

CLASS ACTIONS IN QUEBEC: HIGHLIGHTS OF A UNIQUE PROCEDURE^{1,2}

AÇÕES COLETIVAS EM QUEBEC: APONTAMENTOS ACERCA DE UM PROCEDIMENTO ÚNICO

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ABSTRACT: This article highlights the class action proceeding in Quebec, seeking to expose its main characteristics. The article initially explores the Canadian legal system and provincial legislative peculiarities. In addition to that, the paper explores the three major objectives of class actions: (i) judicial economy; (ii) maximizing access to justice; (iii) deter actual and potential wrongdoers from inflicting damage, especially small amounts of damage on a larger number of people (preventative objective). In sequence, such article specifies how the two-step class action procedure works, starting with the application for authorization, which is a preliminary request and a unique step in the province of Quebec that is meant to filter frivolous demands. Only once the authorization is granted may the case be heard collectively on the merits. The second step of the two-step procedure is an originating application that must be filed if the class action is authorized. Furthermore, this study deals with many relevant matters regarding the class actions in Canada (particularly Quebec), such as: (i) Right of Appeal; (ii) *Res Judicata* Effect – on absent members; (iii) Monetary Distributions and Types of Collective Recovery; (iv) Class Action Financing; (v) Possible Settlements; (vi) Multi-Provincial Class Proceedings and National Classes.

¹ Artigo recebido em 30/06/2021, sob dispensa de revisão.

² This report draws from a report provided to the Justice Studies Center of the Americas. See e.g., Catherine PICHE & Pierre NOREAU, *Civil Justice Reform in Quebec and Canada*, Consultation Report for the Justice Studies Center of the Americas, December 2018 (special mandate), 120 p.

KEYWORDS: Class actions; Quebec; Adequacy of Representative; Access to Justice; Authorization; Multi-jurisdictional Class Actions.

RESUMO: O artigo põe luzes sobre o procedimento que rege as ações coletivas em Quebec, buscando expor suas principais características. Inicialmente, o estudo explora o sistema legal canadense, bem como as peculiaridades legislativas das províncias. Ato contínuo, são elencados os três principais objetivos das ações coletivas: (i) economia processual; (ii) maximização do acesso à justiça; (iii) dissuadir infratores de infligirem danos a várias pessoas, notadamente danos de pequena monta incidentes sobre um grande número de pessoas (objetivo preventivo). Após a análise dos objetivos das ações coletivas, o artigo foca na dualidade procedimental da ação coletiva em Quebec. Nessa linha, o procedimento é iniciado com um pedido de autorização, que se trata de requerimento preliminar e etapa única, o qual se destina a filtrar demandas frívolas ou infundadas. Apenas após a autorização, a demanda é processada coletivamente para que possa haver pronunciamento sobre o mérito. Sendo assim, a segunda etapa procedimental diz respeito à análise do mérito em si. O artigo versa ainda sobre temas de extrema relevância, tais como os seguintes: (i) direito de recorrer; (ii) eficácia subjetiva da coisa julgada para membros ausentes; (iii) pagamento das indenizações e formas de recuperação coletiva; (iv) formas de financiamento das ações coletivas; (v) possibilidade de realização de acordos; (vi) ações coletivas que abrangem múltiplas províncias e “grupos nacionais” (chamadas de ações coletivas multijurisdicionais).

PALAVRAS-CHAVE: Ações Coletivas; Quebec; Representatividade Adequada; Acesso à Justiça; Autorização; Ações Coletivas multijurisdicionais.

1. THE CANADIAN LEGAL SYSTEM AND PROVINCIAL LEGISLATIVE PECULIARITIES

Canada is a **federal state** where legislative competence is distributed between the Parliament of Canada (the Federal Parliament), and the provincial and territorial legislatures

who have the jurisdiction to adopt laws. The distribution of legislative powers is found in sections 91 and 92 of the *Constitution Act*, 1867.³ The laws are enforced by the federal and provincial governments who hold an executive power recognized by the Canadian Constitution. Power is also designated to the judicial courts, through which judges have a role of ensuring the respect of the rule of law. The provinces address **questions of private law and of civil procedure**, and accordingly, collective redress in the form of class actions is determined under provincial law.

The Supreme Court of Canada is the highest court of the country which hears appeals from both the federal and provincial courts.⁴ The provincial courts, situated at the bottom of the pyramid, are divided into different subject matters. For instance, municipal courts have a limited jurisdiction in civil matters, hearing mainly cases concerning municipal tax claims.

Quebec's *Code of Civil Procedure*⁵ governs civil procedure in the province. Provisions within the *Code* specify the subject-matters each court has jurisdiction in. For instance, the Court of Quebec has exclusive jurisdiction to hear a case in which the value of the subject matter of the dispute or the amount claimed is below \$85,000.⁶ The Superior Court has exclusive jurisdiction to hear class actions and applications for injunction, as well as any application that is not under the exclusive jurisdiction of another court, including cases in which the value of the subject matter of the dispute or the amount claimed exceeds \$85,000.⁷ In addition, the Superior Court has a general power of judicial review over all courts in Quebec, with the exception of the Court of Appeal.⁸ The Court of Appeal hears appeals from judgments rendered by other courts.⁹ Judgments rendered by the Superior Court and the Court of Quebec that terminate a

³ *Constitution Act*, 1867 (UK), 30 & 31 Vict, c 3, s 91-92, reprinted in RSC 1985, App II, No 5; Sections 91 and 92 list in which subject matters the Parliament of Canada and the provincial legislatures can exclusively make laws.

