitlement to assert claims for relief are 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 because 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 using 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 the end of 2022, the present value of a catastrophic claim is in the order of C$465,000. 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 an unjust enrichment or fiduciary claim) 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 U.S. 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 and near systematic component of damages claims and awards in Québec class proceedings. 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, however, 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 fulfill 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-près* 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 regulator 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 information 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 and territories. 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 before the Superior Court is typically granted carriage (known as the "first to file" rule). All other motions are thereby stayed. In a 2020 decision, however, the Court of Appeal of Québec determined that the "first to file" rule could not be strictly applied for parallel class actions between the Superior Court of Québec and the Federal Court—in that case, other factors should be weighed. Under recent amendments to Ontario's class actions legislation, carriage motions must be brought within 60 days of the commencement of the first class action in that province, and any carriage decision is final and not subject to appeal.

In Alberta, Saskatchewan, and recently British Columbia, Prince Edward Island and Ontario, 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 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. 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 January 1, 2007, that are sent to the CBA. Once

posted, the action remains in 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 the establishment of 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, Nova Scotia, and Prince Edward Island) 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, Newfoundland and Labrador, Québec, Ontario, Manitoba, 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 proposed securities class actions.

Class actions in Canada are typically commenced with one or more named individuals as the proposed 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 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 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 into 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 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, while there is no "predominance" threshold in most provinces, proposed class actions in Ontario and Prince Edward Island can only be considered the "preferable" procedure if the common questions of fact or law they raise "predominate over any questions affecting only individual class members." 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).

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 and based on the existence of common questions of law and fact. The authorization criteria include the demonstration of an "arguable case," which rests solely on the petitioner's personal cause of action. In addition, the petitioner must demonstrate the existence of a class, the existence of common questions of law and fact, and that they are an appropriate class representative.

The test for authorization of class proceedings in Québec is thus similar to that in the common law jurisdictions, with some significant differences, namely that there is no need to show that a class proceeding is *preferable* to another form of proceeding. However, although not a formal criterion, the court will consider whether the principles of proportionality and the proper administration of justice are respected and favoured by the class action.

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, *Telus Communications Inc. v. Wellman*, 2019 SCC 19, involving both consumers and non-consumers; *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*., 2020 SCC 16, in the employment law context.

With regard 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. 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.
- The representative plaintiff must adequately represent the interests of the class.

In Ontario, the certification test was recently amended to change the focus of the preferable procedure inquiry. In order for a class action to be considered the "preferable procedure" in Ontario (or Prince Edward Island), the court must consider:

- whether a class action is "superior" to all "reasonably available means" of determining the entitlements of the class members to relief or addressing the impugned conduct of the defendant, including quasi-judicial or administrative proceedings, as well as any other "remedial scheme or program outside of a proceeding"; and
- whether questions of fact or law common to the class members predominate over any questions affecting only individual class members.

Predominance is a significant change to the certification test in Ontario (and now in Prince Edward Island), as the prior legislation did not include any predominance requirement among its certification criteria.

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 the party proposing to certify the action as a class proceeding to 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, 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;
- filing of 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;
- trial of any individual issues on individual causation and damages; and
- post award/settlement reporting.

Essentially, the motion for certification will set out the proposed class definition and the proposed 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 causes of action will not be certified only if it is plain and obvious that they disclose no reasonable cause of action and are doomed to fail. While this is not a high threshold, some novel claims will have no prospect of success and should not be certified. See, for example, *Koubi v. Mazda Canada*, 2012 BCCA 310, and *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19.

The party seeking certification must demonstrate through admissible affidavit evidence filed in support of the motion that there is "some basis in fact," or "some evidence," for each element of the certification test, other than the requirement that the pleadings disclose a cause of action. Several recent courts (including appellate courts in Ontario and the Federal Court of Appeal) have held that this

standard requires the representative plaintiff to establish both some basis in fact for the existence of each asserted common issue and also that the asserted issue can be resolved on a class-wide basis. 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;
- the 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 not the norm and is granted only in exceptional cases. Because the certification stage is intended to be procedural, the threshold for production is high enough to protect that process from becoming bogged down by evidence that goes to the merits. In some provinces (e.g., Ontario, Saskatchewan, and Nova Scotia), the courts have been willing to make exceptions where evidence will assist in making a determination on certification, particularly in medical product liability cases. See, for example, *Dine v. Biomet*, 2015 ONSC 1911, and *Sweetland v. GlaxoSmithKline Inc.,* 2014 NSSC 216. 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. The only examinations that may be permitted in the common law provinces and territories are cross-examinations upon filed affidavits and, in some cases, cross-examinations of non-party witnesses pursuant to summons issued in accordance with the rules of court. 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 notable 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 ("arguable case");
- the composition of the class makes joinder difficult or impracticable; and
- the proposed representative plaintiff is in a position to represent the members of the class adequately.

