

Class Actions in Canada: A National Procedure in a Multi-Jurisdictional Society?

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This paper follows the question and answer format stipulated by the conference organizers.

1. As background for consideration of the context within which your country's group litigation operates, please briefly describe your civil litigation system (e.g. common law, civil law)?

Canada is a bijuridical, bilingual nation but one dominated by the common law and adversarial system. For most of the provinces and territories English is the main language and they follow the common law system as inherited from Great Britain through the period of colonization. However, in Québec the French language predominates and the legal system is heavily influenced by civil law as inherited from France through that period of colonization. Nevertheless, Québec has adopted aspects of the adversarial (rather than the inquisitorial) system regarding its procedures for civil litigation, in general, and class actions, in particular.¹

There is also a Federal Court of Canada with jurisdiction throughout the country. It is a bilingual and bijuridical court; for example, its rules of practice are influenced by those of all provinces and territories, including Québec. For a number of reasons, however, the Federal Court has limited subject matter jurisdiction prescribed by statute and confined, for example, to actions against the federal government, those involving admiralty issues,

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¹ See generally G. Gall, *The Canadian Legal System*, 5th ed. (Scarborough, Ont.: Thomson Canada Limited, 2004) at 265ff.

and certain matters of intellectual property.² Thus, that Court's role in civil litigation, in general, and class actions, in particular, is circumscribed.

The relationship of the Aboriginal Peoples to Canadian law and society, remains unresolved and troubled in many ways.

2. What formal rules for representative or non-representative group litigation have been adopted in your country?

Class action procedures have been implemented by almost all provinces and territories, by legislation, and by the Federal Court of Canada, by amendment to its rules of practice.

There were halting efforts by some courts during the 1960s and 1970s to expand class actions in response to various pressures from consumer groups, competition advocates, environmentalists, etc.³ Québec then led the way legislatively in 1978 when a government of a social democratic caste enacted class action legislation as part of a more general reformist agenda.⁴

In the rest of Canada, reform efforts regarding class actions during the late 1970s-1980s were led by the Ontario Law Reform Commission ("OLRC"). It published a massive three-volume report in 1982 advocating broad legislative change.⁵ Reform efforts were further aided by a very restrictive ruling of the Supreme Court of Canada in 1983 that essentially closed the door on judicial expansion of class actions.⁶ The judgment made clear that any change regarding class actions would have to be accomplished through legislation. There followed a period during which inertia and opposition to class actions succeeded in keeping reform efforts at bay. Such opposition was both philosophical (class actions inimical to essentials of the judicial function) and led by interests threatened by the shift in power change could bring (class actions will harm the business community).⁷ However, during the same period, a bill of rights, the *Charter of Rights*

² Peter W. Hogg, *Constitutional Law of Canada*, 5th ed., loose-leaf (Scarborough, Ont.: Thomson Canada Limited, 2007) vol. 1 at 7-26-7-27.

³ The history of the developments are recounted in detail in W.A. Bogart, "Questioning Litigation's Role – Courts and Class Actions in Canada" (1986-1987) 62 *Ind. L.J.* 665.

⁴ *Ibid.* at 685-690.

⁵ Ontario Law Reform Commission, *Report on Class Actions*, vol. 1, 2, 3 (Toronto: Ministry of the Attorney General, 1982). One of the authors of this paper, W.A. Bogart, was a consultant to the Commission during the currency of the class action project.

⁶ *Naken v. General Motors of Canada* (1983), 144 D.L.R. (3d) 385 (S.C.C.).

⁷ For philosophical objections, see P. Glenn, "The Dilemma of Class Action Reform" (1986) 6 *Oxford J. Legal Stud.* 262 and T. Cromwell, "An Examination of the Ontario Law Reform Commission Report on Class Actions" (1983) 15 *Ottawa L. Rev.* 587. For harm to the business community, see W.A. Macdonald, Q.C. & J.W. Rowley, Q.C. "Ontario Class Action Reform: Business and Justice System Impacts – A Comment" (1984) 9 *Can. Bus. L.J.* 351.

and Freedoms,⁸ was entrenched that significantly expanded the power of courts. The *Charter* bolstered acceptance of a more activist court, an essential ingredient of a successful class actions procedure.

In the early 1990s an activist Attorney General broke the logjam through a brokering process involving many of the main interests to be affected by reform.⁹ The Ontario legislation was passed in 1993 followed by the British Columbia legislation in 1995. The Ontario and British Columbia legislation spurred on reform efforts in the latter part of the 1990s in other provinces and in the Federal Court. Such efforts were further encouraged by a Supreme Court of Canada judgment in 2001 that promoted legislative change and that effectively read the approach of such legislation into the unreformed rules addressing class actions.¹⁰ By the early 2000s almost all of the provinces and the Federal Court had achieved comprehensive reform of class actions.¹¹

Class actions procedures apply generally to those actions within the subject matter jurisdictions of the courts. For the provinces and territories, this subject matter jurisdiction has few limitations.¹² In contrast, as previously indicated, the subject matter jurisdiction of the Federal Court is circumscribed.¹³

Class actions have given rise to a wide variety of claims, including: governmental liability, products liability and mass torts; breach of contract; insolvency proceedings; and, securities, environmental and competition law violations.¹⁴ Whether or not a class is certified, of course, depends on many factors. However, Canadian courts have not singled out a particular kind of claim as being particularly problematic for class action treatment. For example, a number of product liability and mass tort class actions have been certified.

⁸ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK), 1982*, c. 11 [*Charter*].

⁹ I. Scott, "Reforming the System: Consultation and Collaboration" (1990) 24 L. Soc'y Gaz. 42; W.A. Bogart, "Ambiguity" in A. Prejiner & J. Roy, eds. *Class Actions in Ontario and Quebec: Proceedings of the First Yves Pratte Conference* (Montréal: Éditions Wilson & La Fleur Ltee, 1992) at 3.

¹⁰ *Western Canadian Shopping Centres, Inc. v. Dutton*, [2001] 2 S.C.R. 534.

¹¹ As of 2007, only the provinces Prince Edward Island and Nova Scotia remain without class action legislation. For an earlier overview of the Canadian experience with class actions see Garry D. Watson, "Class Actions: The Canadian Experience" (2001) 11 Duke J. Comp. & Int'l L. 269.

¹² Peter W. Hogg, *supra* note 2 at 7-3. One limitation, however, is that certain statutes stipulate that proceedings must go forward in a representative capacity by law or under another Act: see e.g. Ontario CPA, *infra* note 16 at s. 37.

¹³ See response to question 1, above.

¹⁴ Ward K. Branch, *Class Actions in Canada*, loose-leaf (Aurora, Ont.: Canada Law Book, 2007) (Release no. 19, July 2007) at 5-1-5-67.

Regarding these kinds of claims, the Canadian courts' approach appears more receptive than their American counterparts.¹⁵

One area where certain courts have shown a reluctance to certify class proceedings is in applications for declarations of constitutional invalidity and of other legal rights, which can typically be resolved through a test case or an individual action for declaratory or injunctive relief, which would then be binding and achieve the same result as a class action or application. Class action legislation applies to both actions and applications. For that reason most legislation is entitled the *Class Proceedings Act*; "proceedings" being defined to include both actions and applications. Applications are proceedings where the essential facts are not in dispute, there is no need for oral evidence and so forth, and the matter can be determined in a summary way. As a result, some courts have been reluctant to certify class applications on the grounds that it would not be a "preferable" way of proceeding.¹⁶ A number of courts have taken a similar position with regard to litigation claiming a declaration of constitutional invalidity of a statute¹⁷; there have been more recent cases to the contrary, particularly where money damages are also sought.¹⁸ In any event, there have been so few motions to certify applications as class applications that hereafter, the paper will simply refer to "actions" and "class actions".

There have been amendments to various class action statutes but for the most part, they have not been significant. A 2003 amendment to Québec's legislation, however, created a requirement that generally, a certification motion only be contested orally (while still granting the judge some discretion to admit relevant written evidence and argument). Previously, a certification motion was to be supported by an affidavit.¹⁹ The 2003

¹⁵ *Ibid.* at 5-1-5-17. Ward Branch, commenting on a draft of this paper, indicates that this may be due in part to the fact that U.S. Federal Rule 23(b)(3) allows a class action to be maintained only if questions of law or fact common to the members of the class "predominate" over questions affecting only individual members, and that a class action is "superior" to other methods for the fair and efficient adjudication of the "controversy". Conversely, in Canadian provinces such as Ontario and British Columbia, there is no requirement that common issues predominate over individual issues, and a class action must be seen by the court as the "preferable" procedure for resolving the common issues (as opposed to the entire controversy).

¹⁶ See e.g. *S.R. Gent (Canada) Inc. v. Ontario (Workplace Safety and Insurance Board)*, [1999] O.J. No. 3362 at para. 15 (S.C.J.) (QL). Whether a class proceeding would be the preferable way of disposing of the common issues is one of the tests for certification: see e.g. *Class Proceedings Act, 1992*, S.O. 1992, c. 6, s. 5(1)(d) [Ontario CPA]. Class actions against the government seeking declaratory relief and damages for breaches of aboriginal rights have been difficult to certify: see e.g. *Davis v. Canada (Attorney General)*, [2007] N.J. No. 42 (S.C. (T.D.)) (QL).

¹⁷ The leading case in this regard is *Guimond v. Québec (Attorney General)*, [1996] 3 S.C.R. 347, rev'g (1995), 123 D.L.R. (4th) 236 (Qc. C.A.), where Mr. Justice Gonthier, writing for the court, stated that "it is true that it is not necessary to pursue a class action to obtain a declaration of constitutional invalidity and therefore, that it is generally undesirable to do so..."

¹⁸ See the discussion in Ward K. Branch, *supra* note 14 at 5-17-5-23, the cases cited, and his view that certification can be appropriate in such cases.

¹⁹ See S.Q. 2002, c. 7, s. 150, which amended Québec Art. 1002 C.C.P. Denis Ferland, professor titulaire, Université Laval, faculté de droit, commenting on a draft of this paper, raised the point that this modification was recommended by the province's Civil Procedure Revision Committee (see Québec,

amendment also created a central registry to track “applications for authorization to institute a class action”.²⁰

Due to space constraints, not all of the Canadian class action statutes are referred to in this paper. Instead, the website addresses linking to the class action statutes for the provinces of Québec, Ontario, and British Columbia are provided below. These are the three provinces that initially enacted class action legislation and also are the jurisdictions where most of this type of litigation is commenced. The legislation of these three provinces has served as models for all other class action legislation enacted in Canada.

The three provinces’ legislation and dates of original enactment are:

- Québec, 1978. See the *Code of Civil Procedure*, R.S.Q. c. C-25, Book IX, art. 999 and following. Available online at the Canadian Legal Information Website: <<http://www.canlii.org/qc/laws/sta/c-25/20070516/whole.html>>;
- Ontario, 1993. See the *Class Proceedings Act, 1992*, S.O. 1992, c. 6. Available online at the Government of Ontario E-Laws website: <http://www.e-laws.gov.on.ca/DBLaws/Statutes/English/92c06_e.htm>; and
- British Columbia, 1995. See the *Class Proceedings Act*, R.S.B.C. 1996, c. 50. Available online at the Government of British Columbia Queen’s Printer website: <http://www.qp.gov.bc.ca/statreg/stat/C/96050_01.htm>.