⁴ The Federal Court of Appeal and the provincial courts of appeal are situated right below the Supreme Court of Canada, followed by the Federal Court, the Tax Court of Canada, and the provincial and territorial superior courts.

⁵ *Code of Civil Procedure* [hereinafter "CCP"], CQLR c C-25.01.

⁶ Art 35, para 1 CCP. The Court of Quebec also has jurisdiction to hear adoption cases and determine applications concerning an individual's confinement in a health or social service institution without their consent (art. 38 CCP). The court is separated into three division: the Civil Division, which encompasses the Small claims division, the Criminal and Penal Division, and the Youth Division.

⁷ Art 33 CCP; See also Art 35, para 2 CCP

⁸ Art 34 CCP

⁹ Art 29 CCP

proceeding, or concern the personal integrity, status or capacity of a person, the special rights of the State or contempt of court can be appealed as of right, while other judgments, for instance if the value of the subject matter of the dispute in appeal is lower than \$60,000, can only be appealed with leave.

The courts apply the *Civil Code of Quebec*¹⁰ (hereinafter “C.C.Q.”), which is the *jus commune* in the province and the foundation of all other laws.¹¹ For many years, the court system was considered as the sole pathway Canadian citizens could take to gain access to justice. However, by identifying barriers to access to justice and determining solutions to overcome them, alternative dispute resolution processes have become increasingly prominent in the Canadian civil justice system, as appears from recent reform of the CCP. The scope of the concept of justice has therefore been enlarged to reflect the reality taking place.

2. HISTORY AND OVERVIEW OF CLASS ACTIONS: THREE PRINCIPAL OBJECTIVES

Quebec legislation enabled class proceedings in 1978, and was the **first province in Canada** to do so.¹² Ontario was the first common law province to enact specific class proceedings legislation in 1992,¹³ and British Columbia thereafter followed. Today, all the provinces in Canada have a class action system,¹⁴ with the exception of Prince Edward Island¹⁵. Moreover, the Federal Court of Canada provides for class proceedings within the Court’s federal

¹⁰ *Civil Code of Quebec* [hereinafter “CCQ”], CQLR c CCQ-1991

¹¹ Preliminary Provision CCQ

¹² *An Act respecting the Class Action*, R.S.Q., c. R.2-1. Also see Janet Walker & Garry D. Watson, *Class Actions in Canada* (2014), p. 33; Catherine Piché, “The Cultural Analysis of Class Action Law”, *Journal of Civil Law Studies*, vol. 2 (2009), p. 44.

¹³ *Class Proceedings Act*, SO 1992 [hereinafter “Ont. CPA”].

¹⁴ See *Class Proceedings Act*, S.A. 2003, c. C-16 (Alberta) [hereinafter “Alta CPA”]; *Class Proceedings Act*, R.S.B.C. 1996, c. 50 (British Columbia) [hereinafter “BCCPA”]; *The Class Proceedings Act*, C.C.S.M. c. C. 130 (Manitoba) [hereinafter “Man. CPA”]; *Class Proceedings Act*, R.S.N.B. 2011, c. 125 (New Brunswick) [hereinafter “NBCPA”]; *Class Actions Act*, S.N.L. 2001, c. C-18-1 (Newfoundland and Labrador) [hereinafter “N&LCPA”]; *Class Proceedings Act*, S.N.S. 2007, c. 28 (Nova Scotia) [hereinafter “NSCPA”]; Ont. CPA; CCP, arts. 574ff. (Quebec); *The Class Actions Act*, S.S. 2001, c. C-12.01 (Saskatchewan) [hereinafter “Sask. CPA”].

¹⁵ In Prince Edward Island and the Canadian territories, class proceedings may be brought in accordance with the local rules of court. See *Western Canadian Shopping Centres Inc. v Dutton*, 2001 SCC 46, at para 27 [Dutton].

law jurisdiction.¹⁶ Class actions in Canada are handled by way of a preliminary filtering process called “certification” in the common law provinces, and “authorization” in Quebec.¹⁷

Initially, Quebec’s class action system was **inspired by American Federal Rule 23** of the *Federal Rules of Civil Procedure*.¹⁸ A stronger influence on Quebec’s class action legislation, as well as on the class action legislation of the other Canadian provinces came from the Ontario Law Reform Commission’s Report on Class Actions.¹⁹ In 1982, the Commission put forward recommendations regarding the institution of the class action procedure in the province. The Report was founded upon the **three principal objectives** of this form of litigation. In *Western Canadian Shopping Centres Inc v. Dutton*, the Supreme Court of Canada presented these objectives as *advantages* of the class action.²⁰

First, the aggregation of individual claims that have a similar factual and legal basis serve the purpose of **judicial economy**.²¹ The class action procedure allows for judicial resources to be used more efficiently since the dispute is litigated only once instead of multiple times. Seeing as the class action allows for the grouping of individual actions, there is not an overdrive of similar disputes before the court. In addition, this procedural device may be advantageous for both parties and the judicial system since the total cost of litigation is reduced.

