

# Class Actions in Canada Part 1: Class Proceedings 101

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Class actions are a well-entrenched form of litigation in Canada, and therefore a significant business risk for Canadian and international companies doing business in Canada.

In this series, we will examine the different class action regimes in Canada, and focus on recent class action trends in areas such as privacy, employment and competition law. In our first instalment, we explore the two primary class action regimes in Canada: the common law approach and the Québec civil law procedure.

## What Is A Class Action?

A class action is a form of civil action where one or a few plaintiffs can sue a defendant or a number of defendants on behalf of a larger group of people who claim the same type of loss from the same defendant or group of defendants. Instead of starting separate lawsuits or having each plaintiff named in the case, the representative plaintiff can pursue the claim on behalf of the class.

Unlike the United States, Canada does not have a “multidistrict litigation” system to consolidate multiple cases against the same defendant against for the same claims.

If the plaintiff recovers money or other remedies in the case, all class members share in that recovery. For plaintiffs, class actions are seen as a tool to increase access to justice, as the costs of litigation are shared among a larger group, and the downside risk is limited as costs in unsuccessful cases are often underwritten by the plaintiffs’ law firm or a third party fund. For defendants, class actions are beneficial in that the result in the case binds all class members, preventing those class members from pursuing subsequent, separate cases. However, the significant financial costs associated with class action litigation can also influence defendants to pay money to settle cases without merit that they might defend in an individual action.

## Class Actions Across Canada

A class action may be commenced in any common law province, and can be brought on behalf of class members in that province or across multiple regions in Canada. It is therefore common to see separate class actions launched in multiple jurisdictions against the same defendant for the same claims. Unlike the United States, Canada does not have a “multidistrict litigation” system to consolidate these cases. Class actions can proceed in multiple jurisdictions simultaneously and the cases will not necessarily be consolidated. This is of greatest procedural consequence when one class action is proceeding in Québec, which has a different legal and procedural regime than the rest of Canada (Québec has a civil law, rather than a common law system).

The result of being subject to different legal regimes means that plaintiffs can seek slightly different relief in each province. It also affects the speed at which the actions will proceed. These implications are discussed below, comparing and contrasting the regimes in Ontario and Québec.

## Class Proceedings in Common Law Canada

In Ontario (and all of the other common law provinces except for Prince Edward Island which does not have class proceedings legislation), an action must be “certified” as a class action, a representative plaintiff must be appointed by the court, and common issues or questions of fact or law must be certified by a judge to be determined at trial before a case can proceed as a class action. This is done through a motion for certification. The motion can require extensive preparation of affidavit evidence, expert reports, and written materials, and may take over a year before it is heard by the court. While witnesses providing affidavit evidence are subject to cross-examination, unlike in the United States there is not usually any documentary or oral discovery of the parties prior to the certification hearing.

### It has become increasingly difficult to successfully oppose class certification in Ontario or other common-law provinces.

Certification does not determine the merits of the case. Rather, it is a procedural matter aimed at screening cases that are not appropriate to be dealt with as a class proceeding. Judges hearing certification motions rarely consider the merits of the lawsuit. They focus on whether the representative plaintiff and the proposed class action meet the elements of the prescribed test: whether the claim: (i) discloses a cause of action; (ii) contains an identifiable class; (iii) proposes issues common to the class; (iv) is the preferable procedure for resolving the complaint; and (v) has an appropriate representative plaintiff.

The representative plaintiff must show it is not plain and obvious that no claim exists and there is “some basis in fact” to meet the remaining elements of the test. This is usually done through affidavit evidence. However, where there is a conflict in either the factual or expert evidence, the court hearing the certification motion does not resolve that conflict; that is a task for the judge presiding over the trial.

As a result of this approach, the test for granting certification is a relatively easy one for plaintiffs to meet. Canadian courts, including the Supreme Court of Canada, have taken a very permissive view of class actions and view them as an important component of enabling the public to obtain access to justice economically. It has therefore become increasingly difficult to successfully oppose class certification in Ontario (or other common-law provinces).

### Class members residing in British Columbia must take steps to opt out of the class if they do not wish to be bound by the result.

Ontario is an “opt-out” jurisdiction, meaning that persons who do not wish to be part of a certified class proceeding and be bound by its results must take active steps to opt out of the proceeding. Ontario permits non-residents of the province to be part of a class. The “opt out” nature of the regime therefore applies regardless of the province in which the class member resides. Other provinces, such as British Columbia, also allow non-residents to be part of a class but use a hybrid approach. Class members residing in British Columbia must take steps to opt out of the class if they do not wish to be bound by the result. However, non-residents must opt in to participate in the class proceeding, meaning that out-of-province class members are not bound by the result if they do not actively choose to join the case.

Once an action is certified as a class proceeding, it proceeds to a common issues trial where a judge resolves the certified issues that apply to all class members. A common issues trial is procedurally similar to a “normal” case, including documentary and oral discovery obligations. The decision binds all members of the class. In many cases, individual trials are required after the resolution of common issues to determine the claims of or compensation owed to particular class members.

In practice, most class proceedings settle before trial, although in light of the low bar for certification, many defendants are choosing to opt for a common issues trial on claims they view as lacking merit.

## Class Proceedings in Québec

In Québec the “certification” stage of the proceeding is known as “authorization.” As with the common law provinces, the authorization stage is not an assessment of the merits of the proceeding. There is a four-part test judges consider when deciding whether to authorize a class proceeding: (i) the claims of the members raise identical, similar or related questions of law or fact; (ii) the facts alleged seem to justify the conclusions sought; (iii) the composition of the class makes joinder difficult or impracticable; and (iv) the proposed representative is in a position to represent the members of the class adequately.

This test is subject to an “arguable case” standard: in light of the facts alleged in the claim and the relevant law, does the plaintiff have an arguable case. The Supreme Court of Canada has recently confirmed the standard for authorizing a class action in Québec is lower than that in the common law provinces such as Ontario for certifying a class proceeding. In Québec, the authorization motion judge’s role is, essentially, to screen out frivolous cases.

In this context, defendants have a very limited ability to challenge the authorization of the proceeding. Unlike in Ontario, where a defendant has the right to submit evidence and to cross-examine any opposing party that submits an affidavit, in Québec the defendant must seek permission from the judge to submit evidence and to cross-examine the representative plaintiff.

Recent changes to Québec’s Civil Code of Procedure have meant that judges are aggressively case managing these matters and moving them forward through the authorization stage quickly.

## The Role of Class Actions in Specific Areas of Law

In the forthcoming installments in this series, we will examine class action litigation in particular areas of law such as privacy, employment and competition law, and explore recent trends and developments.