International Section of the New York State Bar Association
Montreal Seasonal Meeting 2018

Panel 14 Outline:

Everything You Always Wanted to Know About Class Actions

in Canada and the United States — But Were Afraid to Ask!

I. INTRODUCTION AND HISTORICAL BACKGROUND

(A) Modern U.S. class action law in the U.S. goes back to 1966, which introduced in U.S. federal practice the "opt-out" approach as a central feature.

(B) Class action law in Canada is more recent, with the Province of Québec passing the first class action law in 1978, followed by similar statutes enacted in the Provinces of Ontario and British Columbia in 1992 and 1996.

1. Today, all the Canadian provinces have a class action statute, except for Prince-Edward Island. Amendments to the Canadian federal court rules allowing class action were also promulgated in 2007.

2. The U.S. rules were the source of inspiration for the Canadian rules, but some rules—typicality, for example—reflect a legislative intent to reject specific U.S. approaches.

II. PANEL TOPICS

(A) The judicial system. Context helps account for differences between the two countries and their impact on class action practice in Canada. For example:

1. In Canada all judges are appointed. All the judges of the Canadian provincial superior courts are named by the federal government. There are no confirmation hearings.

2. Unlike many American states, there are no judicial elections in Canada. Most Canadian class actions are brought in the provincial superior courts. The Federal Court of Canada has a minuscule class action docket.

3. By comparison, particularly after Congress enacted the Class Action Fairness Act (CAFA), U.S. class actions are likely to be brought in or removed to a U.S. federal court.

4. There also is no analog to the U.S. multidistrict litigation (MDL) procedure in Canada. By contrast, MDL practice, commonplace in the U.S., operates to provide central management of related class actions.

5. There are no jury trials in Canadian class actions. Although class action jury trials similarly are infrequent in the U.S., they take place from time to time, with varying results.

6. Punitive damages in Canada are low by U.S. standards.

(B) Trends in Canada and the U.S.

1. U.S. Supreme Court rulings in recent years have mostly limited the availability of class actions or otherwise made the requirements for certification under U.S. Federal Rule 23 more arduous to satisfy.

2. This trend in Canada is titled more in favor of class certification.

(C) Key similarities and differences. For example:

1. Certification procedure generally, such as the requirement in the U.S. for "rigorous scrutiny," with evidentiary hearings.

2. Evidence that defendants can adduce to oppose certification, including use of expert evidence.

3. The standard applied to certification, including the guidance from a recent ruling by the Supreme Court of Canada.

4. The approaches in each jurisdiction to the "common questions of law or fact" criterion—is one more than one such question needed?

5. Recognizing that most class actions, if certified, settle, the process and requirements for settlement notice and approval.

6. The results when class actions are tried on the merits in the two countries.

III. CASE LAW DEVELOPMENTS. RECENT COURT DECISIONS WILL BE INTERWOVEN INTO THE DISCUSSION. THE FOLLOWING ARE NOTEWORTHY:

(A) United States

1. Rigorous analysis of class certification motions.

To decide whether to certify, the court must undertake a "rigorous analysis" of the Rule 23 requirements for class certification.

That analysis may require a preliminary inquiry into the merits of a plaintiff's case.

A) *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U.S. 338, 131 S.Ct. 2541 (2011).

B) *Amgen, Inc.* v. *Connecticut Retirement Plans & Trust Funds*, 568 U.S. 455, 133 S.Ct. 1184 (2013).

C) *Comcast Corporation* v. *Behrend*, 569 U.S. ___, 133 S.Ct. 1426 (2013).

2. Predominance and use of expert testimony.

Common questions must predominate over individual ones.

But the possibility that some class members may not have been injured does not necessarily preclude certification.

Expert evidence may be offered to prove and to rebut predominance.

A) *Kohen* v. *Pacific Investment Management Company, LLC*, 571 F.3d 672 (7th Cir. 2009).

B) In *re Rail Freight Fuel Surcharge Antitrust Litig*., 725 F.3d 244 (D.C. Cir. 2013).

C) *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 573 U.S. ___, 134 S.Ct. 2398 (2014).

D) *Tyson Foods* v. *Bouaphakeo*, 577 U.S. ___, 136 S.Ct. 1036 (2016).

3. Class member ascertainability and numerosity.

Some courts of appeals hold that am "implicit" additional requirement of certification is that members of the proposed class must be currently and readily ascertainable based on objective criteria.

