



The Legal 500 Country Comparative Guides

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, Canada has a class action regime. A class action is a procedural mechanism which allows persons in similar situations to prosecute an action as a group to resolve common issues instead of each person pursuing individual actions. Class actions can be brought in all provinces and territories as well as under the jurisdiction of the Federal Court in certain prescribed circumstances. Each of Canada's ten provinces has its own class action legislation which enables parties to pursue class proceedings. Class actions are also permitted in Canada's three territories, despite the absence of class action legislation in those jurisdictions. The class action regimes are largely similar in all of Canada's common law jurisdictions, however Quebec's regime has some important procedural differences.

Across Canada, there are three primary goals of class proceedings: (1) judicial economy—class actions avoid unnecessary duplication in fact-finding and legal analysis; (2) access to justice—class actions determine claims that might not otherwise be litigated on an individual basis due to economic and/or social barriers; and (3) behaviour modification—class actions deter unlawful conduct that causes widespread but individually minimal harm.

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

Any legal person, including individuals and corporations, can pursue a class proceeding, provided that person falls within the definition of the proposed class and does not have interests that conflict with the proposed class members. Proceedings are initially filed as "proposed class actions" and only become a class action when a court certifies, or in Quebec authorizes, the proceeding as a class action and appoints a representative plaintiff.

If two or more class proceedings are commenced concerning the same or similar subject matter, a court can stay one or more of the proceedings. A court will determine which proceeding would best advance the claims of the class members efficiently and cost-effectively. In making this determination, the court may consider, among other factors, the theory of the cases being advanced, the relative likelihood of success of each proceeding, the expertise and experience of counsel, and the funding strategy for each proceeding.

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

Canada's ten provinces and three territories have their own court systems. The superior courts of each province and territory have inherent jurisdiction to hear a case on any subject other than those that are statutorily limited to another court. Canada also has a parallel federal court system that has jurisdiction over matters specified in federal statutes. Most class actions are brought in the provincial superior courts of the larger Canadian provinces and/or in the Federal Court.

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 can be based on the same types of conduct and advance the same causes of action that would form the basis of an individual lawsuit. Class proceedings are strictly procedural mechanisms and do not create any new causes of action or substantive rights for the parties.

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

Generally, any civil claim that can be advanced by way

of an individual action can also be pursued by way of a class action. However, if no part of the claim can be resolved on a class-wide basis, or if other procedural requirements are not met, then the action will be deemed inappropriate to proceed as a class action and will fail at the certification or authorization stage.

6. How frequently are class actions brought?

Class actions are frequently brought in Canada. Class action legislation was introduced in 1978 in Quebec and throughout the 1990s and 2000s in most other Canadian provinces. There has been a steady increase in class action filings since. For example, in the Province of Ontario, the Law Commission of Ontario estimated in 2019 that approximately 1,500 class actions have been brought since 1993. It is estimated that approximately 250 class actions were commenced across Canada in 2022.

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

- **Competition Law Class Actions:** Competition law class actions are frequently filed in Canada and are regularly certified or authorized to proceed as class actions. Canadian plaintiffs pursue class actions regarding anti-competitive conduct that is alleged to contravene the criminal provisions of the *Competition Act*. This includes misleading advertising such as drip-pricing or deceptive telemarketing, anti-competitive conspiracies such as price or wage fixing cartels, market allocation schemes and bid-rigging. Competition class actions can be brought by direct purchasers, indirect purchasers who could be many purchasing levels removed from the misconduct, or umbrella purchasers who bought products that were never the direct subject of anti-competitive activity.
- **Securities Law Class Actions:** Securities law class actions are common in Canada. Each province and territory has a *Securities Act*. Primary and secondary market purchasers regularly bring class actions for various misrepresentations including in prospectuses and offering memoranda or failures to make timely disclosures of material changes. Plaintiffs can also rely on common law claims such as fraudulent or negligent

misrepresentation. Plaintiffs tend to prefer claims under the statutory scheme because they do not need to show individual reliance on the misrepresentation.

- **Privacy Class Actions:** There is an upward trend in Canadian privacy class actions as plaintiff groups seek redress for large-scale data breaches or cyberattacks. Canadian courts are grappling with this rapidly evolving area of law, including by defining the limits of the relatively new privacy-based tort of “intrusion upon seclusion” (e.g. a trilogy of Ontario Court of Appeal cases recently held that the tort cannot succeed against the collectors and custodians of private information). While settlements are often reached in privacy class actions, to date the settlement amounts are relatively modest as the individual loss or damage incurred is often nominal in nature.

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

Most Canadian jurisdictions employ an “opt-out” regime. Under this regime, once a class action is certified, individuals captured by the class definition have the ability to opt out of the class action.