In the case of Québec and Ontario other relevant legislation addressing funding mechanisms also exists. These mechanisms are discussed in greater detail in question 12, below. The links to the applicable legislation are as follows:

- In Québec, *An Act Respecting the Class Action*, R.S.Q., c. R-21 is available online at the Canadian Legal Information Website: <<http://www.canlii.org/qc/laws/sta/r-2.1/20070516/whole.html>>. This Act established a Fund named the “Fonds d’aide aux recours collectifs”; and

Ministère de la Justice, Comité de Révision de la Procédure Civile, “La revision de la procedure civile – Une nouvelle culture judiciaire” (Québec: Juillet 2001) online: Justice Québec <<http://www.justice.gouv.qc.ca/francais/publications/rapports/pdf/crpc/crpc-rap2.pdf>>. It aimed to move Québec towards a procedure of class action authorization (certification) wherein the costs and time required for a proceeding were more proportionate to the nature and ultimate purpose of an action as well as the complexity of the dispute. Further, by eliminating the affidavit requirement, the Committee wanted to discourage the trend of the parties essentially arguing the merits of an action on this procedural motion. This restriction on a plaintiff’s evidentiary obligation was challenged and upheld; see *Option Consommateurs v. Pharmascience Inc.*, [2005] R.J.Q. 1367 (C.A.), leave to appeal to S.C.C. refused 25 August 2005. A judge’s discretion to admit relevant evidence when necessary accords with the guiding principle of proper case management and of proportionality, found at Québec Art. 4.1 and 4.2 C.C.P., respectively.

²⁰ *Ibid.*, s. 158. In Québec, certification is referred to as authorization.

- In Ontario, the *Law Society Act*, R.S.O. 1990, c. L.8, , c. 7, as am. by *Law Society Amendment Act (Class Proceedings Funding)*, 1992, S.O. 1992, c. 7, s. 3 is available online at the Government of Ontario E-Laws website: <http://www.e-laws.gov.on.ca/DBLaws/Statutes/English/90108_e.htm#BK139>. Sections 59.1 to 59.5 deal with Ontario’s Class Proceedings Fund.

3. For each litigation mechanism identified above, please provide a general description of the process contemplated by the formal rules.

Need for, Tests for, and Material on Certification

Need for Certification

All relevant legislation requires that leave to proceed with the litigation as a class action be obtained from the court by way of a motion to certify the proceeding as a class action. On the motion the plaintiff must satisfy the court that tests have been met in order for the proceeding to be certified as a class action.

Tests for Certification

The details of the tests differ in each jurisdiction’s legislation. However, generally speaking, there are five criteria that must be satisfied in order for the action to be certified:

- the pleadings must disclose a cause of action;
- there must be an identifiable class;
- the proposed representative must be appropriate;
- there must be common issues; and
- the class action must be the preferable procedure.

One example of differences in the tests is the “preferability” criterion. In Québec there is no specific mention of preferability. However, preferability concerns are generally addressed within an express requirement that the action raises identical, similar, or related questions of law and fact, and that the composition of the group makes joinder difficult or impracticable.²¹ While in Ontario and other provinces there is a requirement of preferability, what the criterion requires is left to the court’s judgment.²² In British Columbia and other jurisdictions the legislation provides a non-exhaustive list of factors that the court is to look to in its determination of whether a class action would be the preferable procedure for the “fair and efficient” resolution of the common issues.²³ One

²¹ See Québec Art. 1003(a) C.C.P.; see also Ward K. Branch, *supra* note 14 at 4-37.

²² Ontario CPA, *supra* note 16 at s. 5(1)(d).

²³ *Class Proceedings Act*, R.S.B.C. 1996, c. 50, s. 4(2) [BC CPA].

of these factors is “whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members.” There is judicial authority suggesting that this factor can make certification more difficult.²⁴ Very recent cases decided by Québec’s Court of Appeal have been interpreted as increasing the difficulty of a class action being authorized in that province.²⁵

There is also divergent authority on whether it is necessary that a representative plaintiff have a personal cause of action against each defendant. In British Columbia, the courts have held that a representative plaintiff can act so long as he or she would fairly and adequately represent the class for the purposes of the certified common issues.²⁶ This allows for so-called “industry class actions” to be filed by one individual. On the other hand, jurisprudence in Ontario and Québec has held that there be at least one representative plaintiff with a cause of action against each named defendant.²⁷

Material to be Presented to Court on Certification Motion

All statutes require material to be filed with the court to assist it in determining whether or not to certify the litigation as a class action. There is commonality in terms of the material to be filed; for example, plaintiffs must have served and filed their statement of claim.

There is, however, some divergence between the various provinces regarding material to be presented on the certification motion. For example, in Ontario and British Columbia, it is a matter of the court’s discretion whether or not a defendant must serve and file a statement of defence for purposes of the certification motion.²⁸ In Québec, as a result of amendments to the legislation in 2003²⁹ and judicial interpretation, the evidence to be adduced and any examinations of parties and so forth are issues largely to be determined

²⁴ See *Tiemstra v. Insurance Corp. of British Columbia* (1997), 149 D.L.R. (4th) 419 (B.C. C.A.) and related cases discussed in Ward K. Branch, *supra* note 14, 4-48–4-49.

²⁵ See Luis Millan, “Is Quebec losing its status as a class action haven?” *The Lawyers Weekly* 27:12 (20 July 2007) 1.

²⁶ See e.g. *Campbell v. Flexwatt Corp.*, *infra* note 87 (court of appeal noting at para. 42 that there is “no requirement that there be a representative plaintiff with a cause of action against every defendant; the legislation simply requires that there be a cause of action...”).

²⁷ The leading case in Québec is *Bouchard c. Agropur Coopérative*, [2006] J.Q. No. 11396 (C.A.) (QL); in Ontario the leading cases are *Ragoonanan Estate v. Imperial Tobacco Canada Ltd.* (2000), 51 O.R. (3d) 603 (S.C.J.) and *Hughes v. Sunbeam Corp. (Canada) Ltd.* (2002), 219 D.L.R. (4th) 467 (Ont. C.A.). See also Ward K. Branch, *supra* note 14 at 4-22–4-26.

²⁸ See e.g. *Maclean v. Telus Corp.*, 2005 BCCA 338. See also Ward K. Branch, *ibid.* at 4-51–4-52; S. Matthews, “Class Actions Cross-Country Check-Up – Developments in BC January 2006-April 2007” (Paper presented to the 4th Annual Symposium on Class Actions, Toronto, 26-27 April 2007) at 5-6 [unpublished].

²⁹ See response to question 2, above.

in the circumstances of the particular case.³⁰ Criteria for such determinations have been developed by the courts in Québec.³¹ Québec's more conservative approach to how much evidence is to be adduced for the certification hearing is not replicated in the other provinces. The amount of material, including expert reports and evidence that goes directly to the merits of the action as a whole, can be extremely high in many certification motions in Ontario and British Columbia. The extent, complexity and as a consequence, the expense, of filing evidence in what is supposed to be a procedural step in the proceeding, has been the subject of much debate in the bar, and the topic of comment by the judiciary.³²

Procedures for Determination of the Common and of Individual Issues

All legislation provides for procedures for the determination of common issues should the class action be certified. In addition, all legislation provides procedures for determination of any issues, should the class be successful on the common issues, that are individual to class members and for calculation and distribution of any monetary relief.³³

Procedures for Protection of the Interests of the Members of the Class

A defining characteristic of all relevant legislation is the effort to protect the interests of members of the class. Generally, such protection requires a willingness of the court to use the devices available to it in the legislation to ensure that members of the class are treated fairly at all times. Such devices in the legislation include (footnote references, unless indicated otherwise, are to the Ontario legislation by way of example):

- appropriate representation of the class as a criterion for certification;³⁴
- provision for creation of subclasses;³⁵

³⁰ S. Rodrigue, "Class Actions in Quebec, A Change in Direction?" (Paper presented to the 4th Annual Symposium on Class Actions, Toronto, 26-27 April 2007) at 1-2 [unpublished].

³¹ See e.g. *Option consommateurs v. Banque Amex du Canada* (27 June 2006), Montréal, Docket No. 500-06-000203-030 (Qc. S.C.) [unreported]. Recently, Québec's Court of Appeal has adopted a more liberal approach to allowing evidence to be gathered for the authorization motion. While Québec Art. 1002 C.C.P. does not allow affidavit evidence to be presented at the motion, the Court of Appeal indicated that judges should look favourably on requests to examine the proposed representative plaintiff before the motion: see *Bouchard c. Agropur Coopérative*, *supra* note 27 at para. 45. This point was raised by Denis Ferland, professor titulaire, Université Laval, faculté de droit, commenting on a draft of this paper.

³² *Andersen v. St. Jude Medical Inc.*, [2003] O.J. No. 3556 at paras. 77-82 (S.C.J.) (QL); *Stewart v. General Motors of Canada Ltd.*, [2007] O.J. No. 2319 at para. 10 (S.C.J.) (QL).

³³ See e.g. Ontario CPA, *supra* note 16 at ss. 24-25 (section 24 of the Ontario legislation allows the court to assess damages in the aggregate and design a procedure for distributing these damages among individual class members; section 25 empowers the court to create a process to determine any other issues that are individual to class members).

³⁴ *Ibid.*, s. 5(1)(e).

³⁵ *Ibid.*, s. 8(2).

- notice to the class in a number of circumstances so that class members can take any action that is prudent to protect their interests;³⁶
- provision for opting out by class members;³⁷
- intervention by class members to make any relevant representations with regard to their interests;³⁸
- appeals by class members if such an appeal is not otherwise taken by the representative plaintiff;³⁹
- protection of members of the class from the running of limitation periods during the currency of the class action;⁴⁰
- procedures for determination of any issues, should the class be successful on the common issues, that are individual to class members and for calculation and distribution of any monetary relief;⁴¹
- requirement of approval by the court of any settlement or discontinuance;⁴² and
- case management procedures.⁴³

³⁶ *Ibid.*, ss. 17-22.

³⁷ *Ibid.*, s. 9.

³⁸ *Ibid.*, s. 14(1).

³⁹ *Ibid.*, s. 30.

⁴⁰ *Ibid.*, s. 28. The Federal Court Rules, addressing class actions, contain no such provision because of jurisdictional constraints: see Federal Court of Canada, Rules Committee, “Class Proceedings in the Federal Court of Canada: A Discussion Paper”, Ottawa: (9 June 2000) at 93-96. One of the authors of this paper, W.A. Bogart, was Director of Research, Federal Court Rules Committee, during the deliberations of the Committee regarding class actions. For a comprehensive review of class actions in the Federal Court, see Ward K. Branch and Donald B. Lebens, “Class Actions in the Federal Court” (Paper prepared for the Continuing Legal Education Society of British Columbia, June 2007).

⁴¹ *Ibid.*, ss. 23-27.

⁴² *Ibid.*, s. 29.

⁴³ *Ibid.*, s. 36 (which indicates that the rules of court (including case management) apply to proceedings under the Act.); Ward K. Branch, *supra* note 14 at 13-1–13-2. See also response to question 9, below.

4. In representative litigation, who may come forward to represent groups of claimants, in what circumstances? Must class members all come forward individually (“opt in”) to join the litigation, in some or all circumstances?

Generally, there is no statutory limitation on who may be a representative plaintiff, so long as that person meets the test prescribed in the Act.⁴⁴

Canadian jurisdictions have adopted opt-out regimes subject to one exception to be discussed.⁴⁵ The opt-out regime was adopted because of the widely held view that most class members are passive in the proceedings. Thus, to have an opt-in regime would have the effect of greatly diminishing the size of most classes in many instances because potential members would not take the necessary steps to have themselves included in the class or they might not have obtained actual notice at all. At the same time, opt-out regimes do permit class members who are actively opposed to the proceedings to exclude themselves if they are so inclined; few have done so.⁴⁶

The one exception to opt-out regimes concerns the provision in the British Columbia statute and some other statutes that allows those who are otherwise members of the class but who are not resident in the province to opt-in.⁴⁷ In the absence of a generally applicable arrangement for national classes such a provision permits, at least in some circumstances, class actions in those provinces to include members from across Canada. However, because, as indicated, most class members are passive (and, therefore, do not take steps to opt-in in these circumstances) the provisions have had limited utility: see the discussion of national classes, below, for further information.