Second, the class action procedure allows for a greater **access to justice**.²² As previously mentioned, litigation involves significant costs; therefore, individuals can pursue claims which,

¹⁶ *Federal Court Rules*, SOR/98-106, enacted pursuant to *Federal Courts Act*, R.S.C. 1985, c. F-7.

¹⁷ See, Ont. CPA, s 5; Alta CPA, s 5; BCCPA, s 4; Man. CPA, s 4; NBCPA s 6; N&LCPA, s 5; NSCPA, s 7; CCP, s 575; and Sask. CPA, s 6.

¹⁸ Fed. R. Civ. P., Rule 23; See also NY CPLR § 9 (2015). Quebec class action law was also modeled on Articles 9 et seq of the *New York Civil Practice Laws and Rules*. Similarly to Quebec’s class action law, under these American rules, there are prerequisites to a class action, the court must make an order “authorizing” the class action, this order must describe the class, the representative plaintiff must “fairly and adequately” represent the interests of the class, and there must be a notice of the class action.

¹⁹ Ontario Law Reform Commission (hereinafter “OLRC”), *Report on Class Actions* (1982), online: <<https://archive.org/details/reportonclassact01onta>>.

²⁰ *Dutton*, at para 27; See also *Vivendi Canada Inc. v Dell’Aniello*, 2014 SCC 1, at para 1, [2014] 1 SCR 3 [Vivendi]: “This procedural vehicle has several objectives, including facilitating access to justice, modifying harmful behavior and conserving judicial resources”.

²¹ *Dutton*, at para 27.

²² *Dutton*, at para 28. Also see Catherine PICHE, « La Class Action à la croisée des systèmes et des traditions », (2016) 2 R.I.D.C. (Int. Rev. Comp. L.) 287 & Catherine PICHE, « L’emprise des cinq doigts de Frankenstein : réflexion en cinq temps sur l’action collective », (2016) 2 R.I.D.C. (Int. Rev. Comp. L.) 291.

from an economic standpoint, are not worth pursuing on an individual basis. These are commonly referred to as individually non-viable claims, meaning claims of modest or significant amounts that are not economically feasible to pursue individually. Access to justice is often understood by class action specialists to mean access to a form of compensation.²³

Third, class actions aim to **deter** actual and potential wrongdoers from inflicting “small amounts of damage on a larger number of people”.²⁴ The literature commonly refers to this later policy objective as “**behaviour modification**”. Essentially, class actions provide litigants with the opportunity to sanction abusive behaviors. If manufacturers fear that a potential class action lawsuit may be filed against them, they are likely to adjust their behavior accordingly. As such, this form of litigation serves as a preventative measure against future harm by dissuading defendants from repeating injurious behaviors. It sends a message to manufacturers and other entities that fraud, unjustified accumulation of wealth, and the distribution of defective products, among other behaviors, are not tolerated. In addition, the process of “cost internalization”, in which the actual or potential defendant is forced to “internalize” the costs that its activities impose on individuals may also achieve behavioral modification.²⁵ For instance, the potential defendant may modify its marketing strategy in order to minimize harm inflicted on society and avoid compensating an eventual injured party.²⁶

3. FIRST STEP OF A TWO-STEP PROCEDURE: AUTHORIZATION AS A FILTERING STAGE

A. *The Class Action as a Representative Procedure*

Article 571 C.C.P. defines the class action as “a procedural means enabling a person who is a member of a class of persons to sue, without a mandate, on behalf of all the members of the

²³ Catherine Piché, “Class Action Value”, (2018) 19:1 Theoretical Inquiries in Law.

²⁴ *Dutton*, at para 29.

²⁵ OLRC Report.

²⁶ *Ibid.*

class and to represent the class.”²⁷ In Quebec, a representative plaintiff may bring a case before the court on behalf of other class members who find themselves in a similar situation (Articles 571 to 604 C.C.P). As such, the class action is **a representative procedure that allows for the collective treatment of individual claims** of people who have not explicitly consented to being members of the class. The definition of “class member” extends beyond natural people, including legal entities established for a private interest, partnerships and associations, or other groups who may not have juridical personality.²⁸

B. The Criteria for Authorization

Class action procedure is twofold in Quebec. Only once the authorization is granted may the case be heard collectively on the merits. Accordingly, an application for authorization to institute a class action must first be filed with the **Superior Court of Quebec**, which has **exclusive jurisdiction** over class actions in the province.²⁹ On average, the delay for obtaining a decision on authorization is two and a half years. The application for authorization is a preliminary request and a unique step in the province of Quebec that is meant to filter frivolous or unfounded cases, to prevent defendants from defending against “untenable claims on the merits”.³⁰

The **application for authorization** must “state the facts on which it is based and the nature of the class action, and describe the class on whose behalf the person intends to act. It must be served on the person against whom the person intends to institute the class action, with at least 30 days’ notice of the presentation date.”³¹ In conformity with the principle of

²⁷ Art 571, para 1 CCP.

