EMPLOYMENT CLASS PROCEEDINGS IN CANADA: OVERVIEW, KEY DISTINCTIONS AND RECENT TRENDS

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Jeffrey Goodman and Prateek Awasthi

Mathews Dinsdale and Clark LLP

Toronto, Ontario

OVERVIEW OF CLASS PROCEEDINGS IN CANADA

1. This paper provides an overview of class proceedings in Canada, identifies key distinction between the American and Canadian approaches to class proceedings, and reviews recent trends in employment-related class proceedings.

2. Most employment disputes, including most class proceedings,[1] tend to be mostly litigated in **provincial courts** and under **provincial laws**. There are three main reasons for this:

   (a) The vast majority of employers and employees work in industries that are governed by provincial employment law. Less than one-tenth of Canadians work in federally regulated industries, such as banking, transportation, radio and television broadcasting, and telecommunication, which are subject to the *Canada Labour Code* (RSC 1985 c. L-2).[2]

   (b) The exclusive authority to make laws in relation to civil procedure rests with the provinces, under Canada's Constitution,[3] and as a result, there exists separate legislation in each of the ten provinces dealing with the rules of civil procedure for class proceedings.[4] The three territories and all federal courts apply the *Federal Courts Rules* (SOR/98-106), part 5.1 of which deals with class proceedings.

   (c) Provincial superior courts have broad and inherent jurisdiction over matters of both provincial and federal law, while federal courts are creations of statute, and only have jurisdiction over federal legislation. Provincial superior courts are empowered

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[1] This paper uses the term "class proceedings", since it includes both "actions" and "applications", which are two ways of pursuing class litigation in Canada. Actions are the ordinary procedure, however, applications may be used where a trial can be conducted without live testimony.
[2] Statistics Canada, *Survey of Employees under Federal Jurisdiction* (2022).
[3] Section 92.14 of the *Constitution Act, 1867* (30 & 31 Vict, c 3)
[4] *Alberta Class Proceedings Act, S.A.* 2003, c. C-16.5, s. 2; *Québec Civil Code of Procedure*, CQLR, c. C-25, art. 1002; New Brunswick *Class Proceedings Act*, R.S.N.B. 2011, c. 125, s. 3; British Columbia *Class Proceedings Act*, R.S.B.C. 1996, c. 50, s. 2; *Manitoba Class Proceedings Act*, C.C.S.M. c. C130, s. 1; Saskatchewan, *The Class Actions Act*, S.S. 2001, c. C-12.01, s. 2; *Newfoundland and Labrador Class Actions Act*, S.N.L. 2001, c. C-18.1, s. 2; Nova Scotia *Class Proceedings Act*, 2007, c. 28, s. 1; Ontario *Class Proceedings Act*, 1992, S.O. 1992 c. 6; Prince Edward Island *Class Proceedings Act*, R.S.P.E.I. 1988, c C-9.01;

to certify multi-jurisdictional class proceedings with a "national class" that includes extra-territorial class members.

3. Similar to the United States, Canada is primarily a common law jurisdiction (except for Quebec, which follows civil law). However, a key difference is that Canada does not allow **"at will"** employment agreements; there is a common law presumption that, absent just cause (as defined under both the common law and provincial wage and hour legislation), employment agreements of an indefinite duration can only be terminated by providing reasonable notice. Employment agreements can rebut that common law presumption through clear and unequivocal language, but they cannot contract out of minimum standards entitlements under provincial statutes that require, amongst other things, notice of termination or pay in lieu of notice.[5]

4. As a result, the most commonly litigated employment-related class proceedings in Canada are for claims for statutory entitlements under minimum standards legislation, in particular **overtime** and **vacation pay**,[6] or in relation to **mass terminations**.[7]

5. More recently, there are a number of "**misclassification**" class proceedings, in which representative plaintiffs alleged they were denied statutory entitlements under provincial or Federal wage and hour legislation available to employees by being wrongly classified as exempt employees or contractors.[8]

6. In contrast, in the employment context, class proceedings are rarely litigated on issues related to **human rights/discrimination, pay equity,** and **workers' compensation claims**, amongst others. This is because in several provinces including Ontario, there are