Representative plaintiffs in class actions have almost all been individuals who are members of the class. The vast majority of class actions have sought monetary relief for harms done to class members. In most instances, these actions are brought by litigators in private practice who have concluded that the actions are sufficiently meritorious and the claim for monetary relief sufficiently large that it is likely a substantial fee can be recovered in the proceedings.⁴⁸

Funding is generally an issue for plaintiff classes.⁴⁹ It is particularly an issue where the relief sought is non-monetary in nature, or is monetary but for a small amount when

⁴⁴ Some jurisdictions, however, impose limitations on corporations and other artificial entities serving as representative plaintiffs: see Québec Arts. 999, 1048 C.C.P. See also Ward K. Branch, *supra* note 14 at 4-14.

⁴⁵ Ontario CPA, *supra* note 16 at s. 9; Québec Art. 1005 C.C.P., Québec Art. 2848 C.C.Q.

⁴⁶ Ward K. Branch, *supra* note 14 at 10-1.

⁴⁷ BC CPA, *supra* note 23 at s. 16(1).

⁴⁸ See response to questions 12 and 13, below, for further discussion.

⁴⁹ *Ibid.*

measured against the cost and complexities of the proceedings. In these situations it will be difficult to attract counsel on a contingency arrangement since there will be no or little monetary recovery to pay counsel. If the proceeding is successful, costs may be awarded (in those jurisdictions where costs are available).⁵⁰ However, even the prospect of such costs may not be sufficient to attract counsel to act in the proceedings, as the costs awarded between parties to litigation tend to be substantially less than the fees that would normally be charged by counsel to a client.

National Class Actions

The lack of a generally applicable provision for national classes is a substantial complication when members of the class are spread throughout the country and when no one court has clear, generally applicable jurisdiction to entertain class actions.⁵¹

Feasibility of National Class Actions

As indicated, the Federal Court has national jurisdiction but has very circumscribed subject matter jurisdiction.⁵² That Court, therefore, offers limited opportunities for national class actions. In contrast, the provinces have general subject matter jurisdiction but limited territorial jurisdiction.

In terms of the provincial courts, there are two basic positions.

The legislation of Ontario and of Québec is silent regarding issues of national class actions. At the same time there are compelling arguments for certifying an otherwise valid class action as a national class action where members of the class are spread throughout the country. Such arguments would include access to justice for class members, avoidance of duplication of litigation and overall savings to the administration of justice. As a result, there have been a number of decisions in Ontario and Québec

⁵⁰ *Ibid.*

⁵¹ For excellent overviews of these and related issues see C. Poltak, "Ontario and Her Sisters: Should Full Faith and Credit Apply to the National Class?" (2006), 3 *The Canadian Class Action Review* 437; C. Jones, "Disorderly and Unfair: The Weird Present and Uncertain Future of 'Full Faith and Credit' in Interjurisdictional Class Actions" (Paper presented to the 4th Annual Symposium on Class Actions, Toronto, 26-27 April 2007) [unpublished].

⁵² See response to question 1, above.

certifying classes to include members not resident in the province⁵³; other courts in those provinces have declined to do so.⁵⁴

The courts that have certified classes to include extra-provincial members have required some showing of “real and substantial connection” to the province in terms of the issues to be litigated on the part of the out of province members of the class.⁵⁵ They also point to the ability of members of the class, including non-residents, to opt-out if such members do not want to be part of the class and to be bound by the proceedings. At the same time, such judgments have been criticized as often not engaging sufficiently in an analysis of the nature of the connection of non-resident members to the province and to the issues in the litigation. More fundamentally, it has been asked whether a court of one province can, as a matter of constitutional authority, require a response from extra-provincial class members in order to free themselves from the effect of a judgment rendered by an Ontario court. That question has, to date, not been answered by the Supreme Court of Canada.⁵⁶

As indicated above, the legislation of British Columbia and some other provinces permit non-resident members of the class to opt-in.⁵⁷ Such a condition, along with the requirement of a “real and substantial connection”, applied by the British Columbia courts in these circumstances, makes it difficult for extra-provincial members who have opted-in to argue subsequently (in the face of an unfavorable judgment on the merits, etc.) that they have not received adequate process.⁵⁸ However, the “opt-in” solution can severely limit the number of extra-provincial members participating; most members of

⁵³ The leading Ontario case is *Nantais v. Telectronics Proprietary (Canada) Ltd.* (1995), 25 O.R. (3d) 331 (Gen. Div.); the leading Québec cases are *Société canadienne des postes c. Lépine*, 2007 QCCA 1092 (C.A.)(QL) and *Masson v. Thompson* (29 January 1992), Montréal 500-06-000005-914 (Que. S.C.) [unreported] (certification decision), aff’d [1993] R.J.Q. 69 (C.A.); [1994] R.J.Q. 1032 (S.C.) (jurisdiction over non-resident class members), aff’d [1995] R.J.Q. 329 (C.A.) (application to sever third party proceedings). See Ward K. Branch, *supra* note 14 at 11-2–11-7.

⁵⁴ See e.g. *McNaughton Automotive Ltd. v. Co-operators General Insurance Co.* (2003), 66 O.R. (3d) 112 (S.C.J.).

⁵⁵ Such connection is also a requirement for the courts of the provinces to enforce each others’ judgments: *Morguard Investments Ltd. v. De Savoye* [1990] 3 S.C.R. 1077; *Hunt v. T&N plc* [1993] 4 S.C.R. 289.

⁵⁶ Ward K. Branch, *supra* note 14 at 11-5, n. 11a. The Manitoba legislation goes further. It expressly contemplates extra-provincial members of the class participating but it does not require them to opt-in: see *Class Proceedings Act*, C.C.S.M. c. C130, s. 6(3) (this subsection reads: “A class that comprises persons resident in Manitoba and persons not resident in Manitoba may be divided into resident and non-resident subclasses”).

⁵⁷ The leading case is *Harrington v. Dow Chemical* (1996), 22 B.C.L.R. (3d) 97 (S.C.) (certification decision), aff’d (2000), 193 D.L.R. (4th) 67 (C.A.); (1998) 55 B.C.L.R. (3d) 316 (S.C.) (extra-provincial class). See Ward K. Branch, *ibid.* at 11-8, n. 22. In addition to the British Columbia, the class proceedings statutes of Saskatchewan, Newfoundland, Alberta and New Brunswick require non-resident members of the class to opt-in.

⁵⁸ Ward K. Branch, *ibid.* at 11-7–11-8.

the class remain passive, especially before the determination of the common questions and in favor of the class.⁵⁹

Management of National Class Actions

The limits regarding national class actions, just discussed, cause enormous complexities in terms of class action litigation involving plaintiffs in several provinces and where there are several counsel involved.⁶⁰ When there are related lawsuits in different provinces, coordinating them largely depends on the good will of the respective case management judges and of various counsel because of the issues regarding the courts of one province binding the others. Similarly there can be significant difficulties in terms of enforcing court orders of one court in the courts of other provinces: see the more detailed discussion, just below. Such complications can cause substantial management problems. For instance in 2006, the parties to class litigation involving abuse of Aboriginal children in government-sponsored schools several decades ago sought approval for settlement from courts in nine different jurisdictions.⁶¹

In an attempt to provide for greater coordination and better management of class litigation that involves plaintiffs across the country, the Uniform Law Commission of Canada (“ULCC”) has produced a set of proposals.⁶² These proposals recommend that: a) a registry be established for all class actions filed in any Canadian jurisdiction and b) legislation be passed in all jurisdictions that would specifically require a court, on a certification motion, to take into account factors, set out in the legislation, relating to the

⁵⁹ This proposition was first advanced in the report of the Ontario Law Reform Commission, *supra* note 5 at 131ff.

⁶⁰ In terms of factors taken into account regarding selection of counsel see *Settingington v. Merck Frosst Canada Ltd.*, [2006] O.J. No. 376 (S.C.J.) (QL), *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2000] O.J. No. 4594 (S.C.J.) (QL) [*Vitapharm*] and Ward K. Branch, *supra* note 14 at 4-59 for a discussion of *Vitapharm* and related cases. See also J. McPhee, “Carriage Battles” *Canadian Lawyer* 31:5 (May 2007) 43.

⁶¹ W. Branch & C. Rhone, “Solving the National Class Problem” (Paper presented to the 4th Annual Symposium on Class Actions, Toronto, 26-27 April 2007) at 1 [unpublished]; P. Vickery, “National Classes and Parallel and Overlapping Class Actions: Coordinating Multi-jurisdictional Class Actions” (Paper presented to the 4th Annual Symposium on Class Actions, Toronto, 26-27 April 2007) [unpublished].

⁶² Letter from Rodney L. Hayley to the Uniform Law Conference of Canada (9 March 2005) online: Uniform Law Conference of Canada <http://www.chlc.ca/en/poam2/National_Class_Actions_Letter_En.pdf>; Uniform Law Conference of Canada, Civil Law Section, “Report of the Uniform Law Conference of Canada’s Committee on the National Class Action and Related Interjurisdictional Issue: Background Analysis” (9 March 2005) online: Uniform Law Conference of Canada <http://www.chlc.ca/en/poam2/National_Class_Actions_Rep_En.pdf>; Uniform Law Conference of Canada, Civil Law Section, “Supplementary Report on Multijurisdictional Class Proceedings in Canada (August 2006) online: Uniform Law Conference of Canada <http://www.chlc.ca/en/poam2/National_Class_Actions_Supplementary_Report_En.pdf>; Uniform Law Conference of Canada, “Uniform Class Proceedings Act (Amendment) 2006” online: Uniform Law Conference of Canada <http://www.chlc.ca/en/us/Uniform_Class_Proceedings_Amendment_En.pdf>.

national aspect of the action before it and the relevance of any related actions in other jurisdictions. The ULCC's proposal requires that two main issues be addressed by the courts: first, which court should decide the appropriate forum for the class action; and second, how the class action should be managed in terms of the motion for certification, etc. by the court selected as the appropriate forum. The aspiration is that, when there is potential class litigation that could be certified in several jurisdictions, only one jurisdiction will be certified, but it will be the "preferable" one. Moreover, the class litigation will potentially be certified in a jurisdiction in which parties have a full opportunity to participate, including in the certification motion. Much work remains to be done in terms of these proposals; having the various jurisdictions cooperate in terms of the registry and pass the legislative amendments will be a daunting task. Nevertheless, the ULCC proposals are an important basis for addressing these difficult issues.

Enforcement of Judgments of National Class Actions

If a national class action is certified there can be issues regarding the enforcement of orders by the courts in other provinces in which, for example, some members of the class reside.⁶³ Courts asked to enforce such judgments might refuse to do so for two reasons: there was not a "real and substantial" connection between members of the class that reside in that province and the court that claimed jurisdiction over the class action and/or members of the class that reside in that province were not treated in a procedurally fair manner (for example, they received inadequate notice that their rights were being determined). Courts in Québec have invoked these reasons in declining to enforce judgments of Ontario courts regarding national class actions.⁶⁴

5. In non-representative group litigation, who may initiate group litigation, and in what circumstances?

Not applicable.

⁶³ C. Poltak, *supra* note 51 at 456-465.

