

Legal 500 Country Comparative Guides 2024

Canada Class Actions

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This country-specific Q&A provides an overview of class actions laws and regulations applicable in Canada.

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Canada: Class Actions

1. Do you have a class action or collective redress mechanism? If so, please describe the mechanism.

Yes, all Canadian provinces have class actions (also referred to as "class proceedings") legislation that allows a representative plaintiff to commence a lawsuit or legal proceeding on behalf of a class of persons or entities.

In general, Canadian class actions legislation allows a representative plaintiff to file a legal proceeding on behalf of a defined class of persons; however, the representative plaintiff is required to apply to the Court for an order certifying that the proceeding meets the statutory requirements to move forward and be prosecuted as a class action. If the Court does not grant the class certification application, then the proceeding can only be pursued as an individual action by the named plaintiff(s).

While there are some minor differences among the class proceedings legislation in force in the different Canadian provinces, the statutory test to determine if a proceeding will be certified to go forward as a class action generally involves the following elements:

- a. The pleadings disclose a cause of action (i.e. a claim that is not bound to fail if all the pleaded allegations of fact are assumed to be true);
- b. There is an identifiable class of 2 or more persons;
- c. The claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
- d. A class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues; and
- e. There is an adequate representative plaintiff to represent the interests of the class and that not have an interest in conflict with those of other class members in relation to the common issues.

If the Court certifies a proceeding to be prosecuted as a class action, then the case proceeds to a trial of the "common issues" that were certified in the decision and order following the class certification application. Trials or other adjudications of individual issues (such as causation or quantification of damages) follow the

common issues trials.

2. Who may bring class action or collective redress proceeding? (e.g. qualified entities, consumers etc)

Canadian class action legislation does not generally include limitations or qualifications on the type of persons or entities that can commence class actions. If the class action involves certain types of claims, then there may be limited categories of persons that can commence the claim. For example, claims pursuant to consumer protection legislation, which are often the subject of class actions, can only be brought by persons that meet the definition of "consumer" in the legislation, and cannot be made by suppliers of goods and services.

3. Which courts deal with class actions or collective redress proceedings?

The superior courts of each of Canada's provinces adjudicate class actions. In addition, the Federal Court of Canada adjudicates class actions where the subject matter of the proceeding is in an area of law over which the Court has jurisdiction under the *Federal Courts Act*, R.S.C. 1985, c. F-7.

4. What types of conduct and causes of action can be relied upon as the basis for a class action or collective redress mechanism?

Class actions legislation in Canada is purely procedural and does not create substantive rights or new causes of action. The Supreme Court of Canada has confirmed this in various decisions, including *Bisaillon v. Concordia University*, 2006 SCC 19 and more recently in *Uber Technologies Inc. v. Heller*, 2020 SCC 16.

As a result, there are no formal legal rules or specifications on the types of conduct or claims that can be pursued as class actions in Canada. There are, however, various areas of law and types claims that have proven more amenable to being used as a basis for class actions in Canada given the statutory criteria that must be established for a legal proceeding to be certified by a Court to be pursued as a class action. Class actions

legislation in Canada generally requires, among other things, that the proposed representative plaintiff's claim give rise to common issues of fact or law and that a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues.

Claims related to conduct by defendants that affect large numbers of people or entities in similar ways or in ways that give rise to similar legal issues are therefore more amenable to being pursued as class actions in Canada. For example, product liability claims are often pursued and certified as class actions because the manufacturer or supplier's conduct in negligently designing or producing large amounts of products or goods will give rise to common factual and legal issues that affect the class of persons that acquired and used those products in similar ways. Similarly, anti-trust/price-fixing claims are often pursued as class actions because an alleged conspiracy or agreement among competitors to artificially set prices involves common conduct that will impact the price that consumers or end-users for goods or services pay in uniform or at least similar ways.