In Québec, 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. Note that as it concerns multi-jurisdictional class actions, the Code of Civil Procedure is clear to the effect that this does not constitute an automatic ground for the stay or discontinuance of the Québec proceedings;

- oral arguments contesting the application to authorize the bringing of a class action (the Code of Civil Procedure specifically provides that applications for authorization can only be contested orally); 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 and damages.

In Québec, the representative plaintiff is not required to file an affidavit in support of the application for authorization the filing of a class action. The application for authorization states the facts giving rise to the proceeding, specifies the nature of the litigation for which the authorization is sought and describes the group on which the representative plaintiff intends to act. The facts alleged 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 to civil actions.

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

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

- describes the class whose members will be bound by any judgment;
- 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 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 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 requesting it 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 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 who have not opted out 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). Somewhat unusually, in *Cappelli v. Nobilis Health Corp.*, 2019 ONSC 4521, Justice Perell approved a *cy-près* distribution of settlement funds to the Class Proceedings Fund. In Québec, a percentage set by statute of any residual amount must be remitted to the *Fonds d'aide aux actions collectives (FAAC)*, a public fund providing financial assistance for the institution of class proceedings. In British Columbia, any funds that have not been distributed within a specified time period will be distributed 50 per cent to the Law Foundation of British Columbia and 50 per cent in any manner that may reasonably be expected to benefit class or subclass members.

VII. Appellate Review

Historically in Ontario, an order certifying an action as a class proceeding could only be appealed with leave of the (Divisional) court, whereas an order denying class certification could be appealed as of right to the Divisional Court. The test for leave included a consideration that the matter to be addressed before the court was one of public importance. However, with the passing of Bill 161 on October 1, 2020, the asymmetrical appeal rights were removed and there is now a direct right of appeal to the Court of Appeal of Ontario for certification-related orders for both plaintiffs and defendants.

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 Court of Appeal of Québec 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 impose a low threshold for obtaining authorization to institute a class action. The *Allen* "test" has been confirmed on numerous occasions by the Court of Appeal of Québec.

In British Columbia, Alberta and the Federal Court, there is an appeal as of right from the certification decision whether or not the class action is certified. In Saskatchewan, Manitoba and Prince Edward Island, 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.

For post-certification appeals, the rights of class members have been restricted to certain circumstances enumerated in some legislation. See for discussion *Coburn and Watson's Metropolitan Home v. Home Depot of Canada Inc*., 2019 BCCA 308, and *Bancroft-Snell v. Visa Canada Corporation*, 2019 ONCA 822.

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 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 and Prince Edward Island 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). Ontario's recently amended *Class Proceedings Act* provides, however, that the representative plaintiff is only entitled to recover the cost of a notice program in respect of the certification motion if the class is ultimately successful in the proceeding. 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 is vastly reduced to minimize the impact of an adverse costs award on parties, including on appeals.

Saskatchewan, Alberta, New Brunswick, Nova Scotia, Prince Edward Island, 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 go towards 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. 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 the *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 funding 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. Developments to Watch

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

Québec

Class actions practitioners have observed an interesting trend at the Court of Appeal lately, as Québec's highest court has confirmed the dismissal, on the merits and after trial, of several class actions that had been previously authorized. Though the bar for granting authorization may be low, many plaintiffs face an uphill battle when having to prove their class action claims, on the balance of probabilities and without presumptions or procedural shortcuts.