⁶⁴ *Société canadienne des postes c. Lépine*, *supra* note 53; *HSBC Bank Canada Ltd. c. Hocking*, [2006] J.Q. no 507 (C.S.) (QL) [appeal to be heard in November, 2007]. There are related issues regarding when a Canadian court should enforce a judgment of a foreign (usually American) court in a class action. The Ontario Court of Appeal has held that a foreign judgment may be enforced by the courts of that province if: a) there is a real and substantial connection linking the cause of action to the foreign jurisdiction; b) the rights of non-resident class members are adequately represented; and, c) non-resident class members are accorded procedural fairness: see *Currie v. McDonald's Restaurants Canada Ltd.* (2005), 74 O.R. (3d) 321 (C.A.). For discussion of these issues see C. Poltak, *ibid.* at 451-456; R. Steep, "The Impact of Cross Border Issues on Ontario Class Actions" (Paper presented to the 4th Annual Symposium on Class Actions, Toronto, 26-27 April 2007) [unpublished].

6. How many lawsuits have proceeded in each litigation form over the past 5 years?

A deficiency in the federally and provincially-established class proceedings regimes in Canada is the lack of comprehensive data relating to such litigation. Until recently, such data was extremely limited and only created through the effort of counsel or academics who took the time to compile it.⁶⁵ Unfortunately, none of this data provides precise numbers on how class actions have developed in Canada in the past five years. The following is a summary of the best information that the authors have been able to acquire regarding data on the commencement of class actions in the past five years.

The research of some commentators reveals at least 287 proposed class proceedings were filed in Ontario between 1993 and April 2001.⁶⁶ The enactment of class action legislation in an increasing number of Canadian jurisdictions coupled with the heightened use of the class action as a vehicle to redress mass wrongs has made the task of tracking filings onerous in recent years. In response, the ULCC proposals mentioned above contained a recommendation for the establishment of a Canadian Class Proceedings Registry.⁶⁷ The Registry would address the difficulty that the courts, counsel and the public routinely encounter when trying to determine whether “the particular matter in which they have an interest has already been made the subject of a class action in another jurisdiction.”⁶⁸

In response to this recommendation, the Canadian Bar Association (“CBA”) launched a pilot project that established the National Class Action Database (the “Database”).⁶⁹ The Database is an electronically-searchable registry of all class actions sent to the CBA. Hence, the accuracy of information garnered from the Database hinges on the willingness of counsel to list their class proceedings on it. In some jurisdictions, the submission of class proceedings to the Database is a mandatory requirement created by judicial Practice Direction.⁷⁰

⁶⁵ See e.g. Garry D. Watson & Charles Wright, “Class Actions in Ontario and British Columbia 1993-2001: An Analysis of the First Eight Years of the Class Actions in Canada’s Common Law Provinces”, First Annual Class Actions Symposium, *Class Actions: “Where are We and Where are We Going?”* (Toronto: Osgoode Hall Law School of York University, 2001).

⁶⁶ *Ibid.* at 3. Additionally, information provided by Donald B. Lebens of Branch MacMaster (received directly from the Chief Justice of the Federal Court of Canada) indicates that 48 class actions have been brought in the Federal Court since its class action rules were introduced in 2002 (e-mail communication from Don Lebens of Branch MacMaster to Ian Matthews (18 June 2007)).

⁶⁷ Uniform Law Conference of Canada, Civil Law Section, “Report of the Uniform Law Conference of Canada’s Committee on the National Class Action and Related Interjurisdictional Issue: Background Analysis”, *supra* note 62 at 16-17.

⁶⁸ *Ibid.* at 16.

⁶⁹ Canadian Bar Association, “National Class Action Database” online: Canadian Bar Association, <<http://www.cba.org/ClassActions/main/gate/index/about.aspx>>.

⁷⁰ At present, such Practice Directions exist for class proceedings commenced in British Columbia (effective 1 January 2007), the Yukon Territory (effective 1 January 2007), the Québec Superior Court’s

While the information on the database is by no means comprehensive, it provides the basis for a qualified estimate of the number of class proceedings commenced in the first six months of 2007.⁷¹ A survey of the proceedings reported to the Database in this time period reveals that 62 actions were commenced, the vast majority being listed as originating in Ontario, British Columbia or Québec. Extrapolating these estimates, one might suggest that nationally, 120-150 class proceedings may be filed in 2007. While the lack of data in Canada prior to the establishment of the Database makes it difficult to gauge the precise pace at which class proceedings have increased in the past five years, it is commonly accepted that class proceedings are more prevalent. About ten years ago, one commentator indicated that about 15 actions per year were being commenced.⁷² Thus, the 15 class actions ten years ago versus the 120-150 at present suggests a significant increase in this form of litigation.

7. In representative litigation, must possible class members be informed of the initiation of the litigation and, if so, how?

Generally, notification is not required for the commencement of proceedings intended to be class actions. Indeed, only after a successful certification motion by one of the parties (almost always the plaintiff), is there a defined class to notify. An action commenced under class proceedings legislation is like any other litigation until it is certified, though as one judge has put it, such litigation is “an action with ambition”.⁷³

Montréal and Québec divisions (both effective 1 January 2007) and the Ontario Superior Court (effective 8 December 2006), and will also be in place for Alberta commencing September 2007. A copy of each of these Practice Directions is available on the Database website: *ibid.* Effective June 1, 2007, the Toronto Judicial Region Practice Direction was revised and its application widened to the entire province of Ontario: Superior Court of Justice, Practice Direction “National Database of Class Proceedings”, online: Ontario Courts <http://www.ontariocourts.on.ca/superior_court_justice/notices/ccpd.htm>. Going forward, the Database will become a valuable source of information as counsel in most ‘major’ class action jurisdictions will now have to report the commencement of a class proceeding to the Database; however, the Database does not yet provide a true national picture of class proceedings and users must still rely upon the accuracy of the information sent to the Database by counsel.

⁷¹ As indicated above at note 70 counsel in most ‘major’ class action jurisdictions (namely, British Columbia, the Montréal and Québec regions in the Province of Québec and the Toronto, Ontario Judicial Region) were required to report new class proceedings to the Database as of at least January 1, 2007. Thus, an estimate of the number of class proceedings filed that covers the period of January 1, 2007 to June 30, 2007 would appear to be accurate with respect to those particular jurisdictions, as well as the Yukon Territory. Further, included in this estimate would be those class proceedings initiated in other jurisdictions which were voluntarily reported by counsel to the Database.

⁷² See Gordon McKee, “Class Actions in Canada”, Fraser Institute Conference, “Is Canada Inheriting America’s Litigious Legacy?” (Toronto, 21 November 1994) at 3-4 as cited in Michael P.A. Carabash, “Shareholder Class Actions in Ontario – Putting John C. Coffee, Jr.’s Findings to the Test”, *The Canadian Class Action Review* [forthcoming in 2007] at n. 120.

⁷³ *McKinnon v. National Money Mart Co.*, [2006] B.C.J. No. 635 at para. 25 (C.A.) (QL).

In practice, however, informal notice of potential class members' claims is often given. Plaintiffs' counsel have become increasingly sophisticated in their ability to publicize class proceedings even before the certification motion is decided. Most of the prominent class action firms issue press releases upon commencement of their actions, and devote websites to the particular litigation where updates on the status of the litigation are posted.⁷⁴ Should the Database⁷⁵ gain prominence, it is not inconceivable that potential class members researching existing class actions in a particular area will use the Database as a resource to determine if an action has been commenced or to locate class counsel.

Class proceedings legislation provides that notice may be given to class members at each pivotal stage of the proceeding, including certification of the action as a class proceeding, settlement approval hearings, and the trial of the common issues.⁷⁶ The content of the notice as well as the manner in which it is published must be approved by the court, usually by the judge case managing the proceeding. The court may also dispense with notice altogether.⁷⁷

Increasingly, the form and content of notice have become more sophisticated and closely scrutinized by the courts. Plaintiffs' counsel are paying greater attention to the effectiveness of notice to the class in the affidavit material submitted to the court on certification and in support of a settlement. In some instances, counsel have retained "class-notification experts" to design notice programs and provide the court with sworn evidence as to the expected efficacy of the notice program.⁷⁸ Such experts were rarely used in Canadian class action litigation five years ago.⁷⁹

The general principle behind notice is that "it is information not advocacy."⁸⁰ The notice must clearly advise who the claimants are within the class proceeding in such a way that each person may easily determine both her class membership, and her legal rights and options.

⁷⁴ See e.g. Sutts, Strosberg LLP, "Money Mart class action", online: Sutts, Strosberg LLP <<http://www.moneymartclassaction.com>> and "Vioxx National Class Action Canada", online: <<http://www.vioxxnationalclassaction.com>>.

⁷⁵ See question 6, above.

⁷⁶ See e.g. Ontario CPA, *supra* note 16 at ss. 17, 29(4).

⁷⁷ *Ibid.*, s. 17(2).

⁷⁸ Notice of the proposed \$1 billion settlement of the Indian Residential Schools Settlement was effected in 27 languages and native dialects, in every province and territory of the country, in print, radio and television advertisements. See Todd Hilsee, "Canadian Class Action Notice - A Rising Tide of Effectiveness", (Paper presented to the 4th Annual Symposium on Class Actions, Toronto, 26-27 April 2007) [unpublished].

⁷⁹ An exception is *Wilson v. Servier Canada Inc.*, [2000] O.J. No. 3392 (S.C.J.) (QL).

⁸⁰ *Cotter v. Levy*, [2000] O.J. No. 3287 at para. 30 (S.C.J.) (QL).

Notice is effected in a variety of ways. Usually, the preferred method of publishing notice to the class is by way of a direct mailing, if the names and addresses of class members are known. Other standard methods of giving notice include: placing the notice in a prominent place in the defendant's place of business; publishing the notice in a national or local newspaper; and class counsel posting the notice on their website. More creative ways of effecting notice have also been devised, including television and radio advertisements and sending the notice to third parties who have access to class members.⁸¹

Costs of notice will, obviously, depend on the size and nature of the class. The preferred method of giving notice, and one of the least expensive, is by direct mailing. Conversely, notice of a proposed national class action settlement which had to be translated into more than two dozen languages and given personally to community groups, was reported to cost over \$3,000,000. Reported cases have noted that the costs of proposed notice programs exceed \$400,000,⁸² not surprising where the cost of publishing a notice once in 1/8 of a page in a national newspaper is over \$30,000. In Québec, the costs of notice can be reduced by the court authorizing the dissemination of a summary version of the notice. This version must state that the full text of the notice is available at the court office and that in case any discrepancy between these two versions, the full-text prevails.⁸³

Although class proceedings legislation generally stipulates that the plaintiff must provide notice to the class, it does not dictate which party must bear the costs of notice. The statutes give the courts a broad discretion in respect of an order as to costs of notice, including apportioning costs among the parties.⁸⁴ One Ontario court has commented that the "general rule" is that the representative plaintiffs must bear the costs of notice to the class.⁸⁵ Courts have at times required the defendants to bear the entire cost of notice in circumstances where the court is satisfied that access to justice concerns militate against

⁸¹ This method of notice has been given in defective medical devices cases, where the notice is given to physicians who presumably pass along the information to their patients (see *Andersen v. St. Jude Medical Inc.* (3 March 2005), Court File No. 00-CV-195906CP (Ont. S.C.J.) [unreported]) and in shareholder class actions by e-mailing the notice to brokers (see *Mondor v. Fisherman*, [2002] O.J. No. 1855 (S.C.J.) (QL)).

⁸² *Wilson v. Servier Canada Inc.*, *supra* note 79 at para. 147.

⁸³ See Québec Art. 1046 C.C.P.

⁸⁴ Ontario CPA, *supra* note 16 at s. 22(1).