Other courts, however, reject "ascertainability" as an addition certification requirement and hold, instead, that the inquiry is part of the manageability requirement.

Numerosity is rarely an obstacle to certification unless the number of class members is roughly 30 or less.

A) *Marcus* v. *BMW of North America, LLC*, 687 F.3d 583 (3d Cir. 2012).

B) In *re Petrobras Securities*, 862 F.3d 250, 264 (2d Cir. 2017).

C) In *re Modafinil Antitrust Litig*., 837 F.3d 238 (3d Cir. 2016).

4. Constitutional standing to sue and standing of non-class members.

To establish standing to sue under Article III of the U.S. Constitution, a plaintiff must (1) have suffered an injury in fact, that is (2) fairly traceable to the challenged conduct, and (3) likely to be redressed by a favorable judicial decision.

Injury in fact must be both particularized and concrete.

Once the named plaintiff class representative has established constitutional standing to sue, it generally is not necessary that non-plaintiff class members also have comparable constitutional standing.

A) *Spokeo* v. *Robins*, 578 U.S. __, 136 S.Ct. 1540 (2016).

B) *Langan* v. *Johnson & Johnson Consumer Companies, Inc.*, 897 F.3d 88 (2d Cir. 2018).

5. Tolling the statute of limitations.

The filing of a class action tolls the running of the limitations period pending the court's ruling whether to grant certification.

Upon denial of certification, the limitations resumes, and a member of the proposed, but now denied, class must either seek to intervene or filing its own suit.

The tolling principle does not apply, however, if, after denial of certification, another class action based on the same claim is filed,

A) *American Pipe & Constr. Co.* v. *Utah*, 414 U.S. 538 (1974).

B) *China Agritech, Inc.* v. *Resh*, ___ U.S.___, 138 S. Ct. 1800 (2018).

6. Arbitration and class action waiver provisions.

The Federal Arbitration Act creates a strong policy in favor of enforcing arbitration provisions, even where state law might otherwise preclude enforcement and even where arbitration would be cost-prohibitive.

Therefore, contractual agreements to arbitrate generally will be enforced, and so will provisions waiving any right to proceed in arbitration in a class or representative claim.

A) *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

B) *American Express Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013).

C) *Epic Systems Corporation v. Lewis*, ___ U.S.___, 138 S. Ct. 1612 (2018).

(A) Canada

1. No rigorous analysis of certification requirements, instead, a large, liberal and purposeful interpretation of the certification or authorization requirements.

2. Common questions need not predominate over individual ones. Expert testimony possible in most provinces (not in Québec)

3. Class may consist of two or more persons in the common law provinces.

4. Standing to sue. A purely procedural matter in Canada.

5. Tolling the statute of limitation. Issues addressed in the various provincial Class Proceeding Act and, in Québec, in the Code of Civil Procedure.

6. Arbitration and class action waiver. Class actions waivers prohibited in consumer contracts in Québec. Issue addressed by the Supreme Court of Canada in:

   A) *Dell Computer Corp.* v. *Union des consommateurs*, [2007] 2 SCR 801, 2007 SCC 34 (CanLII)

   B) *Rogers Wireless Inc.* v. *Muroff*, [2007] 2 SCR 921, 2007 SCC 35 (CanLII)

   C) *Seidel* v. *TELUS Communications Inc.*, [2011] 1 SCR 531, 2011 SCC 15 (CanLII)

7. Most important recent cases:

   A) *Pro‑Sys Consultants Ltd.* v. *Microsoft Corporation*, [2013] 3 S.C.R. 477, 2013 SCC 57 (CanLII). (British Columbia) (Price fixing)

   B) *Sun‑Rype Products Ltd.* v. *Archer Daniels Midland Company*, [2013] 3 S.C.R. 545, 2013 SCC 58 (CanLII). (British Columbia) (Price fixing)

   C) *Infineon Technologies AG* v. *Option consommateurs*, [2013] 3 S.C.R. 600, 2013 SCC 59 (CanLII). (Québec) (Price fixing)

   D) *AIC Limited* v. *Fischer*, [2013] 3 S.C.R. 949, 2013 SCC 69 (CanLII) (Ontario) (Market timing)

E) *Vivendi Canada Inc.* v. *Dell'Aniello*, [2014] 1 S.C.R. 3, 2014 SCC 1 (CanLII). (Québec) (Health insurance plan)