

# Canadian Experience with Class Actions



Class actions have a significant presence on the Canadian litigation landscape. Although only a limited number have progressed to trial, plaintiff firms are commencing complex class actions with increasing frequency. Many of the proposed class actions in Canada mirror proceedings in the United States. There are, however, important differences in the legal requirements and practices between the two jurisdictions. This note provides an overview of class action procedure and recent developments in the area of securities class actions.

The Goodmans LLP class action team has extensive experience dealing with all aspects of Canadian class actions, and acting as co-defence counsel in cross-border cases. We are recognized as go-to counsel for both Canadian based and cross-border cases.

## The Co-ordination of Class Actions in Canada

The vast majority of class actions commenced in Canada are within the exclusive jurisdiction of the Provincial Courts and outside of the jurisdiction of our Federal Court System. As a result, claims arising from the same fact pattern involving similar defendants can be commenced in multiple provinces. There is no procedure (akin to the Multi-District Litigation Panel in the U.S.) for consolidating and managing parallel proceedings in different provincial jurisdictions. This practice can lead to preliminary stay motions by defendants and carriage motions among the competing plaintiffs' firms to appoint a representative plaintiff and class counsel.

Defendants are often required to retain lead counsel in one province to manage the litigation in various provinces. Goodmans assumes this lead role in most cases where its client(s) has been sued in multiple Canadian jurisdictions.

The Ontario *Class Proceedings Act* has been interpreted and applied to permit the certification of national and world-wide classes, making Ontario one of the more active Canadian class action venues. Goodmans lawyers also appear in cases in other Canadian provinces, and work regularly with local counsel in those jurisdictions.

## The Certification Requirements

Ontario courts consider whether to certify class actions on a summary motion without *vive voce* evidence. Class actions will be certified in Ontario if: (i) the claim discloses a cause of action; (ii) an identifiable class of two or more persons would be represented by the plaintiff; (iii) the claims or defences raise common issues; (iv) a class proceeding offers a preferable procedure for resolving the common issues; and (v) the plaintiff will fairly represent class interests, presents a workable plan, and does not have an interest that conflicts with the class interests. Other provinces have similar but not identical requirements for class certification.

Compliance with each of the certification requirements in any particular case is evaluated in the context of the three principal objectives of Canadian class action legislation, which are to promote (i) access to justice, (ii) judicial economy, and (iii) behaviour modification.

## The Test for Class Certification is Procedural, Not Merits-Based

Certification motions are not intended to evaluate the merits of a proposed class action. Often, defendants do not even file their Statements of Defence before the certification motion. However, the courts have mandated that plaintiffs present some factual basis to establish the certification criteria other than the requirement that the Statement of Claim disclose a cause of action. Plaintiffs must establish a minimal evidentiary basis for the causes of action to be asserted and determined on a class-wide basis. Failure to do so has contributed to the denial of certification in a few cases.

The requirement that there be some factual basis to support proposed common issues invites defendants to consider offering a substantive and merits-based answer to the plaintiff's certification request, although not required to do so. This must be balanced against the low evidentiary threshold the plaintiff has to overcome and the risk that a plaintiff could be given an early opportunity to test a defence in a more comprehensive manner than would otherwise be available at this stage of the proceedings. Unlike the discovery process in most states or under the U.S. federal rules of procedure, in Canada the right to conduct examinations for discovery (or depositions) does not exist at the certification motion stage. Thus, a defendant who submits affidavits on the certification motion which are related to the merits, presents the plaintiffs with an opportunity for cross-examination which they would not otherwise have.

## Preliminary Motions Practice

There are often no preliminary motions prior to the certification motion. Any motion to strike is typically rolled into the hearing on the certification requirement that the plaintiff's claim must disclose a cause of action. Even fact-based preliminary challenges based upon the expiry of a limitation period, will often be dealt with in conjunction with the certification motion (or may even be reserved for the defence at the common issues trial). Usually, preliminary motions are procedural in nature, and meant to deal with competing claims in more than one Canadian jurisdiction and/or carriage issues.