⁸⁵ *Markle v. Toronto (City)*, [2004] O.J. No. 3024 at para. 5 (S.C.J.) (QL). Compare Michael A. Eizenga *et al.*, *infra* note 137 at 5.40, where it is noted that "[o]n balance, courts have tended to order the defendants to bear the costs of notice".

ordering the plaintiffs to pay for the notice program⁸⁶ or where the defendant has already admitted that there is a problem with the product at issue in the litigation.⁸⁷

Not surprisingly, defendants resist orders requiring them to pay the costs of notice programs, both in the context of contested certification proceedings and settlements. In British Columbia, where there is no government funding available and no two-way costs rule,⁸⁸ plaintiffs have a particular incentive to transfer the financial burden of a notice program to the defendants.⁸⁹ Given that certification of the action as a class action decidedly is not a determination on the merits of the action,⁹⁰ the defence position that it should not be required to pay for costs of notice of certification where it has not yet been found to have acted improperly has some force. On the other hand, where a defendant is paying for the notice program, an incentive is also created to provide as much information as possible about the identity and location of class members that can be gleaned from the defendants' own records, and utilizing their own resources.

Effective notice to class members takes on special importance in provinces like British Columbia, which have an opt-in regime for non-residents. Even in pure opt-out regimes like Ontario, the claims process that results after a successful trial of common issues, or more frequently in the context of administering a settlement, effectively requires 'opting-in' because class members must take steps to establish their entitlement to settlement proceeds, even if it is by way of filling out a simple form. It is important that notice of the claims deadline reach all class members since a member who has not opted-out but who fails to submit her claim on time will be precluded from receiving any settlement monies, and at the same time she is bound by the terms of the settlement and therefore precluded from initiating an individual action.

Generally the court will require that all class members be given notice of the hearing at which a proposed settlement is to be considered by the court, even though there is no statutory requirement for such notice outside of Québec. Class members are entitled to appear at the hearing and object to the fairness or adequacy of the proposed settlement. There have also been cases where counsel for the representative plaintiff in another jurisdiction objects to the adequacy of settlement in a companion action – a counter-

⁸⁶ *Wilson v. Servier Canada Inc.*, *supra* note 79 at para. 144. See also *Boulanger v. Johnson & Johnson Corp.*, [2007] O.J. No. 2766 (S.C.J.) (QL) (corporate defendants persisted in appealing further even after action was certified and leave to appeal certification was denied, the court noting that requiring the plaintiffs to bear the costs of notice in such a case would undermine the objectives of the Ontario CPA).

⁸⁷ *Campbell v. Flexwatt Corp.* (1996), 25 B.C.L.R. (3d) 329 (S.C.), *aff'd* [1997] B.C.J. No. 2477 (C.A.) (QL).

⁸⁸ See questions 12 and 13, below, for discussion of funding and costs.

⁸⁹ Ward K. Branch, *supra* note 14 at 9-3.

⁹⁰ This principle is axiomatic. See *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158 at 170-171 and the Ontario CPA, *supra* note 16 at s. 5(5).

manoeuvre to the defence strategy of settling multiple class actions across the country in a piecemeal fashion to the ‘lowest bidder’, in what has been termed a ‘reverse auction’.⁹¹

8. In non-representative group litigation, must the named parties be informed that the litigation is proceeding in group form? Can parties/lawyers whose cases are similar to others that are proceeding in group litigation form exclude themselves from the group litigation and proceed independently, and if so how?

Not applicable.

9. In group litigation, are there special case management procedures (e.g. case pleadings, scheduling, development of evidence, motion practice, test cases, preliminary issues)?

Case Management

Case management is widely used in class actions, and mandated by the Ontario CPA. Courts use their powers in case management to prevent this complex form of litigation from becoming unwieldy and to protect the interests of class members.⁹²

Generally, in the common law provinces, the same judge hears every pre-trial motion in class action, including the motion for certification. This “same judge” requirement has led to conflict in Ontario about where the motions should be heard when the lawyers and members of the class are located in various regions (of a very large province).⁹³ The common law provinces are divided regarding the role of case management judges and whether or not they should preside over the trial of the common issues. In some provinces, such as Ontario, the case management judge does not preside at the trial of the common issues unless the parties agree.⁹⁴ In others, such as British Columbia, there is no such prohibition.⁹⁵

⁹¹ *Young v. Dollar Financial Group Inc. et al.*, Court File No. 1301 1311 (Alta. Q.B.) [unreported] (objectors’ submissions dated March 3, 2006). Class counsel in the Ontario action against Money Mart objected to the proposed settlement of the Alberta action against the same company by filing affidavits from both an Alberta class member and a solicitor in the Ontario action who had analyzed the terms of the proposed settlement. In Québec, notice to the class of a settlement hearing is required by Art. 1025 C.C.P.

⁹² Regarding the latter see note 43, above. See also Justice Warren K. Winkler, “Advocacy in Class Proceedings Litigation” (Summer 2000) 19 *Advocates’ Soc. J.* No. 1, 6-9 where he commented that case management judges have a “weighty responsibility” and a “broad discretion” in overseeing class actions.

⁹³ Ward K. Branch, *supra* note 14 at 13-1, n.2 and the cases cited.

⁹⁴ Ontario CPA, *supra* note 16 at s. 34.

⁹⁵ BC CPA, *supra* note 23 at s. 14(3).

In Québec, the Chief Justice may designate a judge to hear the certification motion and to hear all other motions.⁹⁶ Québec also provides the court with broad powers to hasten the progress of the class action or to simplify proof, so long as the measures do not prejudice a party or any class members.⁹⁷

In the absence of provision for national class actions, courts have used their case management powers to coordinate class actions in different provinces that involve the same subject matter. Courts have attempted such coordination on a consent basis among the parties and judges who are involved. At the same time, courts are cognizant of their inability to impose binding coordinating orders on an extra-provincial court when consent is not forthcoming:⁹⁸ see the discussion in question 4, above, relating to the management of national class actions.

See also discussion in question 15, below.

10. In group litigation, what proportion of cases is resolved through party/attorney negotiation and settlement, and what proportion is resolved through judicial or jury decision?

Few statistics are available on the number of cases that settle, either before or after certification or the common issues trial. Anecdotally, it appears that less than 5% of all class actions go to trial, a rate that is consistent with ordinary litigation.⁹⁹ Over the last five years, however, the number of cases determined by way of summary judgment or motions to strike the pleadings on the grounds they disclose no cause of action has increased. The settlement rate, therefore, is diminishing slightly.

Settlements are negotiated by counsel for the parties, sometimes with the assistance of a judge (not the case management judge) as mediator. Representative plaintiffs are rarely

⁹⁶ Québec Art. 1001 C.C.P.

⁹⁷ *Ibid.*, Art. 1045.

⁹⁸ *Serhan Estate v. Johnson & Johnson*, [2004] O.J. No. 1545 (S.C.J.) (QL); Ward K. Branch, *supra* note 14 at 13-3–13-4.

⁹⁹ In Québec law, see the statistics stated by P.-C. Lafond, *La recours collectif, le rôle du juge et sa conception de la justice, impact et évolution* (Cowansville: Les Éditions Yvon Blais Inc., 2006) at 35: “there remain very few final judgments in class action cases. The majority of class action cases end by out of court settlement. From 1979 to 2004, 151 actions ended by way of settlement, against 32 judgments favourable to the class. Therefore, more than three favourable outcomes out of four (82.5%) result in settlement. Moreover, the data shows that more cases are organized at the stage of authorization than at the stage of the lawsuit’s origin or foundation, by a ratio of 2 to 1 (98 against 53)” [translation]. For statistics up to September 2004 in British Columbia, Québec and Ontario see Ward K. Branch and Don Montrichard, “Exposing the ‘Litigation Blackmail’ Myth” (Paper prepared for British Columbia CLE, 25 February 2005), online: Branch MacMaster <<http://www.branmac.com/classactions/articles.htm>>.

at the negotiating table, and in fact, need not endorse the settlement themselves before a court will approve it on behalf of the class.¹⁰⁰

Class counsel have a fiduciary duty to the class and must keep their interests paramount when engaged in settlement discussions.¹⁰¹ The judge at the settlement approval hearing is charged with ensuring that the proposed settlement is “fair, reasonable and in the best interests of those affected by it.”¹⁰² The court does not, however, review the settlement “with an eye to perfection”; rather, the court must be satisfied that the settlement falls “within a zone or range of reasonableness” for the class as a whole.¹⁰³ Courts consider a variety of factors in determining whether to approve the settlement, including:

- the likelihood of recovery, or the likelihood of success;
- the amount and nature of discovery evidence;
- settlement terms and conditions;
- future expense and likely duration of litigation;
- number of objectors and nature of objections;
- presence of good faith and absence of collusion; and
- information conveying to the court the dynamics of, and the positions taken by the parties during the negotiation.¹⁰⁴

Settlements are usually approved by courts. However, it is not unknown for judges hearing motions to not approve the settlement initially. Instead, judges indicate where and how the terms may be deficient and return the matter to the parties and their counsel to address the weaknesses before bringing the matter back to the court.¹⁰⁵ Extensive affidavit evidence is led by class counsel to satisfy the judge that the settlement is provident. Such evidence usually includes a solicitor’s affidavit explaining the terms of

¹⁰⁰ See e.g. *Carom v. Bre-X Minerals Ltd.*, [2001] O.J. No. 4177 at para. 8 (S.C.J.) (QL) (listing nine factors to be taken into account in determining whether to approve the settlement as fair, reasonable and in the best interests of the class as a whole, including the recommendation of the representative plaintiff, the court commenting that “it is not necessary that all the enumerated factors be present in each case”).

¹⁰¹ *Garland v. Enbridge Gas Distribution Inc.*, [2006] O.J. 4907 at para. 29 (S.C.J.) (QL): “The interests of the class must be paramount when counsel are engaged in negotiations to settle the issues with an opposing party. In my opinion, they should not permit their personal interests – and particularly those that are adverse to the interests of the class – to be involved in the negotiations.”

¹⁰² *Sutherland v. Boots Pharmaceutical PLC*, [2002] O.J. No. 1361 at para. 10 (S.C.J.) (QL); *Haney Iron Works Ltd. v. Manufacturers Life Insurance Co.* (1998), 169 D.L.R. (4th) 565 at para. 21 (B.C. S.C.) (QL).

¹⁰³ *Ontario New Home Warranty Program v. Chevron Chemical Co.*, [1999] O.J. No. 2245 at para. 89 (S.C.J.) (QL).

¹⁰⁴ *White v. Canada (Attorney General)*, [2006] B.C.J. No. 760 at para. 11 (S.C.) (QL). These factors were first set out in *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.) (QL).

¹⁰⁵ Comment by Chief Justice Winkler, Court of Appeal for Ontario, on draft of this paper. See also *McCarthy v. Canadian Red Cross Society*, [2001] O.J. No. 567 (S.C.J.) (QL) (tentative rejection of a settlement with leave to file further evidence).

the settlement, how the risks and value of the case were evaluated and addressed in the settlement, and the sufficiency of the settlement fund to pay all potential claims. The degree of judicial scrutiny brought to bear varies with each case and court, but generally, both sides of the bar agree that judges are taking a hard look at settlement agreements.

One component of settlements that attracts particular attention is the class counsel fee. Solicitors' affidavits are typically filed explaining the effort expended by counsel to justify the fee being sought. Judges are cognizant of the potential for collusion between plaintiffs and defence counsel and the inherent conflict in class counsel seeking approval of a settlement where their fee is at issue. Quite recently, an Ontario judge ruled that a settlement agreement cannot be contingent on approval of the class counsel fee negotiated by the parties' representatives, even in circumstances where the representative plaintiff did not object to the fee.¹⁰⁶

As discussed in question 7, above, class members are given notice of the settlement hearing and the opportunity to appear at the hearing and object to the proposed terms. Objectors are relatively infrequent, however, and almost never scuttle the settlement.