²⁸ Art 571, para 2 CCP.

²⁹ Art 33, para 2 CCP.

³⁰ *Infineon Technologies AG v Option consommateurs*, 2013 SCC 59, at para 37, (available on CanLii) [*Infineon*]. Also see Veronica Aimar, « L’autorisation de l’action collective : raisons d’être, application et changements à venir », in Catherine Piché, *The Class Action Effect / L’effet de l’action collective* (Montréal : Yvon Blais, 2018), p. X.

³¹ Art 574 CCP.

proportionality³², the application for authorization can only be contested orally, and cannot include any evidence without permission from the court.

Once the application for authorization to institute a class action has been filed, the chief justice must assign a judge as a **special case management** judge responsible for presiding over the proceeding, and hearing all procedural matters regarding the class action.³³

The special case management judge must determine whether the following **four criteria** codified in Article 575 C.C.P. are met when evaluating if the class action should be authorized:

The court authorizes the class action and appoints the class member it designates as representative plaintiff if it is of the opinion that

(1) the claims of the members of the class raise identical, similar or related issues of law or fact;

(2) the facts alleged appear to justify the conclusions sought;

(3) the composition of the class makes it difficult or impracticable to apply the rules for mandates to take part in judicial proceedings on behalf of others or for consolidation of proceedings; and

(4) the class member appointed as representative plaintiff is in a position to properly represent the class members.³⁴

The “common questions” test in Article 575 (1) C.C.P. aims to determine “[w]hether allowing the suit to proceed as a class action will avoid duplication of fact-finding or legal analysis”.³⁵ In Quebec, this “**commonality**” test is interpreted largely; in order to satisfy this first criterion, it is sufficient to identify one common question between potential class members.³⁶ As such, Quebec’s interpretation of “common issues” allows for more flexibility than the common law provinces.³⁷

The second criterion in Article 575 C.C.P., whether “the facts alleged appear to justify the conclusions sought”, requires courts to ensure that **there is a reasonable cause of action**. This criterion is not meant to be “a test of the merits of the action”; the potential representative plaintiff must merely demonstrate that the claim has “some basis in fact”.³⁸ In other words, only

³² Art 18 CCP; See also Piché, “Class Action Value”, at 559.

³³ Art 572, para 2 CCP.

³⁴ Art 575 CCP.

³⁵ *Dutton*, at para 39. “An issue will be “common” only where its resolution is necessary to the resolution of each class member’s claim”.

³⁶ *Sibiga v Fido Solutions inc.*, 2016 QCCA 1299, at para 122, (available on CanLii).

³⁷ *Ibid.*, at para 54.

³⁸ *Hollick v Toronto (City)*, 2001 SCC 68, at para 16, (available on CanLii).

a “*prima facie* case”, or an “arguable case” must be established.³⁹ Thus, and as previously mentioned, the authorization step in Quebec, particularly Article 572 (2) C.C.P. is merely meant to avoid class actions that are frivolous or clearly unfounded in law.⁴⁰

To decide on the third criterion in Article 575 C.C.P., the judge must be given information regarding the potential size of the class and its characteristics.⁴¹ This criterion is satisfied if the judge considers that the **composition of the class** renders another procedural channel impractical.

Lastly, in accordance with Article 575 (4) C.C.P., the judge must ensure that the appointed representative plaintiff can **adequately represent** the interests of class members. In this determination, the judge must consider three factors: whether he or she has an interest in the suit, is competent, and is not in a conflict of interest with the other class members.⁴² The authorization judgment designates the member who will act a representative plaintiff.⁴³ Under Quebec’s C.C.P., the definition of who can be considered as a representative plaintiff has broadened, henceforth including non-profit organizations. However, legal persons established for a public interest such as religious corporations, government organizations, professional orders, etc., cannot become class members nor representative plaintiffs.

In *Western Canadian Shopping Centres Inc. v. Dutton*, the Supreme Court of Canada listed various factors that the court may look to when assessing whether the proposed representative plaintiff is adequate, including “the motivation of the representative, the competence of the representative’s counsel, and the capacity of the representative to bear any costs that may be incurred by the representative in particular”.⁴⁴ In addition, the proposed

³⁹ *Infineon*, at para 64.

⁴⁰ *Vivendi*, at para 37: “The judge’s function at the authorization stage is one of screening motions to ensure that defendants do not have to defend against untenable claims on the merits. [...] In considering whether the criteria are met at the authorization stage, the judge is therefore deciding a procedural question. The judge must not deal with the merits of the case, as they are to be considered only after the motion for authorization is granted.”; See also *Infineon*, at para 59: “At the authorization stage, the court plays the role of a filter. It need only satisfy itself that the applicant has succeeded in meeting the criteria set out in Art. 1003 of the C.C.P. [now Art. 575 CCP], bearing in mind that the threshold provided for in that article is a low one. The authorizing court’s decision is procedural in nature, as it must decide whether the class action may proceed.”

⁴¹ *Catucci v Valeant Pharmaceuticals International Inc.*, 2017 QCCS 3870, at para 327, (available on CanLii).