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[5] *Machtinger v. HOJ Industries Ltd.*, 1992 CanLII 102
[6] See for example *Wicke v. Canadian Occidental Petroleum Ltd.*, 1998 CanLII 14863 (ON SC); *Kumar v. Sharp Business Forms Inc.*, 2001 CanLII 28301 (ON SC); *Fulawka v. Bank of Nova Scotia*, 2010 ONSC 1148 and 2012 ONCA 443; *Fresco v. Canadian Imperial Bank of Commerce*, 2012 ONCA 444; *McCracken v. Canadian National Railway Company*, 2012 ONCA 445
[7] *Webb v. K-Mart Canada Ltd.*, 1999 CanLII 15076; *Isaacs v. Nortel Networks Corp.*, 2001 CanLII 28314; *Kafka v. Allstate Insurance Company of Canada*, 2011 ONSC 2305.
[8] *Omarali v Just Energy*, 2016 ONSC 4094; *Sondhi v Deloitte*, 2017 ONSC 2122; *Navartnarajah v. FSB Group Ltd.*, 2021 ONSC 5418; *Heller v. Uber Technologies Inc.*, 2021 ONSC 5518; *Davis v. Amazon Canada Fulfillment Services, ULC*, 2023 ONSC 3665; *Rosen v. BMO Nesbitt Burns Inc.*, 2013 ONSC 2144; *Berg v Canadian Hockey League*, 2017 ONSC 2608

specialised tribunals with exclusive or concurrent jurisdiction to deal with these issues, and one of the requirements for certifying a class proceeding is that the class proceeding must be the preferable means for resolving the common issues in the action. Where there are other reasonably available means of resolving claims, it is difficult to show that a class proceeding the preferable means.[9] With discrimination claims in particular, in the absence of systemic policies, it is often difficult to show that there is sufficient commonality.

7. The rules for class proceedings are broadly similar across Canada's provinces and territories, and for the sake of convenience, this paper primarily refers to the provisions of Ontario *Class Proceedings Act*, which is by far the largest province by population, although where notable differences exist across provinces, those are highlighted as well.

8. In general, Canadian jurisprudence recognizes that class proceedings provide three important advantages over a multiplicity of individual suits:[10]

   (a) First, by aggregating similar individual actions, class proceedings serve *judicial economy* by avoiding unnecessary duplication in fact-finding and legal analysis.

   (b) Second, by distributing fixed litigation costs amongst a large number of class members, class proceedings improve *access to justice*;

   (c) Third, class proceedings encourage actual and potential wrongdoers to *modify their behaviour* to take full account of the harm they are causing, or might cause, to the public.

9. While these objectives are not explicitly incorporated into the test for certifications, they are routinely referred to by Courts to assist legal analysis, and in general, a positive view of class proceedings has historically created a relatively low threshold for certification that allowed class proceedings to proliferate widely.

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[9] *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158, at para. 31

[10] Ontario Law Reform Commission, *Report on Class Actions* (1982), vol. I, at pp. 117-45; Ministry of the Attorney General, *Report of the Attorney General's Advisory Committee on Class Action Reform* (February 1990), at pp. 16-18; *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534, 2001 SCC 46 at paras. 27-29.

10. It is a common feature that class proceedings legislations in Canada do not create new causes of action, but rather they lay down the rules for the certification, conduct and outcomes of class proceedings. In Canada, class proceedings generally have three stages:

    (a) **Certification** – where the Court determines whether the proceeding ought to proceed as a class;

    (b) **Common issues trials** – where common issues that were certified are resolved either through a common issues trial or other means; and

    (c) **Individual issues** – if necessary, to determine the entitlement of individual class members to relief, including by individual issues trials.

11. Each of these three stages is described in further detail below.

(a) Certification

12. A class proceeding is commenced like any other civil lawsuit, by a serving and filing a statement of claim or a notice of application (in Ontario) or by a notice of civil claim, petition, or requisition (in British Columbia).[11]

13. In Ontario, a proceeding must expressly indicate that it is commenced under the Ontario *Class Proceedings Act*, and even so, it requires certification to move forward as a class proceeding. In other provinces, a proceeding is not considered a class proceeding until it has been certified as a class proceeding by the provincial court.

14. Either party can move for an order for certification, although it is almost always the plaintiff who brings the motion.

15. The criteria for certification, under section 6 of the Ontario *Class Proceedings Act*, are as follows:

    (a) the pleadings or the notice of application discloses a cause of action;

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[11] *British Columbia Supreme Court Civil Rules*, B.C. Reg. 168/2009, r. 2-1.