Not all cases settle, of course. The Canadian experience with trials of common issues is still in its infancy. In the past five years, only a handful of cases have been tried in all of Canada compared to the number of class actions that have been certified.¹⁰⁷ How common issues trials are conducted, therefore, is somewhat uncharted territory. The ordinary Rules of Civil Procedure apply equally to class proceedings and ordinary actions, as do the usual rules of evidence, including the burden of proof and requirements

¹⁰⁶ *Garland v. Enbridge Gas Distribution Inc.*, *supra* note 101 at paras. 4-6. In this case, the minutes of settlement were amended at the urging of Cullity J. to remove a provision that suggested the settlement was contingent on fee approval in the amount requested. The revised minutes provided that if the fees were reduced by the court in an exercise of its discretion, and the settlement was otherwise approved, the settlement would be binding and the amount payable to a charity would be increased to the extent of the fee reduction.

¹⁰⁷ There may have been as few as 3 class actions that have been tried in Ontario in the past five years: see *Kerr v. Danier Leather Inc.*, [2005] O.J. No. 5388 (C.A.) (QL) [*Kerr*]; *Hislop v. Canada (Attorney General)*, [2003] O.J. No. 5212 (S.C.J.) (QL) [*Hislop*]; *Millard v. North George Capital Management Ltd.*, [2006] O.J. No. 4902 (S.C.J.) (QL) [*Millard*]. While *Kerr*, *Hislop* and *Millard* appear to be the only three Ontario class actions that have gone all the way to a full trial, there have been other cases determined by way of summary judgment, which technically is a determination on the merits: see e.g. *Authorson (Litigation Guardian of) v. Canada (Attorney General)*, [2000] O.J. No. 3768 (S.C.J.) (QL), rev'd in part 2003 SCC 39 (overturning motion judge's summary judgment against the defendant), 2007 ONCA 501 (Court of Appeal allowing Crown's appeal and holding Crown not liable to class for damages); *Englefield v. Wolf*, [2005] O.J. No. 4895 (S.C.J.) (QL) [*Englefield*]. Chief Justice Winkler, commenting on a draft of this paper, indicates that he believes the figure of cases tried in Ontario to be closer to half-a-dozen.

In British Columbia, only a few cases have been determined on the merits: see *Reid v. British Columbia (Egg Marketing Board)* (2007), 45 C.L.L.T. (3d) 264 (B.C. S.C.) [*Reid*] (trial of common issues); *Nanaimo Immigrant Settlement Society v. British Columbia* (2003), 22 B.C.L.R. (4th) 308 (dismissal of application for summary judgment); *Elms v. Laurentian Bank of Canada*, [2004] B.C.J. No. 1608 (S.C.) (QL); *Withler v. Canada (Attorney General)*, 2006 BCSC 101 [*Withler*]; *Kilroy v. A OK Payday Loans Inc.*, 2006 BCSC 1213 [*Kilroy*] (summary trial of common issues). *Reid*, *Withler* and *Kilroy* proceeded to trial.

of admissibility of evidence.¹⁰⁸ Based on the legislation, it would appear at a minimum that the representative plaintiffs must testify at the common issues trial in order to give the court the necessary factual background. Clearly, not all class members are required to attend or testify at the trial, since such a requirement would defeat the purpose of a class proceeding.¹⁰⁹ Statistical evidence can be led,¹¹⁰ and aggregate damages can be determined once liability has been decided, to avoid having to calculate damages for each class member.¹¹¹

After the common issues trial, the case management judge or another judge of the court may conduct further hearings to decide individual issues. It is open to the court to give notice to class members where individual evidence is needed after the determination of common issues.¹¹² Importantly, the judge is required to devise the least expensive and most expeditious methods for resolving any individual issues that remain after trial that are consistent with justice to the class and the parties.¹¹³

11. What remedies are available in representative and non-representative group litigation? When group litigation is resolved with the payment of monetary damages, how are damages allocated among claimants?

There are no limits regarding the kinds of remedies available in class actions.

With regard to monetary relief there are elaborate provisions, including for:

- the assessment of aggregate awards, including sampling evidence, in appropriate circumstances and including shares of such awards to members of the class on an average or proportional application;¹¹⁴
- participation of individual members of the class for determination of issues particular to them;¹¹⁵ and

¹⁰⁸ *Québec (Curateur Public) v. Syndicat national des employés de l'Hôpital St-Ferdinand*, [1996] 3 S.C.R. 211 at paras. 31-33 (QL); *Risorto v. State Farm Mutual Automobile Insurance Co.*, [2007] O.J. No. 676(S.C.J.) (QL).

¹⁰⁹ Michael G. Cochrane, *Class Actions: A Guide to the Class Proceedings Act, 1992* (Aurora: Canada Law Book, 1993) at 48: "It is the representative plaintiff's responsibility to place before the court a sample of class members and their experiences from which the court can draw an inference or conclusion about the experience of the entire class."

¹¹⁰ Ontario CPA, *supra* note 16 at s. 23.

¹¹¹ *Markson v. MBNA Canada Bank*, [2007] O.J. No. 1684 (C.A.) (QL).

¹¹² Ontario CPA, *supra* note 16 at s. 18.

¹¹³ *Ibid.*; BC CPA, *supra* note 23 at s. 20; Québec Art. 1030 C.C.P.

¹¹⁴ Ontario CPA, *ibid.*, ss. 23, 24.

¹¹⁵ *Ibid.*, s. 25.

- distribution of judgments, including by a form of *cy-près*.¹¹⁶

These provisions are largely due to the detailed analysis provided by the OLRC and its wanting to avoid many of the related issues that were plaguing American courts at the time of the OLRC project, that is, the late 1970s.¹¹⁷

Judges do exercise an oversight function. For example, the Ontario legislation explicitly requires judges to “supervise the execution of judgments and the distribution of awards...”¹¹⁸

However, very few class actions have been tried on their merits. Plaintiffs have been successful in many, but not all, of these. As a result there have been very few instances where courts have had to involve themselves in assessment and distribution of monetary relief on a contested basis.¹¹⁹

One way that the elaborate provisions for calculation and distribution of monetary relief have become relevant is regarding issues on certification. The Court of Appeal for Ontario recently held that the applicability of provisions for aggregate assessment, including using sampling methods, should be considered by the Court on certification motions, in determining whether the tests for certification have been met and whether a class action is the preferable procedure for determining the relevant issues.¹²⁰

Data on the outcomes of class proceedings is more readily ascertainable than the data on the number of class proceedings discussed in question 6, above. Certification decisions and a court’s subsequent involvement with the proceeding post-certification increase the likelihood of the case being reported, making the creation of statistical data on outcomes less cumbersome. However, a number of class proceedings that reach the certification stage still go unreported, making a comprehensive analysis of the outcomes of Canadian class proceedings in the past five years a research-intensive task.

The following is a compilation based on figures in Ward K. Branch’s class actions text:

- Québec (data as of 2006):
 - 797 motions for certification had been filed.
 - 365 certification decisions had been issued. Certification was granted in 209 (or about 57%) of those cases.

¹¹⁶ *Ibid.*, s. 26.

¹¹⁷ Ontario Law Reform Commission, *supra* note 5 at v. 2, c. 14.

¹¹⁸ Ontario CPA, *supra* note 16 at s. 26(7). In Québec, see Art. 1033.1 C.C.P.

¹¹⁹ Ward K. Branch, *supra* note 14 at c. 18. For a Québec perspective, see P.-C. Lafond, *supra* note 99.

¹²⁰ *Markson v. MBNA Canada Bank*, *supra* note 111.

- 55 actions had reached decisions on the merits. The class claim was successful in 34 cases (equating to roughly 62%).
- There is no information that indicates what proportion of these actions occurred in the past five years.¹²¹
- Ontario (data for the period of 2002 – July, 2007):
 - 58 certification decisions had been issued where certification was contested. Certification was granted in 30 (or about 52%) of these cases.
 - A further 51 cases were certified on consent or certification was uncontested by the defendant.
 - 5 cases were decided on the merits,¹²² with the class claim being granted in 4 instances.
 - 50 cases were settled: 39 of these settlements occurred prior to certification; 11 subsequent to certification.¹²³
- British Columbia (data for the period of 2002 – July, 2007):
 - 37 certification decisions had been issued where certification was contested. Certification was granted in 26 (or about 70%) of these cases.
 - A further 16 cases were certified on consent or certification was uncontested by the defendant.
 - 5 cases were decided on the merits,¹²⁴ with the class claim being granted in only 1 instance.
 - 19 cases were settled: 11 of these settlements occurred prior to certification; 8 subsequent to certification.¹²⁵
- Other provinces and the Federal Court (data for the period 2002 – July, 2007):
 - 29 cases have reached the certification stage. Certification was granted in 13 (or about 45%) of those cases.¹²⁶

¹²¹ Fonds d'aide aux recours collectifs, *Rapport Annuel 2000* (Montréal, 2002) as cited in Ward K. Branch, *supra* note 14 at 4-93, n. 229.

¹²² See note 107, above. The class was successful in *Authorson, Hislop, Millard and Englefield*.

¹²³ This data, unless otherwise indicated, is based on the cases cited by Ward K. Branch in his text: *Supra* note 14 at 4-94–4-106, n. 230-233. Mr. Branch's research reports cases and their outcomes since the inception of Ontario's *Class Proceedings Act, 1992*, S.O. 1992, c. 6 to July, 2007. To isolate the period between 2002 and July, 2007, the Authors examined the citations of the cases referred to by Mr. Branch and selected those cases whose citation indicated that their certification decisions were released in 2002 or later.

¹²⁴ See note 107, above. The class was successful in *Kilroy*.

¹²⁵ The methodology used to calculate this data is identical to that explained in note 123, above. Again, raw data was taken from the cases cited by Ward K. Branch in his text: *Supra* note 14 at 4-107–4-112, n. 234-237a.

¹²⁶ See Ward K. Branch, *ibid.* at 4-112–4-114, n. 237a.1–237f. This data was obtained by adding the number of certification decisions and results reported by Mr. Branch for the Provinces of Alberta, Saskatchewan, Manitoba, Newfoundland and the Federal Court. It was unnecessary to consider whether

12. Who funds group litigation: the state, legal services organizations, NGOs, private lawyers, or the claimants themselves?

There are two sources of funding for plaintiffs in class actions: class counsel and government funding.

Underwriting by Private Lawyers

It is private lawyers – class counsel – who fund the bulk of class actions in Canada.¹²⁷ They do so by way of contingency fee agreements with the representative plaintiffs whereby counsel agrees to fund the litigation and recover fees and disbursements only in the event of success in the litigation (either judgment at trial or settlement). The risk borne by class counsel is one of the factors taken into consideration by the court in fixing the multiplier and fee.¹²⁸ The contingency fee agreement itself must be approved by the court.¹²⁹ There is no systematic evidence of the fees successful plaintiffs' counsel are recovering; there is, however, increasing media speculation on this subject.¹³⁰

In terms of class counsel fees, payable out of the judgment or settlement, the most common methods by which fees are determined are as follows:

- speculative fee: lawyer is paid his usual rate only in the event of success;
- base/multiplier fee (also known as lodestar): lawyer is paid his usual rate multiplied by the number of hours expended on the file multiplied by a factor of 1 to 5;
- percentage of recovery: lawyer is paid a defined percentage of the total recovery; and
- sliding percentage of recovery: lawyer is paid a defined percentage of the total recovery but the percentage varies depending on the point at which the action settles or is resolved (the later in the litigation the proceeding is resolved, the higher the percentage).¹³¹

any of the cases cited by Mr. Branch pre-dated 2002, as none of the above-mentioned jurisdictions had class proceedings legislation prior to this time.