⁴² *Infineon*, at para 149.

⁴³ Art 576, para 1 CCP.

⁴⁴ *Dutton*, at para 41.

representative is not required to be the “best” possible representative, nor be “typical” of the class.⁴⁵

The representative plaintiff acts on behalf of themselves, but also in the name of the other class members who are not identified.⁴⁶ The other class members cannot intervene voluntarily for the representative plaintiff unless it is to assist them, or to support their application or contentions.⁴⁷ To amend or withdraw a pleading, discontinue the application, or to renounce rights arising from a judgment, the representative plaintiff must receive authorization of the court.⁴⁸ Essentially, the judge must continuously verify that the absent class members are protected.

At the authorization stage, in contrast to the common law provinces, the Quebec judge **cannot consider whether the class action is the “preferable procedure”** for the case. Nevertheless, the judge can deny authorization on the basis of the principle of proportionality (Art. 18 C.C.P.) which must also be taken into account within the class action context.⁴⁹ If the judge is uncertain on whether to approve the class action, authorization should be granted in order to achieve a greater access to justice.

C. The Authorization Decision

⁴⁵ *Ibid.*

⁴⁶ See Art 589 CCP: “The representative plaintiff is deemed to retain sufficient interest to act even if that person’s personal claim is extinguished. The representative plaintiff cannot waive the status of representative plaintiff without the authorization of the court, which cannot be given unless the court is able to appoint another class member as representative plaintiff.

If the representative plaintiff is no longer in a position to properly represent the class members or if that person’s personal claim is extinguished, another class member may ask the court to be substituted as representative plaintiff or propose some other class member for that purpose.

A substitute representative plaintiff continues the proceeding from the stage it has reached; with the authorization of the court, the substitute may refuse to confirm any prior acts if they have caused irreparable prejudice to the class members. The substitute is not liable for legal costs and other expenses in relation to any act prior to the substitution that the substitute has not confirmed, unless the court orders otherwise.”

⁴⁷ Art 586 CCP. The court may allow a class member to file a pleading or participate in the trial if it is of the opinion that the intervention can prove helpful to the class.

⁴⁸ Art 585 CCP: “An admission by the representative plaintiff is binding on the class members unless the court considers that the admission causes them prejudice.”

⁴⁹ *Lorrain c. Petro-Canada*, 2013 QCCA 332. See also *Marcotte v. Longueuil (City)*, 2009 SCC 43, [2009] 3 S.C.R. 65, at para 129-130.

The judgment authorizing the class action **defines the class** whose members will be constrained by the class action judgment, such that these members are able to identify who is included as a class member.⁵⁰ The importance of the class definition is underlined by the Supreme Court of Canada in *Western Canadian Shopping Centres Inc. v. Dutton*:

Class definition is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment. It is essential, therefore, that the class be defined clearly at the outset of the litigation. The definition should state the objective criteria by which members of the class can be identified. While the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation. It is not necessary that every class member be named or known. It is necessary, however, that any particular person's claims to membership in the class be determinable by stated, objective criteria.⁵¹

Solely the individuals who meet this definition can be considered as class members and be represented by the representative plaintiff in the course of the class action.

D. The Opt-Out System

The Quebec class action procedure functions based on an “**opting out**” system through which individuals who meet class definition are automatically members of the class, even if they do not participate actively in the course of the proceedings, unless they explicitly “opt out”. It logically follows that the judgment authorizing the class action orders the publication of a notice to class members, providing them with ample time to “opt out”.⁵² The specific timeframe for opting-out is determined by judgement.⁵³ An individual who wishes to opt out will not be

⁵⁰ Art 576, para 1 CCP

⁵¹ *Dutton*, at para 38.

⁵² Art 576, para 2 CCP; See also Art 579 CCP: The notice describes the class, outlines the main issues to be addressed collectively and the conclusions sought in relation to those issues, identifies the representative plaintiff, the contact information of their lawyer, and the district the class action is to be instituted, and declares that class members have the right to opt out, among other information. See also *Canada Post Corp. v Lépine*, 2009 SCC 16, at para 42, [2009] 1 SCR 549: “The notice procedure is indispensable in that it informs members about how the judgment authorizing the class action or certifying the class proceeding affects them, about the rights — in particular the possibility of opting out of the class action — they have under the judgment, and sometimes, as here, about a settlement in the case.”

⁵³ Art 576, para 3 CCP: The timeframe for opting-out “cannot be shorter than 30 days or longer than six months after the date of the notice to class members. The time limit for opting out is a strict time limit, although a class

constrained by the final judgment of the class action, if that class member followed the opt-out procedure and informed the court clerk before to the expiry of the time limit.⁵⁴

4. STEPS FOLLOWING AUTHORIZATION AND LEADING TO TRIAL ON THE MERITS

A. *Originating Application and Steps Following*

If the class action is authorized, an **originating application** in a class action must be filed with the court office in no later than three months.⁵⁵ The authorization judgment determines the matters to be dealt with collectively, and decides in which district the class action is to be instituted.⁵⁶ This judgment may be revised or annulled by the court at any time, if it is of the opinion that the conditions relating to the matters of law or fact are no longer met.⁵⁷ The representative plaintiff may be permitted to amend the conclusion sought.⁵⁸ In addition, on its own initiative and if required by the situation, the court may modify or divide the class at any moment.⁵⁹

B. *Right of Appeal*

Quebec's C.C.P. interestingly provides for a right to appeal a judgment authorizing a class action, and the possibility to appeal by leave a judgment refusing to authorize.⁶⁰ However,

member, with leave of the court, may opt out after its expiry on proving that it was impossible in fact for the class member to act sooner.”

