Class Actions or Crass Actions? The Latest on Class Action Litigation in North America

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<u>Recent Developments in Class Actions in Canada: What is Hot and What is Not</u>

This session will focus on some of the recent trends in Canadian class actions and provide some thoughts on working with counsel involved in parallel proceedings in other countries.

<u>Viability of National Class Actions – Hot but with Mixed Success</u>

Class actions were first introduced in Canada in 1978 when Quebec amended its *Code of Civil Procedure* to allow for representative claims. Ontario was the first common-law province to introduce class action legislation in 1992, followed closely thereafter by similar legislation in British Columbia. As of 2026 all provinces have class action legislation. Since 2002 class proceedings have also been available in federal court in relation to claims regarding matters under federal jurisdiction such as intellectual property, maritime law, and other claims against the federal government.

While the permissibility of national class actions was the subject of debate for many years, Canadian courts now frequently certify national classes. In November 2024, the Supreme Court of Canada confirmed the constitutionality of legislation enacted in British Columbia that authorized the province to bring a class action on behalf of other provincial governments and the federal government for the recovery of health care costs arising from the opioid epidemic.[1] Typically a class action brought on behalf of a national class means that the class includes Canadian residents across the country. However, non-residents may be required to opt in or out to participate in the action, depending on the jurisdiction.

While national classes may bring efficiency in certain respects there are competing interests to balance in the implementation. For non-resident class members who fail to opt out where the claim is brought in an opt out jurisdiction, the doctrine of *res judicata* may preclude them from asserting a similar claim in their home province. In certain contexts, the class members may perceive the chances of success of the claim to be greater in their home province. Defendants who provide services or operate across the country may save a considerable amount in legal fees and costs by avoiding parallel claims being brought in multiple jurisdictions across the country, however, the larger class size may make the claims harder to settle or resolve. The courts too may have an interest in avoiding parallel claims in multiple jurisdictions to avoid inconsistent findings of facts

[1] *Sanis Health Inc. v. British Columbia*, 2024 SCC 40.

and outcomes. However, the laws are not identical across provinces and there is an interest in ensuring that local laws are interpreted by those appointed in those jurisdictions.

The issue of the court of British Columbia's territorial competence in relation to a claim involving non-resident defendants and non-resident class members was recently addressed in *Cline v. Gymnastics Canada*, 2025 BCSC 146.[2] The court determined that it did not have jurisdiction over the defendant in respect of claims of its member gymnasts who did not undertake gymnastics in British Columbia. The court confirmed that the fact that an action is a proposed class proceeding does not negate the requirement that the court have territorial jurisdiction over the defendants.[3]

There are also statutory restrictions that have been argued prevent national classes. One example of that is in the context of consumer protection legislation claims.[4]

Multiplicity of Proceedings Involving Same Subject and Same Defendants

The ability to prevent or control multiple class actions relating to the same subject matter and against the same defendants being brought in different provinces continues to prove challenging.[5] With respect to the former, multijurisdictional protocols have been adopted by provincial practice directions to help courts and litigants manage overlapping proceedings and avoid duplication. However, in practice, they are rarely used and of limited utility. When different plaintiff firms commence competing class actions, the "lead" class action is often determined through carriage motions. While there has been a rise of multi-plaintiff firm consortiums to avoid carriage battles, there continue to be territorial battles in many instances.

In some cases, there are even overlapping claims brought against the same defendants in a single jurisdiction. Where that occurs the court may issue a stay on the basis of an abuse of process to prevent a multiplicity of proceedings.[6]

There is no special federal procedure for multidistrict litigation in Canada, although an unofficial "mass tort" model has emerged in recent years.

BC and Quebec Are Hot Jurisdictions

Class action jurisprudence can vary across the country. This has resulted in certain jurisdictions being preferred venues for launching class proceedings, particularly in light of the ability to bring the claim on behalf of a national class.