Other areas of law that have given rise to class actions in Canada include: environmental law claims, securities law claims (for example under statutory secondary market liability causes of action), consumer claims for deceptive marketing or breach of consumer protection legislation, institutional abuse claims, pensions, franchise law claims, and invasion of privacy claims related to cybersecurity breaches.

5. Are there any limitations of types of claims that may be brought on a collective basis?

The only express limitation on the types of claims that may be brought as class actions is a restriction in class actions legislation that makes class actions inapplicable where a proceeding may be brought by the plaintiff in a representative capacity under another statute. Examples of this are certain proceedings that can be commenced by members of a co-operative under Ontario's *Co-operative Corporations Act* and proceedings by a credit union under the *Credit Unions and Caisses Populaires Act, 1994* of Ontario. In general, this restriction has not been an obstacle to class actions in Canada in any material way.

There are other specific types of claims and cases that are not amenable to being brought as class actions based on the subject matter or relief sought. For example, certain types of claims related to improperly levied taxes are within the exclusive jurisdiction of the Tax Court of Canada, which does not have procedural rules allowing

for class actions. Other types of cases may not be brought as class actions where they involve claims that are within the exclusive jurisdiction of another administrative tribunal or regulatory body. For example, proposed class actions have been denied where they involved matters within the jurisdiction of the Canadian Radio-television and Telecommunications Commission and where they involved utility overcharge claims within the jurisdiction of a provincial energy regulator's complaint procedure.

6. How frequently are class actions brought?

Class actions are frequently pursued in Canadian courts. According to a database kept by the Canadian Bar Association, the number of class actions cases filed in BC and Ontario, two of Canada's most active class action jurisdictions, since 2020 were as follows:

Year	Cases Filed - BC	Cases Filed - Ontario
2023	34	31
2022	50	69
2021	65	67
2020	51	36

According to a compilation of statistics from a leading Canadian text, authored by the Honourable Ward K. Branch of the BC Supreme Court and Mathew P. Good, *Class Actions in Canada*, as of June 30, 2023, 1,006 class actions had reached decisions on certification in Canada (excluding Quebec). Of those, 663 were contested. Of those contested certifications, 404 (61%) were certified. These numbers are provided for each province from the introduction of its class action legislation to June 30, 2023, which limits comparability at any one point in time.

7. What are the top three emerging business risks that are the focus of class action or collective redress litigation?

Recent research into Canadian class action trends suggests that the highest number of class action cases in recent court filings were in the following three areas:

1. Consumer Protection. Each province has consumer protection legislation that creates statutory causes of action for various forms of supplier misconduct. These statutes include features such as reverse onus provisions that make claims of this nature amenable to being pursued as class actions.

2. **Product Liability.** Product liability claims have long been a regular subject matter of Canadian class actions and the certification of such claims is well established.
3. **Privacy.** This would include class action claims arising from data breaches, where private personal information is disclosed as a result of on-line piracy or other means. Anecdotally, this type of class action claim appears to be proliferating in recent years in Canada.

8. Is your jurisdiction an “opt in” or “opt out” jurisdiction?

Most Canadian provinces are “opt out” jurisdictions that require class members to affirmatively opt out of the proceeding after receiving notice of certification. Notice of certification is typically disseminated to class members through a variety of means, including media publications and direct mailings, pursuant to a court approved notice plan.

Some provinces, such as New Brunswick and Newfoundland & Labrador require class members that reside outside the province to “opt in” to the proceeding after receiving notice in order to participate as class members. Class proceedings legislation in other provinces, such as British Columbia, has recently been amended to change the jurisdiction to an “opt out” regime for out-of-province class members.

9. What is required (i.e. procedural formalities) in order to start a class action or collective redress claim?

In the common law provinces (i.e. all of the provinces other than Quebec), a claimant files and serves an originating pleading (referred to variously as a Statement of Claim, Notice of Civil Claim, or Petition) containing the material facts alleged and the legal claims or causes of action being pursued. Generally, this is followed by the filing of a notice of application or court motion and supporting affidavits seeking certification of the proceeding as a class action in accordance with the statutory criteria summarized under #1, above. The affidavit evidence in support of a certification application is only intended to establish the statutory criteria for certification, not the merits of the claims and the evidentiary standard is lower than at trial; there needs to be only “some basis in fact” that the certification requirements are met.