In New Brunswick and Newfoundland and Labrador, non-residents need to opt into a class action certified in those provinces. Other provinces have recently switched from “opt in” to “opt out” in respect of non-residents. Opting into a class action means that individuals are only part of the class action if they have decided to join the proceeding and informed class counsel of their intention to be part of the class.

After a class action is certified, a notice needs to be published to allow for class members to either opt-in or opt-out. A notice will usually be published in various media outlets and will be based on a court-approved notice plan. The court will determine the timeframe for members to opt-in or out.

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

A plaintiff commences a proposed class action by filing a statement of claim, application, or petition. Afterwards, the plaintiff brings a motion to certify (or in Quebec authorize) the class action. In the certification motion/application, the Court determines whether the case is suitable to proceed as a class action.

While there are minor differences across Canada's common law provinces, the test for certification is largely as follows. A party seeking to certify a class action bears the burden of proof to show that:

1. the pleadings or the notice of application discloses a cause of action;
2. there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
3. the claims or defences of the class members raise common issues;
4. a class proceeding would be the preferable procedure for the resolution of the common issues; and
5. there is a representative plaintiff or defendant who,
 - would fairly and adequately represent the interests of the class,
 - has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
 - does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

The standard of proof is relatively low. A party will pass the first requirement so long as it is not "plain and obvious" that no cause of action has been disclosed. No evidence is admissible on this issue. Instead the factual allegations are taken as true. For the other requirements, the standard of proof is "some basis in fact" that the requirement is fulfilled. This is a lower standard than the regular balance of probabilities standard employed in civil suits.

In Quebec, a party seeking to authorize a class action only needs to show that they have an arguable case. Facts alleged are assumed to be true. The plaintiff is not required to file any affidavit evidence and the defendant requires leave of the court to cross-examine any affidavits.

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

All of the remedies available in individual proceedings are theoretically available in class proceedings, including common law, statutory and equitable relief.

The court has discretion to award aggregate damages for the whole class. In most Canadian jurisdictions,

courts can rely on statistical evidence to determine the amount and distribution of an aggregate damages award.

The court cannot award aggregate damages, however, where proof of damages is required from individuals. In these cases, it is possible for the court to make a class-wide finding of liability, and then require streamlined individual trials to determine the loss of each class member.

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

Yes, punitive damages are available in class actions and are commonly asserted by plaintiffs. Punitive damages can be awarded following a trial of common issues if the defendant's conduct was sufficiently reprehensible. Under the common law, punitive damages could be awarded in any civil suit if the defendant's conduct was "malicious, oppressive and high handed [such] that it offends the court's sense of decency." An award of punitive damages may advance one of the primary goals of class actions: behaviour modification.

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

While it may be possible to try a class action by jury, virtually all Canadian civil actions, including class actions, are tried by a judge alone.

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

The measure of damages awarded for class actions varies by the type of claim. For example, tort, contract and statutory claims give rise to different damages based on different theories of loss.

A court can award damages on a class-wide basis by awarding aggregate damages. For example, in Ontario, aggregate damages are appropriate if monetary relief is claimed on behalf of some or all class members, no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined to establish the amount of the defendant's monetary liability, and the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.

In most provinces, courts can rely on statistical evidence to determine the measure of damages. Expert evidence, usually from an economist, can be introduced to calculate and quantify damages.

If it is not possible to award damages on an aggregate basis, the court may establish liability on a class-wide basis and then require individual plaintiffs to prove their own particular damages.

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

Canada is comprised of ten provinces and three territories that are each separate jurisdictions with different court systems, in addition to the Federal Court system. It is common for different plaintiffs to commence separate class actions in different provinces regarding the same issues, oftentimes with overlapping class definitions that would capture the same persons as class members in multiple proceedings. Class counsel will sometimes form a consortium to coordinate their efforts across jurisdictions, usually advancing one action first as a test case. While there have been some occasions where courts from different provinces have sat together to hear parallel class actions, a uniform and consistent approach to the coordination of multi-jurisdictional class actions in Canada has yet to be settled.

Class actions are sometimes proposed on behalf of all Canadians alleging breaches of provincial statutes, such as securities, employment or consumer protection legislation. This can create significant complications dealing with varying legislation containing different substantive provisions as well as different treatment of arbitration agreements and class action waivers.

There must also be a real and substantial connection between the subject matter of the plaintiff's claims and the jurisdiction in which the claim is filed (as discussed further below at Question 15).

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

Class actions are subject to normal conflict of laws considerations. Canadian courts will only exercise jurisdiction over claims with a real and substantial connection to the jurisdiction of the court, which can include claims brought by or on behalf of non-Canadians and persons domiciled outside of Canada.