## The Impact of the Loser Pays Cost Regime

Certification motions are becoming increasingly complex because of defendants' growing interest in challenging certification with substantive evidence. The result is that the certification process can be extremely expensive. This creates an additional risk for both plaintiffs and defendants because in certain Canadian provinces, including Ontario, parties who are unsuccessful on preliminary motions and at trial are presumptively responsible for bearing a significant portion of the successful party's legal costs and all of its reasonable expert fees. In the case of an unsuccessful plaintiff, these costs may be adjusted downward to account for whether the class proceeding was a test case, raised a novel point of law, or involved a matter of public interest. In cases where class counsel has given an indemnity to the representative plaintiffs, the risk to class counsel is high.

A plaintiff's counsel may receive a success premium for the risk assumed in successfully prosecuting a motion or action. However, that premium is generally regarded as a contingency fee and is levied against the settlement or judgment amount and is not required to be paid by the unsuccessful defendant.

A plaintiff's cost exposure can be mitigated if the plaintiff obtains the support of the Class Proceedings Fund, a fund maintained and administrated by the Law Foundation of Ontario. Plaintiffs may apply to the Fund for financial support for their case. If funding is provided, the Fund receives 10% of any recovery, but it will also indemnify the representative plaintiffs against any adverse cost award if the action is unsuccessful. Increasingly, plaintiffs and plaintiffs' counsel are also reducing their exposure to cost awards through arrangements made for cost sharing with other firms or by purchasing an indemnity from third party litigation funders in exchange for a share of any recovery.

## Securities Class Actions

Secondary market liability claims are the focus of many of the more recently issued proposed class actions in Ontario. Several of these claims have involved issuers listed on exchanges in the United States and Canada. It is not uncommon for an issuer to be required to defend proposed class actions arising from the same facts in parallel Canadian and American proceedings.

Secondary market liability in Ontario and certain other provinces is governed by relatively recent legislation. The amendments to the Ontario Securities Act that created a statutory cause of action for secondary market liability became effective in December 31, 2005.

A unique feature of the regime for secondary market liability in Ontario is that it requires a plaintiff to obtain leave of the court to commence any secondary market liability action. Leave is granted if the claim is brought in good faith, and if the court is presented with evidence demonstrating there is a reasonable possibility the action will be resolved in the plaintiff's favour at trial.

To date, the Ontario courts have decided only four leave motions. In each case, the court set a relatively low threshold for establishing a reasonable possibility of success. Goodmans has represented defendants in two of these cases in which, despite the low threshold, leave was denied.

The Ontario statutory regime for secondary market liability is particularly noteworthy because it does not require plaintiffs to establish reliance on the impugned representations. While this makes it easier to advance a claim, significant caps on damages limit the potential liability of issuers, directors, officers and the issuer's advisors. The issuer, for example, is only liable up to 5% of its market capitalization measured as of the date of the alleged misrepresentation.

Common law claims of negligent misrepresentation have generally been denied certification because Canadian law traditionally required proof of individual reliance to establish this cause of action, and reliance could therefore not be determined as a common issue. Negligent misrepresentation claims however, are often pleaded as a concurrent cause of action with the statutory secondary market claims. This is done to create the risk for the defendant that a plaintiff may

be able to avoid the liability limits on damages that apply to statutory claims. Recent cases are divided on the issue of whether the requirement to prove individual reliance remains a barrier for certification for the common law claims.

Few class actions have proceeded to trial in Canada. Goodmans acted on the first and only class action for prospectus misrepresentation tried in Canada so far. Goodmans successfully defended two of the issuer's officers through certification, trial and appeals to the Court of Appeal and Supreme Court of Canada.

## Goodmans' Experience

Goodmans has extensive experience with class actions in a broad array of subject areas, including securities, product liability, pensions, environmental and competition and price fixing. Our recognized experts in class actions include: Benjamin Zarnett, Alan Mark, Jessica Kimmel, Suzy Kauffman and David Conklin. Goodmans lawyers are identified as leading class action litigators in numerous leading directories such as *Chambers Global*, *Benchmark Canada*, *Lexpert* and *Best Lawyers in Canada*.

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