In 2025, Quebec continued to lead the pack. Almost ½ of all class action filings in Canada were made in Quebec. This is largely as a result of the low authorization threshold under its rules of

[2] Appeal quashed, Cline v. Fédération de Gymnastique du Québec,2025 BCCA 132.

[3] *Cline v. Gymnastics Canada*, *supra*., at para.88.

[4] *Consumer Protection Act*, RSA 2000, c.C-26.3 ["consumer may commence an action in the Court of Queen's Bench . . ."]; *The Consumer Protection Act*, CCSM c. C200; *Consumer Protection and Business Practices Act*, SNL 2009, c.C-31.1; *The Consumer Protection Act*, SS 1996, c.C-30; *Seidel v. TELUS Communications Inc.*, para.34.

[5] *Ewert v. Nippon Yusen Kabushiki Kaisha*, 2022 BCSC 1908; *Fantov v. Canada Bread Company, Limited*, 2019 BCCA 447; *David v. Loblaw*, 2018 ONSC 6469.

[6] *Kett v. Google LLC*, 2023 BCCA 350.

Civil procedure. However, because of the unique legislative context, class actions filed in Quebec are largely brought exclusively on behalf of residents of Quebec.

British Columbia was the second most active jurisdiction in Canada. Ontario amended its Class Proceedings Act in 2020. The amendments are perceived by plaintiffs' class counsel to have raised the bar for certification in Ontario. As a result, British Columbia has become the preferred jurisdiction for the filing of national class actions. These claims are typically brought on behalf of all residents of Canada, other than Quebec (although in some cases they also include residents of Quebec). Generally, when they exclude residents of Quebec, a parallel proceeding will be brought in Quebec. Sometimes proceedings are stayed or paused in one of the jurisdictions in which the claim is brought.

The Rules of Evidence Apply

In a proposed class action proceeding, the usual rules of evidence apply – there are no modified rules of admissibility.[7]

As noted by the court in *Huebner*[8], on a certification motion:

"[T]he court has . . . an important gate-keeping role with respect to the admissibility of evidence, and it is not appropriate or fair to shirk that responsibility by saying let it in, and the objections will go to weight rather than admissibility".[9]

This includes admissibility of expert opinion evidence.

One of the requirements at a certification hearing is for the plaintiff to demonstrate "some basis in fact" for all of the certification requirements other than the existence of a cause of action. In Heubner, the court confirm that that the "some basis in fact" standard must be met with evidence that satisfies the "usual criteria for admissibility." This has been confirmed to refer to the commonl law rules of evidence, for example, that opinion evidence is only admissible from a certified expert, whether the court has received their qualifications, information and assumptions on whcht the opinion is based, and the instructions given.[10]

Privacy, Consumer Protection and Competition Class Actions are Hot

Privacy class actions, including those related to the use of AI, have been on the rise over the course of the last few years. This includes both data breach claims and claims related to the alleged unauthorized collection, storage and use of data by various platforms. This has resulted plaintiffs' counsel seeking to apply long-standing legal doctrines and statutes to new technologies in ways not previously contemplated. The jurisprudence and legislation in this area is still emerging and this will likely be a hot topic for some time to come.

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[7] *Ernewein v. General Motors of Canada Ltd*., 2005 BCCA 540, at para.31.

[8] *Huebner v. PR Seniors Housing Management Ltd., D.B.A. Retirement Concepts*, 2021 BCSC 837.

[9] *Huebner*, *supra*., at para.15.

[10] *British Columbia v. Apotex, Inc.*, 2025 BCSC 92, at para.176.

Consumer protection claims continue to be a mainstay of class proceedings. Many relate to alleged misrepresentations (either by commission or omission) in the user interfaces of online businesses.

Competition claims have also been on the rise. Allegations of price-fixing in a multitude of contexts again often engaging businesses with digital platforms.