⁵⁴ Art 580 CCP. In addition, a class member will be considered as having opted out if they do not discontinue a prior application concerning the same subject matter as the class action before the expiry of the time limit. *Ibid.*

⁵⁵ Art 583, para 1 CCP.

⁵⁶ Art 576, para 1 CCP.

⁵⁷ Art 588, para 1 CCP.

⁵⁸ Art 588, para 2 CCP.

⁵⁹ *Ibid.*

⁶⁰ Art 578 CCP: “A judgment authorizing a class action may be appealed only with leave of a judge of the Court of Appeal. A judgment denying authorization may be appealed as of right by the applicator, with leave of a judge of the Court of Appeal, by a member of the class on whose behalf the application for authorization was filed. The

if the representative plaintiff does not file an appeal or if it was dismissed for not being properly initiated, a class member may request permission from the Court of Appeal to be substituted as representative plaintiff in order to appeal the judgment.⁶¹

C. *Res Judicata Effect –on Absent Members Too*

The judgment, which acquires the force of *res judicata*⁶² is **binding on all class members who did not opt-out**.⁶³ In other words, the “absent” class members can no longer bring this same claim before the court.⁶⁴ The judgment must also identify whether the class members’ claims are to be recovered collectively or individually.⁶⁵

D. *Monetary Distributions and Types of Collective Recovery*

The recovery of claims is said to be **collective** when a sufficiently precise total claim amount can be identified from the evidence.⁶⁶ In situations in which the individual liquidation of the class members’ claims or the distribution of an amount to each class member is

appeal is heard and decided by preference.”; See also Art 602 CCP: “the judgment on a class action may be appealed as of right.”

⁶¹ *Ibid.* This request must be made within two months after the publication or notification of the judgment notice. *Ibid.*

⁶² *Gaudette v Whirlpool Canada*, 2017 QCCS 4193, at para 17.

⁶³ Deborah Hensler, “The Global Landscape of Collective Litigation” in Deborah Hensler, Christopher Hodges & Ianika Tzankova, *Class Actions in Context: How Culture, Economics & Politics Shape Collective Litigation* (2016) 1 at 6.

⁶⁴ *Ibid.*

⁶⁵ Art 592 CCP.

⁶⁶ Art 595 CCP: Once the total claim amount is determined, “the court may order that it be deposited in its entirety, or according to the terms it specifies, with a financial institution carrying on business in Québec; the interest on the amount deposited accrues to the class members. The court may reduce the total claim amount if it orders an additional form of reparation, or may order reparation appropriate to the circumstances instead of a monetary award.”

See also Art 596 CCP: “A judgment that orders collective recovery makes provision for individual liquidation of the class members’ claims or for distribution of an amount to each class member.

The court designates a person to carry out the operation, gives them the necessary instructions, including instructions as to proof and procedure, and determines their remuneration.

The court disposes of any remaining balance in the same manner as when remitting an amount to a third person, having regard, among other things, to the members’ interests. If the judgment is against the State, the remaining balance is paid into the Access to Justice Fund.”

“**impracticable, inappropriate or too costly**”, the court must determine the **residual balance** after the collocation of the costs, fee and disbursements, and instruct that the amount be remitted to a third person it chooses.⁶⁷ In addition, according to Article 1 of the *Regulation Respecting the Percentage Withheld by the Class Action Assistance Fund*, anywhere between 30% to 90% of that amount is accorded to the Class Action Assistance Fund.⁶⁸

The liquidation, distribution or remittance of the amount of the collected recovery is carried out after the payment of the legal costs, the representative plaintiff’s lawyer fees, and the representative plaintiff’s disbursements, both to the extent determined by the court.⁶⁹ In the context of the individual recovery of claims, the court must determine the claim of each class member.⁷⁰ Only members who filed individual claims can be compensated by the defendant.

E. Class Action Financing

In Quebec, class actions are financed primarily by class counsel, through the use of **contingency fees**. Further, the “**loser-pays rule**” is applicable to all civil litigation, including class actions, which means that the party who is defeated pays the costs of litigation. In the class action context, however, it is the representative plaintiff who carries the risk of paying the costs,

⁶⁷ Art 597, para 1 CCP; See also Catherine Piché & André Lespérance, “L’action collective comme outil de prévention, d’évitement et de dissuasion” in *Colloque national sur l’action collective. Développements récents au Québec, au Canada et aux États-Unis* (Montréal : Éditions Yvon Blais, 2016) 61. See also Catherine Piché, “Le recouvrement et l’indemnisation des membres dans l’action collective” (2016) 94 R. du. B. Canadien 171, 188.