In Quebec, a class action is commenced by filing and serving an Application to institute a class action in the Superior Court of Quebec, referred to an “authorization application”. The authorization to institute a class action in Quebec involves similar but not identical statutory requirements as in the “common law” provinces of Canada. There is no requirement for a representative plaintiff in Quebec to file affidavit evidence in support of the application and there is limited ability under Quebec’s procedural rules for defendants to obtain leave of the Court to examine the plaintiff or file responding evidence.

10. What remedies are available to claimants in class action or collective redress proceedings?

All forms of remedies available in individual civil actions in Canada are theoretically available in class actions as well. Typical remedies in class actions in Canada usually involve monetary awards, but declaratory and injunctive relief can also be granted in connection with class proceedings.

Monetary awards can take the form of damages for losses suffered by class members, with the measure and quantum of damages depending on the type of legal cause of action involved and the economic theory of loss. Monetary awards can also be in the form of restitution for unjust enrichment or disgorgement of profits if there is a legal basis for such an award in light of the defendant(s)’ conduct and the cause of action pled. Restitutory or disgorgement claims are often pled in class actions as they can be granted and assessed without individual trials or other adjudications in respect of each class member and are therefore more amenable to class certification.

Damages awards often require individual evidence from class members to establish causation and for quantification purposes; however, class action legislation does also allow for aggregate monetary awards to be granted if, following a common issues trial, no questions of fact or law other than those relating to assessment of monetary relief remain to be determined and the aggregate of the defendant’s liability to some or all class members can reasonably be determined without proof by individual class members. A Court can also use statistical evidence that would not otherwise be admissible for the purposes of determining issues relating to the amount or distribution of an aggregate monetary award.

11. Are punitive or exemplary damages available for class actions or collective redress

proceedings?

Yes, Canadian courts regularly certify common issues in class action proceedings that determine whether the defendant's conduct justifies an award of punitive damages payable to the class.

12. Are class actions or collective redress proceedings subject to juries? If so, what is the role of juries?

Yes, class actions are subject to the ordinary rules of court that apply to civil proceedings in the provincial superior courts, which allow for civil juries in certain circumstances. A civil jury could in theory hear and decide the certified common issues at a common issues trial. However, as a matter of practice civil juries are seldom used in Canada for complex legal cases and jury notices filed in class proceedings have been struck on that basis. In practice, the vast majority of class actions in Canada are adjudicated by a judge alone.

13. What is the measure of damages for class actions or collective redress proceedings?

The measure of damages varies depending on the type of legal claim that is the subject of the class action. For example, tort claims, statutory causes of action, and contract or warranty claims can all give rise to different measures of damages based on different theories of loss and compensatory principles. As noted above, monetary awards can also be restitutionary in nature or measured based on the defendants' profits or gains resulting from the misconduct alleged.

14. Are there any jurisdictional obstacles to class actions or collective redress proceedings?

The main jurisdictional obstacle to class actions in Canada arises when the proposed representative plaintiff's claim is potentially within the scope of an agreement to arbitrate disputes. This circumstance arises regularly in respect of mass consumer claims where suppliers' standard contract terms often include mandatory arbitration provisions, but it can also arise in respect of other types of claim where the parties' relationship is governed by contract. Generally speaking, legislation in force in the provinces regarding commercial arbitration requires that legal proceedings commenced in the courts must be stayed if they are the subject of a mandatory arbitration agreement. The Supreme Court of Canada has confirmed that, subject to certain statutory

exceptions, proposed class actions must also be stayed and referred to arbitration, including to address matters of arbitrability and such claims are therefore outside of the Court's jurisdiction.

