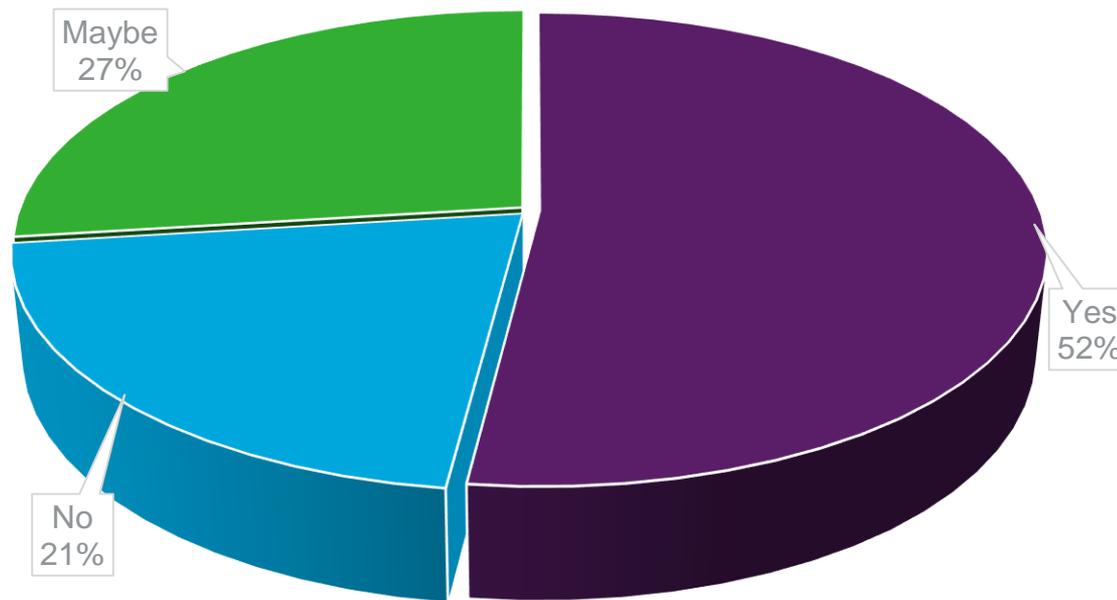


What you need to know about employment class actions?

Presented by:
Mark Evans and Andy Pushalik

Will there be more class action cases in Canada?



- 2018 National Litigation Report, Grant Thornton

In a 2019 survey of U.S. general counsel or senior legal officers at 395 Fortune 1000 and other large companies across a variety of industries, labour and employment matters represented the most common type of class action.

-2019 Carlton Fields Class Action Survey

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CLASS ACTION / Last Modified: 23 May 2019

Uber Class Action

Cavalluzzo is co-counsel with Samfiru Tumarkin LLP in a proposed class action against Uber Technologies Inc. and related companies (collectively "Uber...



CLASS ACTION / Last Modified: 11 April 2019

Basic Income Class Action

If you were a recipient of the Ontario Basic Income, you might benefit from this Class Action. We encourage you to fill out the form found at the bott...



CLASS ACTION / Last Modified: 26 March 2019

Blyth Academy Class Action

If you work or worked at Blyth Academy teaching courses there, you might benefit from the Class Action. We encourage you to fill out the form fo...

Misclassification

CLASS ACTION...?

- *Class Proceedings Act, 1992*, S.O. 1992, c. 6
 - In **Ontario** – in force since January 1, 1993
- Largely a procedural regime
 - person who commences a proceeding **shall make a motion...for an order certifying** the proceeding as a class proceeding and appointing the person representative plaintiff
- *Rules of Civil Procedure* continue to apply
- *CPA* s. 2: Representative plaintiff(s) commences court proceedings on behalf of the “**members of the class**”

TEST FOR CERTIFICATION

- *CPA* s. 5: Court will certify a class action if:
 - Pleadings disclose a **cause of action**
 - **Identifiable class** of two or more persons
 - Claims raise **common issues**
 - Class action is the **preferable procedure**
 - **Representative plaintiff** who:
 - Would fairly and adequately represent class members
 - Has produced a plan for the class proceeding
 - Does not have a conflict of interest on the common issues

WHY CLASS ACTIONS?