⁶⁸ *Regulation respecting the percentage withheld by the Fonds d’aide aux actions collectives*, CQLR c R-2.1, r 2, Art. 1; See also Catherine Piché, “Public Financeers as Overseers of Class Proceedings” (2016) 12:3 NYLJ 776, 23.

⁶⁹ Art 598 CCP; See also Art 593 CCP: “The court may award the representative plaintiff an indemnity for disbursements and an amount to cover legal costs and the lawyer’s professional fee. Both are payable out of the amount recovered collectively or before payment of individual claims.

In the interests of the class members, the court assesses whether the fee charged by the representative plaintiff’s lawyer is reasonable; if the fee is not reasonable, the court may determine it. Regardless of whether the Class Action Assistance Fund provided assistance to the representative plaintiff, the court hears the Fund before ruling on the legal costs and the fee. The court considers whether or not the Fund guaranteed payment of all or any portion of the legal costs or the fee.”

⁷⁰ Art 600 CCP; See also Art 599 CCP: A judgment that orders the individual recovery of claims must identify which matters remain to be decided to determine individual claims.

and in any event, in Quebec this exposure to costs is minimal, for historical access to justice considerations.

In Quebec, as well as in other provinces such as Ontario, there is **public funding** available to assist the representative plaintiff in assuming the costs of the class action. For instance, when instituting a class action, the representative plaintiff may apply to receive initial funding from the “Fonds d’aide aux actions collectives”, a fund financed by the Government of Quebec that finances one third of class actions in the province.⁷¹ In practice, as mentioned above, the representative plaintiff in Quebec does not assume exorbitant costs in instituting a class action litigation.

5. SETTLEMENTS

Approximately 82% of all class actions are settled in Quebec, while 16% of all cases will be tried to the merits.⁷² Many class actions are concluded through ADR processes, either before or after authorization, but a majority of those actions settled will be so before authorization.⁷³ The settlement of a class action must be negotiated justly by the parties and approved by the court to ensure its equitable character and that it is in the **best interests of the class members**.⁷⁴ In order to protect the interests of the class members who are absent from the negotiations, class action legislation states that a settlement can only be reached with court approval.⁷⁵ In this instance, the court acts as a **protector** of class members.⁷⁶

6. MULTI-PROVINCIAL CLASS PROCEEDINGS AND NATIONAL CLASSES

Canadian **courts have permitted national class actions**, also known as multi-jurisdictional class actions in which the class members are not limited to residents of a given

⁷¹ Fonds d’aide aux actions collectives Website, online: < <http://www.faac.justice.gouv.qc.ca/#>>.

⁷² According to data obtained at the Class Actions Lab over a time period of 25 years.

⁷³ *Ibid.*

⁷⁴ Catherine Piché, *Fairness in Class Action Settlements* (Toronto: Carswell, 2011).

⁷⁵ See notably art. 590 C.C.P. and s. 29 C.P.A. (Ont.).

⁷⁶ See Piché, *Fairness in Class Action Settlements*.

province, but rather, any Canadian resident who meets the definition of member of that particular class.⁷⁷ For instance, a national class action was instituted against the federal government for forcing Aboriginal students to attend residential schools.⁷⁸ That class action ended with a historic settlement providing for common experience payments, special distributions and a formal excuse from the Government, among other things. The validity of multi-jurisdictional class actions was first recognized in Quebec in the 2008 Superior Court decision *Brito v. Pfizer Canada inc.*⁷⁹ Essentially, the judge stated that case law interprets class action legislation in Quebec broadly in order to favor access to justice.⁸⁰

Under Quebec's CCP, the legislator now recognizes the existence of multi-jurisdictional class actions.⁸¹ According to Article 577 CCP, the judge cannot refuse to authorize a class action simply because class members are part of a multi-jurisdictional class action that has already been initiated outside of Quebec.⁸² If the court is asked to decline jurisdiction, to stay an application for authorization to institute a class action or to stay a class action, the rights and interests of Quebec residents must be considered.⁸³ Where a multi-jurisdictional class action is already under way outside of Quebec, the court may disallow the discontinuance of an application for authorization, or authorize another representative plaintiff to institute a class action concerning the same subject matter if the judge believes that this would better serve and protect the rights and interests of Quebec class members.⁸⁴

Moreover, once a judgment is rendered and an application for the homologation of the transaction or the recognition of a judgment in a class action outside of Quebec is made, the court must verify that the *Civil Code of Quebec* rules pertaining to the recognition and enforcement of foreign decisions have been followed, and that that class members were given a sufficient notice.⁸⁵ In addition, the court must ensure that Quebec residents can exercise the

⁷⁷ Walker et al., at 871.

⁷⁸ See Residential Schools Website, online at <http://www.aadnc-aandc.gc.ca/eng/1100100015576/1100100015577>.

⁷⁹ *Brito v Pfizer Canada inc.*, 2008 QCCS 2231, (available on CanLii).

⁸⁰ *Ibid*, at para 99.

⁸¹ Art 577 CCP.

⁸² Art 577, para 1 CCP.

⁸³ Art 577, para 2 CCP.

⁸⁴ Art 577, para 3 CCP.