Other types of jurisdictional issues arise when multiple class actions involving the same subject matter or claims are commenced in multiple provinces. Class action legislation in many provinces has now been updated to allow the province's superior court to decline to certify a class proceeding if a multi-jurisdictional class action has been commenced in another province and it would be preferable for the claims or common issues to be resolved in the proceeding commenced in another province.

15. Are there any limits on the nationality or domicile of claimants in class actions or collective redress proceedings?

There are no limits on nationality of claimants, but the class proceeding legislation in some provinces, such as British Columbia, Saskatchewan, and New Brunswick does require that the person commencing the proposed class action be a resident of that province.

Generally speaking, and subject to stays of proceedings or other relief where competing class actions are commenced in multiple provinces, a class proceeding in one province can include class members resident across Canada. It is also possible in some circumstances for Canadian courts to certify a "global" class that includes class members that are not residents of Canada, such as for example in a securities class action involving an issuer on a Canadian exchange. Complex jurisdictional and procedural issues can arise in such cases and class actions are much more commonly limited to Canadian residents.

16. Do any international laws (e.g. EU Representative Actions Directive) impact the conduct of class actions or collective redress proceedings? If so, how?

No international laws or treaties impact the conduct of Canadian class actions.

17. Is there any mechanism for the collective settlement of class actions or collective redress proceedings?

Yes, Canadian class actions legislation includes

provisions governing the settlement of class proceedings and requiring judicial oversight and approval of settlements as being in the best interests of the class. Upon reaching a settlement, the representative plaintiff is required to apply for court approval in order for the settlement to be enforceable and binding on absent class members.

18. Is there any judicial oversight for settlements of class actions or collective redress mechanisms?

Yes, Canadian class actions legislation provides that a class proceeding may be settled only with approval of the court and on terms the court considers appropriate.

The judicial oversight process generally involves, first, a court application to approve publication of notice to class members regarding the settlement and of the date and time of a subsequent settlement approval hearing. The notice also provides information to class members on how they may opt out of the proceeding and the deadline to do so and how they may deliver objections to the settlement. If the settlement was concluded prior to class certification, this "first round" settlement application would also include consent by the settling defendant(s) to certification of the class proceeding.

Following publication of the notice of settlement approval hearing and the expiry of the "opt out deadline", the Court conducts a settlement approval hearing. The central question a Canadian court considers on settlement approval is whether the settlement is fair, reasonable, and in the best interest of the class. Generally, the courts in Canada adopt a policy favouring settlement of complex disputes and settlements will be approved if they are within a range of reasonableness. Factors considered include: (a) whether counsel of sufficient experience and ability undertaken sufficient investigations to satisfy the court that the settlement is based on a proper analysis of the claim; (b) whether there is any reason to believe that collusion or extraneous considerations have influenced negotiations such that an inappropriate settlement may have been reached; (c) on a cost/benefit analysis, whether the class is well-served by accepting the settlement rather than proceeding with the litigation; and (d) whether sufficient information been provided to the members of the class represented by representative plaintiffs and, if so, are they generally favourably disposed to the settlement.

Post settlement administration and claims approval can also be complicated in some cases, and the courts may become involved in resolving issues or disputes that can

arise.

19. How do class actions or collective redress proceedings typically interact with regulatory enforcement findings? e.g. competition or financial regulators?

Class actions in Canada will often overlap and run in parallel with regulatory enforcement matters. For example, in recent years a large national class action was prosecuted against two large credit card providers and their associated network of financial institutions, while the Competition Bureau of Canada concurrently pursued a regulatory enforcement action at the Competition Tribunal alleging breach of the resale price maintenance provisions in Canada's *Competition Act*. The Competition Tribunal's decision to dismiss the enforcement action was subsequently referenced by the BC courts in approving a settlement in the class proceeding.

