# DEFENDING CLASS ACTIONS IN CANADA

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In-house counsel or external counsel are regularly required to direct or otherwise oversee the defence of class actions in Canada. Canadian class proceedings can take place as an extension of worldwide or United States litigation or as single disputes, made in Canada. This article highlights some of the major differences in Canadian procedural practice that can impact the overall defence strategy of United States counsel.

The number of class actions started in Canada continues to grow each year. Class proceeding legislation in some provinces of Canada is relatively young and not yet deeply litigated. Significant substantive and procedural issues are before appellate courts in Canada in the areas of securities law, employment and overtime law, banking and anti-trust or competition law and consumer products.

Directing simultaneous defences in conventional litigation in different jurisdictions in the United States poses many challenges. Those challenges are magnified when actions are also brought in either the common law provinces of Canada or in the civil jurisdiction in the Province of Québec.

American counsel are initially surprised by the breadth of cases certified in Canada as compared to the United States. The test for certification of class actions in Canada is lower than in the United States. Canadian courts will often certify an action if there is one common material issue that will move the proceeding forward. Canadian law does not include some of the more important restrictions to certification found under United States Federal Rules of Civil Procedure. For example, in Ontario there is no requirement that common issues of fact or law predominate over individual issues nor does Canadian law rigorously apply the concept of typicality.

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## Canada as a Federal Jurisdiction – Non Uniformity

Class action law in Canada is largely, but not exclusively, provincial. There is however great similarity between the substantive and procedural law among the nine common law provinces and three common law territories.

For example, the criteria in Ontario are: (a) the pleadings must disclose a cause of action; (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant; (c) the claims or defences of the class members raise common issues; (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and (e) there is a representative plaintiff or defendant (*Class Proceedings Act, S.O. 1992,* c.6, s.5*)*.

The substantive and procedural law is distinctly different in the civil law jurisdiction of the Province of Québec. The certification criteria under the *Québec Code of Civil Procedure* are: (a) the members of the group must present similar, identical or related questions of fact and law – i.e. there must be one or more common issue(s) to be tried; (b) the plaintiff must have asserted a prima facie case that is not frivolous; (c) the number of class members must be sufficient so that it would be impractical or impossible for each of them to join in the same action or to allow one of them to represent the others by proxy; and (d) the proposed representative plaintiff must be an adequate representative for the members of the group. Québec law does not include the "preferable procedure" criterion applicable in common law Canada.

## National Classes – Work in Progress

The viability of national classes in Canadian law is still unsettled.

Canadian provinces have not enacted protocols permitting the certification of national class actions in Canada, the enforcement of class action judgments or the preclusion of claims of individual plaintiffs after a class action settlement or judgment in a different province.

This uncertainty promotes the proliferation of parallel class proceedings against the same defendant in Canada. Fortunately, for the sake of efficiency, one action in one jurisdiction often becomes the lead action.

## Procedural Implications of Cross Border Litigation

Broadly speaking, most Canadian class action proceedings will be decided by a judge alone, and not by a jury. Trials are typically lengthier than in the United States. This is in part because in most provinces witnesses other than the plaintiff and one representative of the corporate defendant are not deposed prior to trial in Canada. A recent Canadian product liability class action established a high watermark of 138 days for trial.

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In the case of parallel actions brought in Canadian and American jurisdictions, the use of documentary production in one action for the benefit of the other is a developing trend. Protective orders issued in the courts of the United States do not necessarily bar Canadian plaintiff access to documents and discovery evidence in parallel actions in Canada. Plaintiffs in Canadian proceedings have sometimes obtained access to discovery in United States actions.

In a recent decision of the Ontario Court, the bid of a Canadian resident to oppose enforcement of a letter of request for deposition by United States class plaintiffs on the basis that the deposition would violate narrower Canadian discovery rules was rejected in the spirit of comity.

Further tactical implications are created by differences in litigation privilege and work product privilege between jurisdictions in the United States and Canada. For example, litigation privilege may cease to apply upon termination of litigation in Canada and not have perpetual protection. Differences in Canadian law mean that the creation of solicitor work product must be carefully considered.

## Exposure to Significant Awards of Legal Fees

There are enormous differences in the rules of the provinces concering the payment of legal costs by unsuccessful class action litigants. In some jurisdictions, such as Québec, unsuccessful defendants on certification hearings will be required to pay nominal awards towards plaintiff legal costs. In other provinces, unsuccessful defendants will face awards of legal costs of several hundred thousand dollars on certification.

American counsel are also often surprised by the existence of third party funds that can be available to pay for the costs of plaintiff experts and to idenmnify unsuccessful plaintiffs against significant costs awards which can be made against them.

## Impact of Trans-Border Class Actions in Canada

Few claims of Canadian claimants are tried or settled in class action proceedings in the United States or other jurisdictions outside of Canada. A more common practice is for internationally negotiated settlements affecting Canadian claimants to be approved in a Canadian class action proceeding.

Settlement approval may be sought in several provincial jurisdictions in Canada, particularly in jurisdictions where large numbers of claimants reside in a foreign country. Defendants may be interested in seeking settlement approval in multiple provinces, and particularly Québec, for the purpose of precluding claims.

Canadian courts show a willingness to work collaboratively in defining classes to avoid the troublesome problem of overlapping cross-border classes.

## Conclusion

The defence of Canadian class actions as part of global or North American litigation strategy is common in Canada. Recognition and appreciation of the significant differences in law and practice will greatly improve the result achieved and permit clients and counsel to manage the proceedings effectively.

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