(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 who,

(i) would fairly and adequately represent the interests of the class,

(ii) 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

(iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

16. Other provincial legislations have similar certification criteria, although some differences exist in their wording. In Quebec, this step is called "authorization" and the rules are somewhat different, as the request proceeds assuming the facts alleged to be true, and does not require any affidavit evidence in support of the application. The defendant may file responding affidavits or cross-examine the plaintiff, but the plaintiff only needs to show they have an arguable case.

17. Generally speaking, certification in Canada tends to be a lower bar than in the United States. As a result, class proceedings have become increasingly common, including as a means of resolving employment-related disputes, raising an increasing array of complex issues, such as directors' liability, and common employer claims against multiple defendants.[12]

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[12] *Berg v Canadian Hockey League*, 2017 ONSC 2608

18. In some situations, class proceedings have continued to proliferate despite judicial efforts. Take for example, misclassification class proceedings. Ontario courts have limited certification of such cases to two situations:[13]

    (a) where there is class-wide job function similarity; and

    (b) where the common issues were focused on the systemic nature of the defendant company's policies.

19. Where courts are compelled to ask in a misclassification case whether a class member is an employee, or if the case is focused on individual class members' entitlements, courts have generally refused to certify them since they "collapse under the weight of an 'it depends' reality".[14] Despite this, as a judge recently observed, "class actions alleging the misclassification of employees as independent contractors are increasing",[15] adding strain to an over-burdened judicial system. As a result, legislators and judges have been challenged to raise the threshold of certification.

20. A motion for certification, if it succeeds, results in an order that names a representative plaintiff or plaintiffs, defines the class, the common issues, the claims, defences and reliefs, and includes a workable plan.[16] Over the years, some of these requirements have been relaxed by courts, a practice best illustrated by the low standard of "appropriate" applied for a litigation plan.

21. Most provinces apply an **opt-out** model, but British Columbia, Newfoundland and New Brunswick apply a hybrid opt-in/opt-out model dependent on the residence of the class member.

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[13] *McCracken v. Canadian National Railway Company*, 2012 ONCA 445
[14] *Omarali v Just Energy*, 2016 ONSC 4094 (CanLII), at para 3
[15] *Sondhi v Deloitte*, 2017 ONSC 2122 (CanLII), at para 24
[16] Section 8, Ontario CPA.

22. Ordinarily, respondents tend to wait until certification to file a statement of **defence**, although some members of the judiciary insist on pleadings being fully exchanged before the argument of the certification motion.[17]

23. While **discovery** normally takes place after certification, in some cases, courts may allow motions for production of documents prior to certification, if it is shown by the moving party that production is necessary to inform issues relevant on certification.[18]

(b) Common Issues trial

Following certification and the close of pleadings, the class proceeding moves forward with documentary and oral discovery, pre-trial motions, exchange of expert reports, following which, common issues are usually determined through a trial or summary judgment motion, where the normal rules of civil procedure apply. Unlike in the United States, most class proceedings in Canada are not heard by a jury, but are tried before a judge alone.

(c) Individual Issues

24. Once common issues have been determined, courts determine how to address individual issues, liability and damages, and judges exercise considerable discretion in deciding whether to do so through further hearings, mediation or any other manner.[19]

25. Where the issue of monetary relief can be determined without individual assessments, aggregate assessments are available, as a form of "rough justice".[20] In a class proceeding involving employee claims for vacation pay and statutory holiday pay, an Ontario court found a reasonable likelihood that the conditions for an aggregate assessment would be satisfied at a common issues trial.[21]

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[17] *Pennyfeather v Timminco Limited*, 2011 ONSC 4257 (S.C.J.), (Perrell J.) at para. 9.
[18] *Mancinelli v Royal Bank of Canada*, 2017 ONSC 87, at para 41; *Davidson v. T.E.S. Contract Services Inc.*, 2024 ONSC 1044, at para 20; *Mentor Worldwide LLC v Bosco*, 2023 BCCA 127.
[19] Section 26.2, Ontario *Class Proceedings Act*.
[20] Section 24, Ontario *Class Proceedings Act;* *Markson v. MBNA Canada Bank*, 2007 ONCA 334; *Ramdath v George Brown College*, 2014 ONSC 3066
[21] *Singh v. RBC Insurance Agency Ltd.*, 2023 ONSC 1439, at para 179

26. In all provinces, costs are awarded to the successful party, except in British Columbia, Manitoba and Newfoundland (unless the action is vexatious, frivolous, or abusive). The amounts awarded in costs can very considerably from province to province. In Ontario, a party could recover most or all of its costs depending on the level of success they achieved,[22] whereas in provinces, such as New Brunswick, the cost awarded are often a fraction of the expended costs, regardless of the success of the parties.