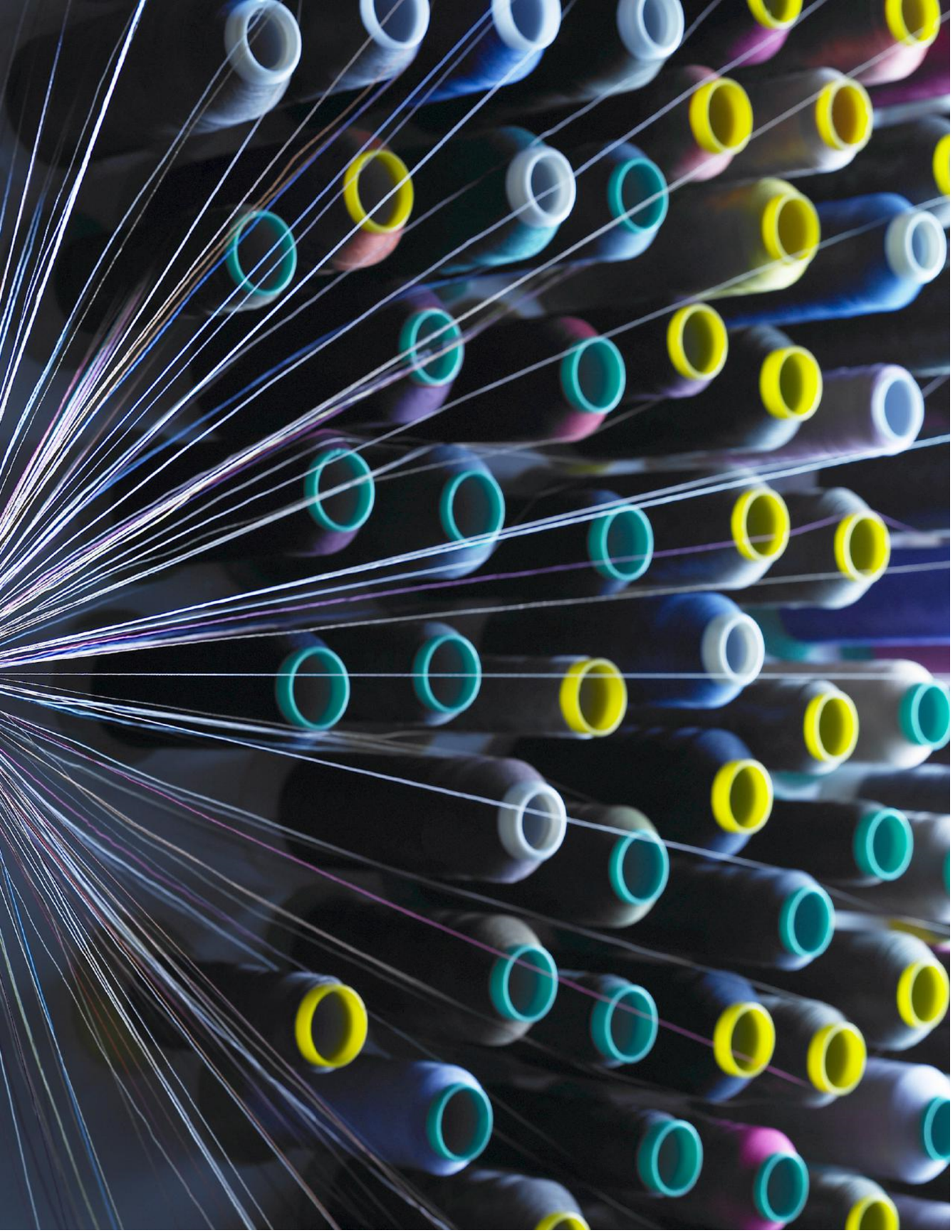
Some of these cases include the Court of Appeal's landmark decision in *Lamoureux c. Organisme canadien de réglementation du commerce des valeurs mobilières (OCRCVM)*, 2022 QCCA 685, as well as *Fortin c. Mazda Canada inc*., 2022 QCCA 635.

Ontario

In Ontario, there has been a steady decline in the number of new class actions commenced. The passing of Bill 161, which brought about major changes to Ontario's *Class Proceedings Act,* and which imports the requirement that common issues "predominate" over individual issues and encourages pre-certification motions, may be contributing to this decline. These amendments came into effect in October 2020 and their full impact is still being evaluated by class action practitioners in Ontario, along with the judiciary.

British Columbia

In British Columbia, there has been a steady increase in the number of class actions commenced. This increase is likely contributed to by the 2018 amendments to B.C.'s legislation which changed B.C. from a non-resident opt-in regime to an opt-out regime, the attractiveness to class counsel and to funders of the no-costs regime, and changes in other areas of B.C. law (particularly insurance law) that saw an influx of new firms into the plaintiff's bar



Key contacts

Glenn Zakaib
Toronto
416.367.6664
gzakaib@blg.com

Michelle Maniago
Vancouver
640.640.4139
mmaniago@blg.com

Ian C. Matthews
Toronto
416.367.6723
imatthews@blg.com

About Borden Ladner Gervais LLP

As the largest, truly full-service Canadian law firm, Borden Ladner Gervais LLP (BLG) delivers practical legal advice for domestic and international clients across more practices and industries than any Canadian firm. With over 725 lawyers, intellectual property agents and other professionals, BLG serves the legal needs of businesses and institutions across Canada and beyond – from M&A and capital markets, to disputes, financing, and trademark & patent registration.

The **BLG Class Actions Group** is a part of the larger BLG Disputes Group, which is the preeminent litigation practice in Canada. We understand all the underlying and ancillary issues covered by a class action. Drawing on our substantive strengths in areas such as product liability and consumer protection, competition, securities, financial institutions, insurance, environmental law, privacy, labour and employment, unpaid wages, and overtime matters, to name but a few, we will always assemble the team required for any situation.

Canada's Law Firm
Borden Ladner Gervais LLP is an Ontario Limited Liability Partnership.

Borden Ladner Gervais