There are no limitations based on nationality. Generally,

plaintiffs and class members can be domiciled outside of Canada, subject to some procedural requirements. The provinces of Manitoba, New Brunswick, Newfoundland and Labrador, and Saskatchewan require "foreign" class members to comprise a separate subclass. Newfoundland and Labrador and New Brunswick also require "foreign" class members to opt into the class proceeding.

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.

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

The parties craft their own settlement with the assistance of counsel. The settlement is not legally binding until it has been approved by the court.

If multiple class actions have been brought across several provinces or territories, a settling defendant will usually require that the settlement agreement cover all of the proceedings and that the overall settlement is contingent on obtaining the court's approval in each of the jurisdictions in which a claim has been filed. From a settling defendant's perspective, this provides a level of comfort in terms of finality because it avoids a scenario where a defendant ends up settling only some of the proceedings in the event the settlement is not approved by one or more of the courts.

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

Yes, judicial oversight is required to settle a class action. For example, in Ontario, a settlement will not be binding unless it has been approved by a court as fair, reasonable, and in the best interests of the class. Courts will consider many factors, including the likelihood of recovery or likelihood of success, the amount and nature of discovery, evidence, or investigation, and the proposed settlement terms and conditions. Class counsel fees must also be approved by courts. Similar factors are considered in other provinces.

Canadian courts will not 're-write' the terms of a proposed settlement agreement. The court will either

approve the proposed settlement or reject it. However, practically speaking, in a scenario where a court rejects a proposed settlement based on specified concerns, the parties will often re-negotiate the settlement to address those concerns and re-apply to the court for approval.

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

Findings by the Canadian Competition Bureau, the Privacy Commissioner of Canada, provincial securities regulators like the Ontario Securities Commission and Health Canada (with respect to food, drug, product and medical recalls), to name a few examples, are closely watched by plaintiff firms seeking to launch class proceedings.

However, class proceedings are civil actions pursued by private individuals or corporations, and not by regulators. Findings in regulatory proceedings are not binding in a civil class action. The parties to class proceedings may attempt to rely on documentary evidence from a regulatory proceeding, and may in rare cases seek to subpoena a witness from a regulator, however regulators usually have no direct role in class proceedings.

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

Canadian class action claims for environmental damages have been common for years, and it is expected that class actions related to ESG matters will become increasingly prominent in Canada. One area of increasing litigation concerns "greenwashing"—the practice of making false or misleading claims about the environmental benefits of a product or a practice. For example, the Competition Bureau concluded in a regulatory proceeding that a company made false or misleading recyclability claims. The Competition Bureau and the company reached a settlement agreement. Following the announcement of the settlement agreement, several class action lawsuits were launched against the company.

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

Third-party litigation funding for class actions is

generally permitted in Canada. These arrangements are increasingly popular as third-party funders are often prepared to indemnify plaintiffs against adverse cost awards, and provide funding for disbursements and expert costs. Funding is also available through public sources in Quebec and Ontario.

Third-party funding is subject to court approval. For example, in Ontario a court must be satisfied that (i) the agreement, including indemnity for costs and amounts payable to the funder under the agreement, is fair and reasonable, (ii) the agreement will not diminish the rights of the representative plaintiff to instruct the solicitor or control the litigation or otherwise impair the solicitor-client relationship, (iii) the funder is financially able to satisfy an adverse costs award in the proceeding, to the extent of the indemnity provided under the agreement. The third-party funding agreement must also comply with various procedural requirements.

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

Contingency fees are the norm in class proceedings. Typically, contingency fees will be set out in the retainer agreement between class counsel and the proposed representative plaintiff(s). The Alberta class action legislation explicitly requires that a contingency fee arrangement be set out in writing, witnessed, and formally served on the representative plaintiff. Usually, class counsel will be entitled to a percentage of the sum awarded in judgment or negotiated in a settlement.

Class counsel's fees are subject to court approval and courts will not automatically approve them. Courts will consider several relevant factors in determining what the appropriate fee is, including the complexity of the case, the risks for class counsel in bringing the case, and the monetary value of the matters in issue.

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

The Canadian default rule is that the losing party bears at least a portion of the winning party's legal costs, including in class action actions in most provinces. For example, in Ontario, a court may consider whether the proceeding was a test case, raised a novel point of law, or involved a matter of public interest in exercising its discretion regarding costs. In contrast, British Columbia has legislated that, subject to a few exceptions, parties

are responsible for their costs in class actions.

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

Provincial legislatures regularly update and refine their class action regimes. For example, Ontario recently introduced significant amendments to its *Class Proceedings Act, 1992*. Among other changes, Ontario introduced modifications to the certification test, mandatory dismissals for a plaintiff’s delay to certify the class action within a specified timeframe, and changed the appeal routes of certification decisions.

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