¹²⁷ Less often, class counsel arranges for a consortium of third party investors to fund the litigation by way of a loan to the representative plaintiffs, repayable only in the event of success in the litigation. See e.g. *Nantais v. Telectronics Proprietary (Canada) Ltd.* (14 September 1995), Windsor 95-GD-31789 (Ont. Ct. (Gen. Div.) [unreported]). See also “Investors betting lawsuits will bring big payoffs”, *Toronto Star* (22 February 1998) A3.

¹²⁸ See discussion of counsel fees in question 13, below.

¹²⁹ Ontario CPA, *supra* note 16 at ss. 32(3), 33.

¹³⁰ See e.g. Geoff Kirbyson, “The Big Picture” *Canadian Lawyer* 31:8 (August 2007) 20.

¹³¹ Rachael Mulheron, *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Oxford: Hart Publishing, 2004) at 469.

The Ontario class action legislation specifically envisions the use of the base/multiplier basis of recovery for class counsel.¹³² While the statute does not specifically provide for percentage fee recovery, Ontario courts have also endorsed that method of calculating a reasonable fee,¹³³ on the basis that it promotes efficiency and discourages inflated docketing. In recent years, class counsel fees awarded on the base/multiplier method have been as high as a multiplier of 4.8,¹³⁴ but generally range between 1 and 3. A recent study of Ontario class counsel fees approved between 1996 and 2006 indicates that the median multiplier was 2.5 and the median percentage recovery was approximately 15%.¹³⁵ Fees in the range of 25% of the total recovery are not uncommon.¹³⁶

In British Columbia, the legislation does not specifically state the kind of contingency fee agreement that may be entered into, and in fact, contingency fees were permitted in litigation long before class proceedings legislation was introduced. This stands in contrast to the situation in Ontario where contingency fees in class proceedings were a first for litigation in the province. British Columbia courts have endorsed both percentage fee and multiplier/base fee contingency fee agreements, so long as the fee award represents “fair value to the class”.¹³⁷ In Québec’s legislation, there are no specific requirements for contingency fee retainer agreements.¹³⁸

¹³² Ontario CPA, *supra* note 16 at s. 33.

¹³³ The court considered whether percentage-based fees were authorized under the Ontario class proceedings legislation in *Crown Bay Hotel Ltd. Partnership v. Zurich Indemnity Co. of Canada*, [1998] O.J. No. 1891 (Gen. Div.) (QL), where Winkler J. (as he then was) noted at para. 11 that “A contingency fee arrangement limited to the notion of a multiple of the time spent may, depending upon the circumstances, have the effect of encouraging counsel to prolong the proceeding unnecessarily and of hindering settlement, especially in those cases where the chance of some recovery at trial seems fairly certain. On the other hand, where a percentage fee [...] is in place, such a fee arrangement encourages rather than discourages settlement. [...] Fee arrangements which reward efficiency and results should not be discouraged.” Subsequently, Ontario courts have awarded class counsel fees on a percentage basis: see e.g. *Bona Foods Ltd. v. Ajinomoto U.S.A., Inc.*, [2005] O.J. No. 908 (S.C.J.) (QL). An insightful discussion of the advantages and disadvantages of percentage-based fees can be found in Benjamin Alarie, “Rethinking the Approval of Class Counsel’s Fees in Ontario Class Actions”, *The Canadian Class Actions Review* [forthcoming] at 8.

¹³⁴ *Hislop v. Canada (Attorney General)*, [2004] O.J. No. 1867 (S.C.J.) (QL). In British Columbia, a court has awarded class counsel fees equating to a multiplier of 5.5: see *Endean v. Canadian Red Cross Society*, [2000] B.C.J. No. 1254 (S.C.) (QL).

¹³⁵ Benjamin Alarie, *supra* note 133.

¹³⁶ See e.g. *Toevs v. Yorkton*, [2006] O.J. No. 538 (S.C.J.) (QL) (\$650,000 fee in a \$2.6 million settlement); *Wilson v. Servier Canada Inc.*, [2005] O.J. No. 1039 (S.C.J.) (QL) (\$10 million fee in a \$40 million settlement).

¹³⁷ Michael A. Eizenga *et al.*, *Class Actions Law and Practice*, looseleaf (Markham, ON: LexisNexis Canada Inc., 2006) at 13.2.

¹³⁸ Ward K. Branch, *supra* note 14 at 7-3.

Courts will consider a variety of factors in determining what counsel fee is reasonable and fair in all of the circumstances, including the time and labour required; the novelty of the legal issues involved; the outcome; and the risk taken by class counsel.¹³⁹ Courts have subjected class counsel to considerable effort in justifying the fee sought to be approved. For example, dockets must be submitted and are subjected to some scrutiny to ensure that there was no over-lawyering, no duplication of effort, and a reasonable division of labour between firms and lawyers.¹⁴⁰

No hard data is available on the rate of recovery in class actions by comparison to other types of litigation. Presumably, successful non-representative litigation undertaken on a contingency basis can be as lucrative as class action litigation (except that in the former, there is no judicial approval required of the retainer agreement). But there is no doubt that class counsel bear a significant risk in underwriting a class action,¹⁴¹ and when successful, are rewarded handsomely.

Underwriting by Government Funds

Ontario and Québec each have government funds to which representative plaintiffs may apply for funding of their litigation. In the case of Ontario, funding is for disbursements only; in the case of Québec, there may be funding for both disbursements and legal fees. The funding granted is often very modest, but in addition to the financial support, representative plaintiffs are indemnified by the Fund against adverse costs orders.¹⁴² In exchange, the Fund collects a percentage of any judgment or settlement obtained in the class action.¹⁴³

¹³⁹ For a recent example where the list of factors is discussed, see *White v. Canada (Attorney General)*, *supra* note 104 at para. 27.

¹⁴⁰ *Rose v. Pettie*, [2006] O.J. No. 1612 (S.C.J.) (QL) (reducing base fee on the basis of “significant duplication of work and an otherwise unnecessary expenditure of lawyers’ time” (para. 8)).

¹⁴¹ In *Hislop v. Canada (Attorney General)*, *supra* note 134, Macdonald J. commented (at para. 12) that the significant litigation and financial risks assumed by class counsel made the case “bet your firm” litigation.

¹⁴² *Law Society Act*, R.S.O. 1990, c. L.8, as am. by *Law Society Amendment Act (Class Proceedings Funding)*, 1992, S.O. 1992, c. 7, s. 3. In Québec, if a cost award is made against the representative plaintiff and she is unable to pay, the defendant may then apply to the Québec Fund for payment. The Fund then becomes subrogated to the defendant’s rights as against the unsuccessful representative: see *An Act Respecting the Class Action*, R.S.Q. c. R-21, s. 31, as cited in Ward K. Branch, *supra* note 14 at 8-7, n. 45. In Alberta, there is a two way costs regime and there is no fund for which the plaintiffs can subsidize or protect themselves from costs. See Ward K. Branch, *ibid.* at 19-15. The significance of the indemnification against adverse costs orders provided by the Fund is more fully discussed in question 13, below.

¹⁴³ In Ontario, the percentage recovery is 10% on top of the amount of funding previously paid by the Ontario Fund to the representative plaintiff: *Class Proceedings*, O. Reg. 771/92, s. 10(3)(b). In Québec, the amount collected by its Fund varies depending on the method of recovery by the class, and applies in every class action, not just those in which funding has been granted. The Québec Fund has subrogation of any amounts provided and it will typically take 50-90% of the remaining balance after individual claims on any collective award. Where there is no collective award, the Fund can take in the range of 2-10% of individual liquidated claims. If a court decides not to proceed with individual claims, the Fund is entitled to 30-70% of

Somewhat unexpectedly, the Class Proceedings Fund in Ontario is little used. In part, this is due to the small number of applicants. In 2005, the last year for which the Class Proceedings Committee issued an annual report, only six applications for funding were made.¹⁴⁴ Funding was approved for one application, refused in another, and pending in the remaining four as of the end of fiscal 2005. The total amount of money awarded to applicants in 2005 (including monies paid in respect of previous years' awards) was only \$288,149.22.¹⁴⁵ Interviews of a sampling of leading class action lawyers indicate that the primary reasons plaintiffs do not seek funding more often are: the low approval rate by the Class Proceedings Committee (which assesses the merits of an action in determining whether to grant financial support); the minimal amount of funding granted; and the relatively exorbitant share of the ultimate settlement or judgment amount which is levied by the Fund.¹⁴⁶ Despite its intended objective of facilitating access to justice by overcoming the significant financial barriers to class proceedings faced by representative plaintiffs, the Class Proceedings Fund in Ontario has not fulfilled its promise.

Ward Branch, commenting on a draft of this paper, suggests that in contrast, the Québec Fund is a very vibrant entity. The fact that the Fund takes a portion of all class settlements or judgments, whether or not it provides funding, creates an energizing cycle: (1) the Fund is well-funded by virtue of its levy on all settlements and judgments; (2) making it easier to accept applications; (3) creating an incentive to apply; and (4) hence, the Fund is used in most cases (since you are going to be “charged” in any event and the funding is liberal).

13. Costs and benefits.

Representative plaintiffs face two possible financial burdens: their own lawyers' fees and disbursements, and those of the opposing party in the event the latter is successful in the action.¹⁴⁷ Contingency fee agreements address the first financial hurdle, and provide that the lawyer will only be paid out of a settlement or judgment. The latter risk of exposure

the total award, less lawyers' fees and costs: Ward K. Branch, *ibid.* at 8-6, n. 43. See also *Regulation respecting the Percentage withheld by the Fonds d'aide aux recours collectifs*, R.R.Q. c. R-21, r. 3.1.

¹⁴⁴ The Law Foundation of Ontario, *2005 Annual Report*, online: The Law Foundation of Ontario <<http://www.lawfoundation-on.org/English/2005%20Annual%20Report%20Eng.pdf>> at 7.

¹⁴⁵ *Ibid.* at 8.

¹⁴⁶ See also Ward Branch & Luciana Brasil, “‘If it ain’t broke, don’t fix it! If it is broke, fix it!’ Costs Regimes for Class Actions”, (Paper presented to the 4th Annual Symposium on Class Actions, Toronto, 26-27 April 2007) online: Branch MacMaster <<http://www.branmac.com/go/download/broke-fix.pdf>> at 4.

¹⁴⁷ In Ontario, which has a two-way costs regime, the representative plaintiffs are at risk of adverse costs awards throughout the proceeding, including following motions. The legality and propriety of plaintiffs' counsel indemnifying representative plaintiffs against adverse cost awards was confirmed recently in *Holmes v. London Life Insurance Co.*, [2007] O.J. No. 158 (S.C.J.) (QL).

is more vexing, and is resolved by indemnities provided either by class counsel or a government fund, where available. The potential barriers to class action litigation remain, however; the costs exposure is merely transferred from the representative plaintiff to her lawyer, and as a result, any chilling effect caused by meting out substantial costs orders against plaintiffs (i.e., their lawyers) remains a source of concern from an access to justice perspective.