- 3 fundamental goals (*Western Canadian Shopping Centres Inc v Dutton*, 2001 SCC 46)
 - Access to justice
 - Judicial economy
 - Behaviour modification
- Do you have “vulnerable employees”because of the particular circumstances of the plaintiffs in this case, it would be very difficult for them to mount individual actions and to bear the expense of doing so. Obviously, making access to justice possible for vulnerable people such as the defendants is a key purpose of the CPA... *although no particular question of contractual interpretation has been identified...it would be preferable to permit a class action to proceed... provided the subclass is properly defined...* *Basyal v. Mac’s Convenience Stores (B.C.C.A.)*

DIFFERENT PROVINCIAL REGIMES

- Regimes are largely similar, but there are some differences
- **Quebec** has a materially different regime and a materially more lenient test...
 - To “authorize” the class proceeding, court focuses on whether class has an arguable case
 - Ability to resist certification is much more difficult
- 2 **key differences** between common law provinces:
 - **Opt-out or Opt-in**
 - Are class members automatically included (opt-out), or must they identify themselves as a class member (opt-in)?
 - **Costs**
 - Is a costs award available to the successful party?

OPT-OUT OR OPT-IN?

Opt-Out	Opt-Out and Opt-In
<ul style="list-style-type: none">• Ontario• British Columbia• Manitoba• Alberta• Saskatchewan• Nova Scotia• Quebec <p>*Class members must opt-out of class proceedings.</p>	<ul style="list-style-type: none">• New Brunswick• Newfoundland and Labrador <p>*Resident class members must opt-out. Non-residents must opt-in.</p>

COSTS

Costs Awarded	No Costs Awarded
<ul style="list-style-type: none">• Ontario• Saskatchewan• Alberta• New Brunswick• Nova Scotia• Quebec <p>*Losing party pays successful party's costs</p>	<ul style="list-style-type: none">• British Columbia• Manitoba• Newfoundland and Labrador (unless action is vexatious, frivolous, or abusive) <p>*No costs awarded against any party</p>

STRATEGY...

- In Canada, 716 class actions were commenced in the last 5 years
- A disproportionate number of class actions are commenced in Quebec
- Class proceedings often take 4 – 5 years to resolve
- Historically, 8-10% go to trial
- Against this backdrop – critical to develop a strategy and establish leverage
 - **Objectives:**
 - Defeat certification?
 - Narrow the size of the class and/or issues?
 - Settlement?
 - **Potential strategies:**
 - Deliver a defence?
 - Summary judgment? (no pre-certification discovery rights)
 - Fight certification or negotiate certification issues?
 - **Related concerns:**
 - Slow to proceed (often take 4-5 years to resolve)
 - PR concerns?
 - Cross border?

Recent Examples of Canadian Employment Class Actions

Fresco v. Canadian Imperial Bank of Commerce, 2012 ONCA 444

• Facts

- Employee claimed that employer **overtime policies** and practices **violated** the *Canada Labour Code*.
- Employer policy required **pre-approval** and contained **in lieu** provisions.
- Employee moved to **certify** a class action.

• Ruling

- Action was **certified** as a class proceeding.

Fresco v. Canadian Imperial Bank of Commerce, 2012 ONCA 444

• Reasoning

- Overtime policy arguably created narrower obligations than the *Canada Labour Code*.
- Employee claims did not turn on the legality of the policy but on the systematic practices resulting in breach.
- Alleged differences in individual experiences did not weaken finding of common issues.

Heller v Uber Technologies Inc, 2019 ONCA 1

• Facts

- Plaintiff was an Uber driver.
- Proposed class proceeding alleging that:
 - Class members are employees of Uber; and
 - Entitled to rights under the *Employment Standards Act*.
- Uber claimed that arbitration agreement requires a stay of proceedings.

• Ruling

- Court of Appeal Ruled Arbitration clause invalid. Stay of proceedings denied.

Heller v Uber Technologies Inc, 2019 ONCA 1

• Reasoning

- Underlying **presumption** that plaintiff is an Uber employee, as pleaded.
- Arbitration clause results in a **contracting out** of the *ESA* because:
 - Plaintiff is **prevented** from complaining to Ministry of Labour.
- Contracting out of *ESA* is **prohibited** by statute.
- Leave to appeal by SCC granted.
- Note: class action not yet certified.

Bourque v. Cineflix, Statement of Claim

- Facts

- Defendant company makes TV programs.
- Plaintiff claims that class members are **misclassified** as independent contractors.
- Proposed **class action** alleging that defendant **violated** the *Employment Standards Act*:
 - **unpaid** overtime, vacation and public holiday pay.

- No trial decision yet

Thank you

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