27. Having reviewed some provincial features of Canadian laws related to class proceedings, we can now review certain key distinctions with the United States, where there has generally tended to be a higher threshold for certification.

KEY DISTINCTIONS BETWEEN THE AMERICAN AND CANADIAN APPROACHES

28. It is not a coincidence that there are some similarities between Canadian and American rules laws relating to class proceedings. Historically, Canadian class proceeding legislations were based on Rule 23 of the US *Federal Rules of Civil Procedure,* and include the following **key similarities**:[23]

(a) each claim is based on a separate contract;

(b) class members seek resolution of both common and individual issues;

(c) not all members of the class can be identified;

(d) each class member's damages require individual assessment;

(e) there is no predefined fund for the payment of a judgment;

(f) class members seek different remedies; and

(g) classes include sub-classes with separate common issues.

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[22] *Pearson v. Inco Ltd.*, 2006 CanLII 7666 (ON CA) at para. 13; *Delorme v. Allstate Insurance Company of Canada*, 2023 ONSC 4271, at para 27

[23] Walker, Janet, *"Class Proceedings in Canada - Report for the 18th Congress of the International Academy of Comparative Law"* (2010). Paper 41. http://digitalcommons.osgoode.yorku.ca/all_papers/41 (Retrieved February 27, 2024).

29. Some **key differences** between the two modes are illustrated by section 6 of the Ontario *Class Proceedings Act*, which states that the following features do not prevent a case from being certified as a class proceeding:

(a) The relief claimed includes a claim for damages that would require individual assessment after determination of the common issues;

(b) The relief claimed relates to separate contracts involving different class members;

(c) Different remedies are sought for different class members;

(d) The number of class members or the identity of each class member is not known; or

(e) The class includes a subclass whose members have claims or defences that raise common issues not shared by all class members.[24]

30. A key difference at the certification stage, is that the **evidentiary standard** applied in Ontario and much of the rest of Canada, is "some basis in fact", which does not require resolving conflicting facts and evidence, and is a lower standard than the American approach of making factual determinations at the certification stage on "a preponderance of the evidence".[25] Canadian courts have taken the view that they are "ill-equipped to resolve conflicts in the evidence or to engage in the finely calibrated assessments of evidentiary weight" at the certification stage.[26] A lower evidentiary standard contributes to a lower threshold for certification in Canada.

31. Another key difference is that until recently, there was generally no requirement in Canada that **common issues** "predominate" over issues affecting individual members.[27] Where individual issues overwhelm common ones, a class proceeding is not considered the "preferable" method for resolving the claim, but there was no requirement to show

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[24] *Ibid.*
[25] *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 (CanLII), [2013] 3 SCR 477, at para 102
[26] *Cloud v. Canada (Attorney General)*, 2004 CanLII 45444 (ON CA), at para 50
[27] *Banman v. Ontario*, 2023 ONSC 6187 (CanLII), at paras. 185 and 317

"predomination", as in the Untied States.[28] However, as discussed in further detail below, recent amendments in Ontario have brought that factor into consideration.[29]

32. One final important difference is that Canadian Federal Courts do not have the power of US Federal Courts to coordinate and case manage **multi-jurisdictional proceedings** relating to the same subject matter, which allows for several individual cases to run in parallel. Instead, such claims are brough as class proceedings in Canada. Since 2018, it has been possible to certify a national class proceeding in British Columbia on an opt-out basis, making it an attractive jurisdiction for plaintiffs. In Alberta, British Columbia, Ontario and Saskatchewan, a party may bring a motion asking to stay an action where there is an overlapping class proceeding in another province. Due to the new amendments in Ontario, at certification, the court is required to consider whether there is another class proceeding pending in another province involving the same subject matter and, if so, to determine whether it would be preferable for some or all of the claims in the Ontario action to be resolved in another proceeding.

33. Overall, Canadian legislation and courts have historically provided a lower threshold for certification than in the United States for certification and this has resulted in an increasing number of class proceedings being brought and certified, particularly in British Columbia, Ontario and Quebec. However, more recently, courts have also responded by trying to raising the threshold for certification through a variety of approaches, as discussed below.