Two Models of Costs in Class Actions

The basic rule in Canada is a “two way costs rule”, i.e., losers pay costs to the winners of the litigation. The amount to be paid varies in different jurisdictions. In terms of class actions two different models of costs have emerged. In some jurisdictions, such as Québec and Ontario, the “two way” costs rule has been applied; though in the case of Québec on a limited scale.¹⁴⁸ In other jurisdictions, such as British Columbia there is a “no costs” rule, i.e., the court cannot, subject to exceptions, award costs to any party up to the resolution of the common issues; the exceptions are for frivolous or abusive conduct and so forth.¹⁴⁹ At present the “no costs rule” has been adopted in most jurisdictions.¹⁵⁰ The rationale for the “no way costs” rule is to remove the disincentives that faced plaintiffs, who were exposed to costs orders should the class action fail. However, this rule also deprives successful plaintiffs of costs; thus, in that sense, taking away an incentive to being meritorious class actions. Not surprisingly there is serious debate in Canada in terms of which is the better rule for, on the one hand, encouraging well-founded class actions and, on the other, discouraging unmeritorious ones.¹⁵¹

Canadian courts have, in the main, been sensitive to the impact large costs award against plaintiffs will have on the viability of class actions. Even in no costs regimes, courts can order costs against an unsuccessful defendant to sanction abusive conduct or delay.¹⁵² In two-way costs regimes, courts have been cautious to order costs against unsuccessful plaintiffs. In 2004, the Court of Appeal of Alberta reversed the lower court’s award of costs against a plaintiff following the defendants’ successful motion to strike, on the basis that the plaintiffs had claimed a novel point of law that was a matter of broad public

¹⁴⁸ Ontario CPA, *supra* note 16 at s. 31; Québec Art. 1050.1 C.C.P. A “two way” costs regime also exists under the Alberta (*Class Proceedings Act*, S.A. 2003, c. C-16.5, s. 37) and New Brunswick (*Class Proceedings Act*, S.N.B. 2006, c. C-5.15, s. 39) Acts.

¹⁴⁹ BC CPA, *supra* note 23 at s. 37.

¹⁵⁰ In addition to British Columbia, the “no costs” rule has been adopted in Saskatchewan (*Class Actions Act*, S.S. 2001, c. C-12.01, s. 40), Newfoundland (*Class Actions Act*, S.N.L. 2001, c. C-18.1, s. 37), Manitoba (*Class Proceedings Act*, C.C.S.M. c. C130, ss. 37(1) to (4)) and at the Federal Court (*Federal Court Rules, 1998*, SOR/98-106, as am. by *Rules Amending the Federal Court Rules, 1998*, SOR/2002-417, s. 17, R. 299.41).

¹⁵¹ Comment by Chief Justice Winkler on draft of this paper.

¹⁵² See BC CPA, *supra* note 23 at s. 37(2).

interest.¹⁵³ In doing so, the Court acknowledged the role that class actions play in increasing access to justice in the judicial system, stating that “large cost awards against unsuccessful plaintiffs will have a chilling effect and likely discourage meritorious class actions.”¹⁵⁴ As a result of this decision, Alberta courts have created a judicially mandated standard for awarding costs in class actions, reflective of the statutorily mandated criteria in other provinces.¹⁵⁵ While Ontario courts exhibit the same caution in ordering costs against plaintiffs, there have been some significant costs awards made against unsuccessful plaintiffs.¹⁵⁶

14. Is the burden that group litigation places on the court more, the same, or less, than in comparable non-representative, non-group litigation? What is the average time to dispose of a group case, and how does this compare to comparable non-representative non-group litigation?

There are no statistics available to gauge the relative burdens placed on Canadian courts by class action and ordinary civil litigation. Class actions do, however, require more significant case management by the designated judge than does most complex litigation, but this is certainly not always the case. Class actions that proceed smoothly to certification and then settlement may, in fact, require little by way of judicial oversight until the certification and settlement approval hearings are heard. Nevertheless, most plaintiffs counsel agree that class proceedings require significant assistance from judges in terms of scheduling, enforcement of timetables, and procedural motions.

The time it takes for a case to get to the certification motion varies greatly from action to action. On average, it is expected that the certification motion will not be heard for at least one year from the time the action is commenced. It is not unusual for the hearing to be heard two or three years after the claim is instituted, because of pleadings motions, cross-examinations on the certification material, and scheduling difficulties. Ordinary litigation also can take three years or more to get to trial, depending on the same variables.

Courts have commented on the length of time cases are taking to get to certification and determination on the merits. The Chief Justice of the Court of Appeal for Ontario commented in one case, which went up to the Supreme Court of Canada twice on interlocutory matters, that the protracted nature of the matter “cast some doubt on the

¹⁵³ *Pauli v. Ace INA Insurance Co.*, [2004] A.J. No. 883 at paras. 26-28 (C.A.) (QL).

¹⁵⁴ *Ibid.*, at para. 31.

¹⁵⁵ Steven Leidl & Scott Gordon, “Alberta’s Class Action Cost Regime”, (Paper presented to the 4th Annual Symposium on Class Actions, Toronto, 26-27 April 2007) [unpublished].

¹⁵⁶ *Pearson v. Inco Ltd.*, [2002] O.J. No. 3532 (S.C.J.) (QL), rev’d (2006), 78 O.R. (3d) 641 (costs order overturned as certification granted by Court of Appeal); *Kerr v. Danier Leather Inc.*, [2006] O.J. No. 3370 (C.A.) (QL), (representative plaintiff was ordered to pay the defendants \$100,000 after an unsuccessful trial).

wisdom of hearing a case in instalments”. He continued, noting that “[b]efore employing an instalment approach, it should be considered whether there is potential for such a procedure to result in multiple rounds of proceedings through various levels of court. Such an eventuality is to be avoided where possible, as it does little service to the parties or to the efficient administration of justice.”¹⁵⁷ More recently, a judge refusing leave to appeal from a certification order, noted that the claim had been commenced over three years earlier and that it was “now time for the issues raised to be sent on for trial. The interests of justice and, I would have thought, the parties, demand resolution.”¹⁵⁸ On the other hand, in complex litigation experienced counsel have argued that litigating the key issues in advance of certification rather than the entire case at once shortens rather than lengthens the proceedings and contains costs.¹⁵⁹ Moreover, to address the concern about the length of time cases are taking to get to the certification hearing, case management judges are becoming more open to insisting on the 90-day rule, which requires that the certification motion be brought within 90 days of the close of pleadings.¹⁶⁰

The length of time required for a case to reach the trial of the common issues is, of course, even longer. In *Mandeville v. Manufacturers Life Insurance Co.*, for example, an action commenced in December, 2001, the certification and summary judgment motions were argued in September 2002,¹⁶¹ the appeal argued and denied in June 2004,¹⁶² and as of the summer of 2007, was still in the oral and documentary discovery stage. The case is not expected to go to trial before 2008.

15. What are the current debates in your jurisdiction over the application of collective litigation rules and their consequences?

At the general policy level in the broader society there is little debate regarding class actions. They are supported as part of the functioning of the civil justice system. In addition, there are two other reasons why class actions are widely approved.

¹⁵⁷ *Garland v. Consumers’ Gas Co.*, [2001] O.J. No. 4651 at para. 76 (C.A.) (QL).

¹⁵⁸ *Smith v. National Money Mart Co.* (2 April 2007), Court File No. 03-CV-1275 (Ont. S.C.J.) [unreported].

¹⁵⁹ See e.g. *Attis v. Canada (Minister of Health)*, [2007] O.J. No. 2990 at para. 11 (S.C.J.) (QL). See also Roy Millen, “Addressing the Merits of a Proposed Class Proceeding in Advance of Certification”, *Class Action V:4* (July 2007) 367, who argues that “pre-certification motions on the merits have become an important tool for streamlining proposed class proceedings, in order to reduce the risk of wasted cost, delay and uncertainty necessitated by the process of and following certification”.

¹⁶⁰ Observation by Chief Justice Winkler in commenting on a draft of this paper. The 90-day rule is common to many class proceedings statutes, including the Ontario CPA, *supra* note 16 at s. 2(3) and the BC CPA, *supra* note 23 at s. 2(3).

¹⁶¹ [2002] O.J. No. 5386 (S.C.J.) (QL).

¹⁶² [2004] O.J. No. 2509 (C.A.) (QL).

First, in 1982 Canada entrenched a bill of rights: the *Charter of Rights and Freedoms*.¹⁶³ The *Charter* substantially enlarged the powers of courts and contributed significantly to a “rights consciousness” among Canadians. The prestige of courts in Canada is very high while trust in representative politics is low and has been in decline for at least a couple of decades.¹⁶⁴ This faith in courts is generally available to support initiatives involving the judiciary, including class actions.

Second, there is a relatively organized push in the legal profession, especially in Ontario, for initiatives to provide access to justice. For example, the Law Society of Upper Canada (Ontario) organized an international conference on access to justice in 2003 and has a standing Access to Justice Committee, one of the law faculties (Windsor) has access to justice as an institutional theme (and, among other aspects, has a mandatory first year course in access to justice) and there have been a number of developments involving *pro bono* services by lawyers.¹⁶⁵ What the impact of these developments will be remains to be seen but class actions, having access to justice as a main purpose, enjoy support garnered from the larger access to justice movement.¹⁶⁶

There are three main areas which are the focus of debate regarding possible change. They are:

- national class actions and the management of these actions;¹⁶⁷
- a comprehensive Database;¹⁶⁸ and
- the complexity of, the amount of material filed on, and the length of time for a case to reach certification.¹⁶⁹

¹⁶³ *Charter*, *supra* note 8.

¹⁶⁴ W.A. Bogart, *Good Government? Good Citizens?: Courts, Politics, and Markets in a Changing Canada* (Vancouver: University of British Columbia Press, 2005) at c. 2.

¹⁶⁵ Regarding the LSUC’s conference see J. Bass, W.A. Bogart & F. Zemans, *Access to Justice for a New Century: The Way Forward* (Toronto: LSUC/Irwin Law, 2005).

¹⁶⁶ Access to justice (along with judicial economy and behavior modification) was explicitly identified as a major goal of class actions in the seminal report of the Ontario Law Reform Commission, *supra* note 5 at vol. 1, 119ff. This goal has consistently been alluded to by the courts: see *Western Canadian Shopping Centres, Inc. v. Dutton*, *supra* note 10 at 549-550 (where McLachlin CJC observed that “class actions improve access to justice by making economical the prosecution of claims that would otherwise be too costly to prosecute individually...”).

¹⁶⁷ See response to question 4, above.

¹⁶⁸ See response to question 6, above.

¹⁶⁹ See response to questions 3 and 14, above.

16. Overall, how would you evaluate the mechanism(s) success in achieving major changes in behavior, activities or policy, relative to the costs incurred by public and private actors?

This is a difficult question to answer for Canada because of the lack of reliable statistics and rigorous empirical studies. There are three generally agreed upon purposes of class actions: improved access to justice, enhanced judicial economy, and increased modification of wrongful behavior. However, the extent to which any of these benefits are actually realized is to a large extent unknown. Moreover, there are few reliable statistics on the overall costs of class actions. Thus it is impossible to engage in a reliable costs/benefits analysis called for in the question.

At the same time one can venture to suggest that overall class actions are performing at an acceptable level. Precise measurements are clearly lacking. However, there is no concerted criticism that would suggest that class actions, in total, are doing more harm than good. One indication is commentary from those who represent defendants. Counsel involved in class actions typically represent only plaintiffs or defendants. Lawyers who represent defendants are, generally, well organized and well funded. Thus, they are a prominent source for pointing out negatives associated with class actions. They have levied a wide variety of critiques, for example, regarding the ability and appropriateness of courts of individual provinces certifying national class actions.¹⁷⁰ However, none of these criticisms strike at the existence of class actions or their legitimacy. In addition, there have been no concerted criticisms from members of the public, or otherwise, regarding lack of actual benefit to class members, an issue about which there should be constant vigilance.

This question does underscore the need for much more rigorous assessment of class actions and the outcomes that are being produced in Canadian society.

¹⁷⁰ See response to question 4, above.