Arbitration Clauses Precluding Class Proceedings – Hot

Since the Supreme Court of Canada decision in ***Uber Technologies Inc. v. Heller***, 2020 SCC 16, there have been numerous decisions upholding arbitration clauses and staying class proceedings pending arbitration. In *Uber*, Heller, an Uber driver, argued that the standard form agreement which required arbitration of disputes was unconscionable. If unconscionable and unenforceable the claim would not be arbitrable. The SCC held that in "abnormal" cases where there would be a brick wall that would prevent the jurisdictional question (in that case whether the arbitration clause was unconscionable) from being determined if it were referred to an arbitrator for determination the court may determine the jurisdictional question. The court concluded that the arbitration clause was unconscionable.

The cases that have been decided since have distinguished *Uber* on many grounds including: consumer agreements vs. commercial agreements; lack of evidence of a brick wall; different arbitral rules with lesser fees and provisions that allow for lower value claims to be dealt with more cost-effectively and expeditiously, and no elements of necessity or dependence that would support a finding of unconscionability.[11]

Cost Recovery and Public Harms Litigation

Canadian governments have enacted legislation to enable them to make claims against defendants for alleged mass and toxic torts and public harms. It started with tobacco, it continues with opioids and it is looking to expand to a host of other alleged public harms running the gamut from high sugar beverages to conditions said to relate to addiction to devices and video games.

In March 2024, the government of British Columbia announced its ambition to sue a wide range of companies—including social media operators, vaping product manufacturers, and makers of energy drinks—for costs incurred addressing the alleged public health effects of their alleged mass torts. To that end, the government introduced the *Public Health Accountability and Cost Recovery Act* (also known as Bill 12). However, Bill 12 received significant backlash and, coming shortly before an election, the ambitious legislation was paused.

On June 23, 2024, British Columbia filed a proposed national class action on behalf of Canadian governments against manufacturers of perfluoroalkyl and polyfluoroalkyl substances (PFAS), sometimes referred to as "forever chemicals". This claim was filed without special-purpose health care cost recovery legislation. When British Columbia sued manufacturers and distributors of opioid medicines it was similarly before the *Opioid Damages and Health Care Costs Recovery Act* was enacted, but that legislation is now the core of its claim against several defendants.

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[11] *Williams v. Amazon Inc.*, 2023 BCCA 314; *Spark Event Rentals Ltd. v. Google LLC et al*, 2024 BCCA 148, leave to appeal to SCC dismissed 2024 CanLII 122490; *Aspen Technology Inc. et al v. Wiederhold*, 2025 BCCA 261; *Zanin v. Ooma, Inc.*, 2025 FC 51.

A much-narrowed version of Bill 12, the *Vaping Product Damages and Health Care Costs Recovery Act*, SBC 2025, c. 29 was passed by the Legislative Assembly without amendment, coming into force on December 3, 2025. On December 12, 2025, British Columbia filed a claim under the new statute against Juul Labs, Inc., Juul Labs Canada, Ltd., Altria Group, Inc., and four individuals.

Copycat Claims – Always Hot

Class actions filed in Canada often emerge from claims (or settlements) or regulatory actions in other jurisdictions (primarily the US).[12] Claims that can be easily copied and transported into our jurisdiction make it easier for plaintiffs' counsel to take on the financial risk of the claim.

Some things to consider when that does occur:

- Effective working relationships with counsel across jurisdictions.
- Avoiding reinventing the wheel.
- Preventing strategic use of evidence by plaintiffs.
- Motions to dismiss are not as common in Canadian context.
- Litigation holds that anticipate the broader claims.
- Ensuring that any settlements do not include provisions that will make claims in other jurisdictions more problematic.

[12] *Wolfe v. Hyundai Auto Canada Corp.*, 2025 BCSC 2670 [allegations of Risk of engine fire and loss of functionality with respect to ABS Module]; *Coburn and Watson's Metropolitan Home v. BMO Financial Group*, 2018 BCSC 1183 [allegation regarding interchange fees paid by merchants in connection with the acceptance of Visa and MasterCard credit cards as payment for goods and services]; *Situmorang v. Google LLC*, 2024 BCCA 9.