It is also possible in some circumstances that a regulatory enforcement process that provides compensation to parties that would be class members in a proposed class action may render the class action not "preferable" for certification. However, there will be many cases where the regulatory enforcement action will be considered insufficient to fulfil the objectives of Canadian class proceedings legislation and will not be preferable to or displace a class proceeding. For example, in one such case the Supreme Court of Canada rejected the argument that an Ontario Securities Commission investigation and regulatory settlement was preferable to a class proceeding in respect of the same conduct, given the lack of participatory rights for class members and limits on the O.S.C.'s remedial powers.

20. Are class actions or collective redress proceedings being brought for 'ESG' matters? If so, how are those claims being framed?

While it does not appear that any claims specifically involving ESG matters have been filed to date in Canada, it seems likely that such claim will be pursued in the near future. For example, in British Columbia a campaign known as "Sue Big Oil" is ongoing and involves a number of municipalities, local governments and environmental groups seeking to gain support for a proposed class action proceeding against various large oil & gas and fossil fuel companies to recover the public costs of combatting climate change. As of May 2024, at least five local governments in the province had voted to support the proposed class action.

21. Is litigation funding for class actions or collective redress proceedings permitted?

Yes, private third-party litigation funding for class actions in Canada is generally allowed, subject to Court approval. Such arrangements require Court approval as they are binding on absent class members. Private funding agreements vary in terms and structure, but often include an indemnity against adverse costs awards, given that class counsel generally indemnifies the representative plaintiff, as well as disbursement funding. Legal fees are also sometimes provided. The courts consider various factors in approving such agreements, but generally must be satisfied that the agreement would not compromise class counsel's duties to the representative plaintiff and the class.

In addition to private funding arrangements, the provinces of Ontario and Quebec also have public funding options available to representative plaintiffs to assist in financing class actions.

22. Are contingency fee arrangements permissible for the funding of class actions or collective redress proceedings?

Yes, contingency fee arrangements for class counsel are standard practice for class actions in Canada. Such agreements are entered into between class counsel and the representative plaintiff and typically provide for indemnification of the representative plaintiff against any adverse costs awards and payment by counsel of required disbursements. Contingency fees are set as a percentage of any monetary award or settlement, usually in the range of 25-35%.

Class counsel fees are ultimately subject to Court approval, which typically takes place in conjunction with settlement approval. The Court will only approve a reasonable fee and will scrutinize such matters as the total docketed time of the plaintiff's lawyers, regularly hourly rates, the complexity of the matter, and the size of the fee claimed in relation to the recovery by the class. However, it is also recognized that class counsel undertake substantial economic risk and that the approval of contingency fee agreements promotes the

object of class actions in increasing access to justice.

23. Can a court make an 'adverse costs' order against the unsuccessful party in class actions or collective redress proceedings?

The answer to this question varies depending on the province or jurisdiction. Some provinces, specifically British Columbia, Saskatchewan, Manitoba, and Newfoundland & Labrador, adopted statutory provisions in their class proceedings legislation that limit adverse costs awards against any party arising from a class proceeding or an appeal arising from a class proceeding. The Federal Court of Canada likewise follows a "no-costs" rule for class actions.

Other jurisdictions, most notably Ontario and Alberta, have retained the general rule in civil litigation that costs are awarded to the successful party in class action proceedings.

24. Are there any proposals for the reform of class actions or collective redress proceedings? If so, what are those proposals?

Reform proposals for class actions legislation are regular and on-going in various Canadian provinces. For example, Ontario in 2020 implemented significant changes to its *Class Proceedings Act, 1992*. The amendments to the legislation, among other things, created a more stringent test for class certification, including a requirement that common issues of fact and law must "predominate" over any questions affecting only individual class members, and require Ontario courts to hear early dispositive motions and motions that may narrow the issues before the certification motion.

More recently in 2023, the Saskatchewan Law Reform Commission published its Final Report regarding proposed reform of that province's *Class Actions Act*. Among other things the reform proposal recommends changes that would create a one-year deadline from filing of the claim for the plaintiff to file a certification motion, subject to the court's discretion to extent that time period. Other recommended changes were proposed to address litigation funding agreements.

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