EMERGING ISSUES IN CANADIAN CLASS PROCEEDINGS

34. In recent years, Canadian provinces have sought to address the proliferation of class proceedings. In Ontario, amendments to the *Class Proceedings Act*, came into effect in October 2020,[30] and now require that: (i) the proposed class proceeding be a superior means of determining the rights or entitlement of the class members, as compared with, *inter alia*, any quasi-judicial or administrative proceedings; and, (ii) that questions of fact or law

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[28] *Hollick v Toronto (City)*, 2001 SCC 68 (CanLII), [2001] 3 SCR 158 at paras. 28 – 31; *Rumley v British Columbia*, [2001] 3 S.C.R. 184, at para. 35
[29] Smarter and Stronger Justice Act, 2020, S.O. 2020, c. 11 - Bill 161
[30] Smarter and Stronger Justice Act, 2020, S.O. 2020, c. 11 - Bill 161

common to the class members predominate over the individual issues. These amendments have brought Ontario law closer in line with the American model, and is likely to increase the threshold for certification and more and more class proceedings being launched in provinces like British Columbia.

35. The judiciary has also done its part to raise the threshold for certification, as seen from the following decisions:

(a) The "**preferability**" analysis has been interpreted more strictly. In *Banman v Ontario* (2023 ONSC 6187) (Perrell J.), the Ontario Superior Court interpreted the new amendments to section 5(1.1) of the CPA, holding that a proposed class proceeding "must" be superlative to the alternatives to satisfy the preferable procedure criterion, and common issues "must" predominate as a whole over individual issues. Common issues will not predominate when they will necessarily break down into individual issues, and that common issues should not only be common when cast at the most general level. A class proceeding will not be preferable if at the end of the day, claimants would face the same economic and practical hurdles they faced at the outset of the proposed class proceeding.

(b) The increasing application of the preferability analysis is highlighted by the recent decision in *Navartnarajah v FSB Group Ltd*., 2023 ONSC 2574, in which the Court **decertified** a class proceeding 95% of the class members had decided to opt out of the process, on the basis that a class proceeding was no longer preferable over an ordinary civil proceeding.

(c) There are limits being imposed on **multi-jurisdictional proceedings**. Recently, the Alberta Court of the King's Bench refused to certify a misclassification class proceeding on a national basis, but limited it to the province of Alberta.[31] The Court held that while there are high-level similarities in employment legislation there is still variation, such as how an employer or employee is defined. Further, there are different administrative regimes in different provinces, which may provide a

[31] *Virani v Uber Portier Canada Inc*, 2023 ABKB 240

preferred remedy for proposed class members in those provinces. Therefore, a multi-jurisdictional class proceeding was not the preferred procedure.

(d) There is stricter scrutiny of the **cause of action**. In *Gebien v Apotex,* 2023 ONSC 6792, a proposed class proceeding against the manufacturers and distributors of opioids, found it was plain and obvious that no reasonable causes of action were raised against a group of distributor defendants pursuant to section 5(1)(a) of the CPA due to a lack of material facts pleaded connecting the distributor defendants to the plaintiff's allegations. The court also found the plaintiff had no legally viable common design claim that would ground joint and several liability of the defendants, but ultimately held the plaintiff could advance a claim as against 14 groups of manufacturer defendants with a representative plaintiff joined for each of these groups, asserting certain statutory and negligence claims, which would satisfy the cause of action criterion (if properly pleaded).[32]

36. Overall, legislators and judges in Ontario have sought to "raise the threshold, heighten the barrier or make more rigorous the challenge" of certifying a class proceeding, with an emphasis on the preferability criterion.[33] It is expected that these amendments and decisions will assist employers in challenging class proceedings at certification, it remains to be seen how much they address the proliferation of class proceedings in Canada.

CONCLUSION

37. The Canadian class proceedings landscape is dynamic and rapidly evolving. As more plaintiffs start taking advantage of the availability of class proceedings as an avenue, in particular for employment-related claims, courts will be challenged to heighten the barrier for certification while ensuring class proceedings promote judicial economy, result in behaviour modification, and increase access to justice.

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[32] See also *Lewis v Uber Canada Inc*, 2023 ONSC 6190
[33] *Banman v Ontario*, 2023 ONSC 6187, at para. 317