⁸⁵ Art 594, para 1 CCP

rights that are equivalent to those applied before a Quebec court.⁸⁶ In a collective recovery situation in which there is a remaining balance to be paid to a third person, the Superior Court of Quebec will decide on the Quebec resident's share.⁸⁷

Although the CCP and the courts recognize multi-jurisdictional class actions, in practice, there is a **lack of coordination** between the different provincial jurisdictions in Canada. As stated by the Supreme Court of Canada in *Hunt v T&N plc*:

Legal systems and rules are a reflection and expression of the fundamental values of a society, so to respect diversity of societies it is important to respect differences in legal systems. But if this is to work in our era where numerous transactions and interactions spill over the borders defining legal communities in our decentralized world legal order, there must also be a workable method of coordinating this diversity. Otherwise, the anarchic system's worst attributes emerge, and individual litigants will pay the inevitable price of unfairness.⁸⁸

This quotation demonstrates the complexities involved in multi-jurisdictional class actions in Canada, and gives rise to **several questions**. Does the suspension of the prescriptive period in one jurisdiction produce effects in another? Which law firm(s) will act as class counsel for the representative plaintiff and the absent class members? Does each jurisdiction's respective authorization criteria play a role in determining where the class action is instituted? For instance, Quebec's authorization stage has a low threshold, thus the authorization criteria are easier to satisfy in comparison to other jurisdictions.⁸⁹ In light of these questions, we can assert that the diversity underlining multi-jurisdictional class actions in Canada must be more effectively coordinated in order to enhance access to justice for all litigants.

Moreover, **constitutional issues in multi-jurisdiction class actions remain**. Essentially, courts may lack the competence to legislate on matters outside the province since their authority is limited to their respective jurisdictions.⁹⁰ As discussed in *Unifund Assurance Co. v Insurance Corp. of British Columbia*, "[i]t is well established that a province has no legislative competence to legislate extraterritorially. If the Ontario Act purported to regulate civil rights in British Columbia arising out of an accident in that province, this would be an

⁸⁶ Art 594, para 2 CCP

⁸⁷ Art 594, para 2 CCP

⁸⁸ *Hunt v T&N plc*, [1993] 4 SCR 289, (available on CanLii).

⁸⁹ *Infineon*, at para 64.

⁹⁰ *Walker & Watson*, at 268.

impermissible extraterritorial application of provincial legislation.”⁹¹ Such territorial limits are consistent with the principle of federalism which is central to the Canadian Constitution. As stated by the Supreme Court of Canada, “[t]his territorial restriction is fundamental to our system of federalism in which each province is obliged to respect the sovereignty of the other provinces within their respective legislative spheres, and expects the same respect in return.”⁹²

There are certain **exceptions to the principle of federalism**, however, through which provincial legislation may affect civil rights outside the province. For instance, the legislation may relate to a “valid provincial purpose”, and the effect on civil rights outside the province may be a “necessary incident” to a provincial purpose and “collateral” to the exercise of the province’s power.⁹³ Certain authors have argued that the courts have the authority to authorize or certify multi-jurisdictional class actions in circumstances in which there is a “real and substantial connection between the class and the forum province”.⁹⁴ In practice, the constitutionality issue has yet to be resolved; uncertainty surrounding multi-jurisdictional class actions remains, especially with respect to whether an eventual judgment or transaction will be recognized and enforced outside the province.

Moreover, the *Currie* decision focused on whether a judgment rendered in a multijurisdictional class action can be granted a “preclusive effect” since the defendant wants to prevent a plaintiff from pursuing a claim that was already resolved in a foreign class action.⁹⁵ In this decision, the judgment rendered in another jurisdiction did not create a “preclusive effect” since the notice provided to Canadian class members was inadequate.⁹⁶ As previously mentioned, notice is indispensable.⁹⁷ The most recent Canadian Bar Association’s [hereinafter “CBA”] protocol, entitled *Canadian Judicial Protocol for the Management of Multi-Jurisdictional Class Actions and the Provision of Class Action Notice*, addresses the

⁹¹ *Unifund Assurance Co. v Insurance Corp. of British Columbia*, [2003] 4 SCR 289, at para 50, (available on CanLii).

⁹² *Ibid* at para 51.

⁹³ Walker & Watson, at 269.

⁹⁴ *Ibid* at 271.

⁹⁵ *Currie v. McDonald's Restaurants of Canada Ltd.*, [2005] O.J. No. 506, 74 O.R. (3d) 321 (C.A.), par. 17.

⁹⁶ *Ibid* at 37.

⁹⁷ *Canada Post Corp. v Lépine*, at para 42.

fundamental importance of notice and puts forward recommendations for the best practices for issuing notice in class proceedings.⁹⁸ In this latter protocol, the National Class Actions Task Force also dedicates a section to the multi-jurisdictional case management hearings and motions.⁹⁹ Although the previous protocol was issued in 2011, it remains relevant today. The protocol focused on the administration of multi-jurisdictional class action settlements and their notice obligations.¹⁰⁰ Everything considered, multi-jurisdictional class actions are a topic of great significance in Canada, as can be seen by the CBA's protocols that aim to assist in the coordination and management of such actions.

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