

Move to the head of the class

Technology and complexity are driving the shift toward U.S.-style litigation in Canada

By Joelle Gott, Ron Graham, Eric Khan, Bob Low, Dave Stewart

The class action landscape in Canada is undergoing sweeping changes. It's been almost 20 years since the federal uniform class proceedings act became law and over a decade since the Supreme Court of Canada ruling allowed provincial courts to approve class actions even for provinces that lack their own legislation. These events signal the inevitable move toward more American-style class action proceedings north of the border.

The net result for Canadian business, as well as Canadian firms with U.S. holdings, is clear: Class action litigation is growing across the country. Organizations now see this as a necessary cost of doing business – like buying insurance or implementing a disaster recovery plan – and realize the need to invest up-front in protective measures. If they don't, they may find themselves at increased risk – both to their bottom line and their reputation.

It has taken this long for class action-related activity to ramp up in Canada for several reasons. A few include the differences between U.S. and Canadian style awards and that it typically takes years for plaintiffs' lawyers to build a financial base on which they can pursue these types of cases. Class action activity is beginning to hit its stride in Canada as more plaintiff lawyers have had a chance to test the waters.

"Looking across jurisdictions, our experience shows that Canada's seasoned plaintiff bar has entrenched relationships with key U.S. class action players," explains Eric Khan, who leads Deloitte's class action services group. "This reality, coupled with amendments to provincial securities legislation, has prompted a surge in copy-cat filings in Canada."

"It's like a game of dominoes," adds Ron Graham, an associate partner who is closely involved in claims management and loan administration. "Once plaintiff counsel realize victory against one defendant, other defendants in similar industries become fair game."

Legal professionals are acutely interested in what's driving these changes and how to best position themselves to help companies navigate this increasingly complex landscape.

Although the four major steps involved in the lifecycle of a class action – securing information and data, certifying the matter, establishing liability and quantifying damages and, finally, administering the terms of the settlement or judgment – are well understood within the legal community, changes in the way class actions are handled in Canada, as well as rapid evolutions in business technology and management processes, are driving up the level of complexity. This reinforces the importance of leveraging best practices in pursuing a case as well as defending against one, a reality that validates seeking third party assistance no matter what side you're on.



Securing quality information and data

Long before a class action is certified, the key to success or failure is the quality of data related to the issue at hand and how the data is organized. The initial steps to secure quality data include:

- Identifying, securing and preserving the evidence
- Reviewing and analyzing it
- Performing necessary interviews

It is vital to understand what data is relevant to the matter at hand and how it can be securely extracted from the organization's systems. Business information typically exists in two broad forms:

- **Structured data.** Bank statements, client lists, anything that is stored in structured form such as a database, spreadsheet or similarly structured system or application.
- **Unstructured data.** Email, letters, instant messages or other content that is not otherwise easily structured or categorized.

In either form, the extended timelines of class action cases make it more difficult to capture requisite data.

"Based on our experience, it is apparent that as you go back in time, it is exponentially more difficult to map your data processes," says Dave Stewart, who leads the analytic and forensic technology practice for Deloitte. "Some of these cases go back many years. In the meantime, your business has become more complex, and you've likely updated business systems and processes."

Corporations' reliance on electronic systems is creating increasing amounts of stored data. The accelerated rate of data creation poses a major challenge at this stage because it complicates attempts to meet litigation hold requirements. The data must be carefully assessed so that only the information relevant to the case is extracted and preserved.

Paper and microfiche pose another challenge as it can be labour-intensive to extract even basic data. Automated processes that can turn the paper pile into searchable databases have evolved. Forensic specialists can identify areas where manual effort can be reduced.

Increased complexity is no excuse

Although complexity and lengthy review periods can drive up the cost of – and effort associated with – capturing the data relevant to a class action, it may not necessarily be an excuse for non-compliance. As we have seen with recent decisions, the courts are becoming less tolerant of defence claims that damages are not quantifiable.

"In a class action, the court doesn't care how you've managed your business over the years," Stewart continues. "If the court asks for qualitative analysis, you need to comply, even if it's a complex undertaking. Companies

cannot avoid compliance by saying it's too expensive or difficult to refute the allegations of the class."

Understanding systems flow – how information moves through different systems and processes throughout the business and between the business and its stakeholders – is a key step in cutting through the complexity and identifying the data that matters. Securing the data at all stages of the process is also fundamental to the case. Plaintiff counsel may use any doubts about data integrity to challenge the validity of production during litigation. Computer forensic processes can verify whether data was tampered with, while e-discovery skills can manage various production orders.

People are important, too, as they often are the only resources who understand how the systems interact with each other.

Who do I turn to?

"It's often difficult to grasp the sheer range of systems and applications involved in recording a transaction," says Stewart. "That's why it's critical to engage the IT department and other business leaders who understand how all the pieces fit together."

Although it can be time consuming, this level of discipline is a prerequisite to understanding where the relevant information lies. Lack of transparency in the early stages of a case may weaken a predetermined legal argument and may result in a spoliation charge if the data isn't preserved according to the court's guidelines. This is where specialists in data forensics and analysis can help.

"When seeking data forensic specialists, look for people who have implemented enterprise-class solutions in the past and who understand how systems implementation influences business processes," says Stewart. "Because of the long timelines associated with many class action cases, you're often dealing with multiple systems that are not integrated. Having knowledge of how to make these systems talk to each other is an essential step in this process."

"You're in the business of running your operations, not managing a class action case or defending against one," adds Stewart. "Assigning people who are good at managing the operations the task of managing the class action suit can create unnecessary risk."

Because of rapid advances in technology, the price-performance curve for e-discovery, computer forensics, forensic data analysis and other critical aspects of securing data is shifting quickly as well. "Today's technology for controlling your information is evolving faster than you'd expect," he says. "What seemed impossible a few years ago is now a reality."

Defence against class certification

With the exception of the Quebec Civil Code, the judiciary requires five tests to be met to certify a class proceeding, including: a cause of action; an identifiable class; common issues; preferable procedure; and an adequate representative plaintiff. Although the tests for class action certification are generally accepted in all provinces, the nature by which defence teams are challenging certification is changing largely due to two judgments.

In 2007, the decisions on the certification of both *Markson v. MBNA Canada Bank* and *Cassano v. the TD Bank* were issued. One result is that defence strategies are evolving toward using preferable procedure to challenge plaintiffs' cases. This may include pre-emptive measures such as voluntary compensation programs or similar dispute resolution mechanisms that courts might view favourably as alternatives to class action proceedings. "However, the Canadian judiciary has provided limited guidance on the acceptability of pro-active remediation programs, as seen in *Hollick v. City of Toronto*, *Bittner v. Louisiana Pacific* and *Pearson v. Inco*, and has clearly highlighted deficiencies in cases such as *Rumley v. British Columbia*, *Brimmer v. Via Rail* and *Olson v. Behr Process*," according to Khan.

In the fight to circumvent certification, counsel may turn to external advisers for help in identifying the class, critiquing loss quantification methodologies proposed by plaintiff experts, and demonstrating the uniqueness of loss calculations to class members.

Defence by pre-emptive strike

As preferable procedure-based defence becomes a more popular means to challenge certification, corporate counsel looking for guidance in building an alternative resolution plan can reach out to third party advisors with experience in this area.

According to Khan, "Three things are required for a pre-established program, such as a voluntary compensation program, to be considered a suitable alternative to a class action proceeding." Specifically, the program must provide:

- A transparent and consistent claims determination process
- Fair and reasonable levels of benefit entitlement
- An easily accessible dispute resolution mechanism

Companies are now weighing the risks of waiting for eventual action against taking a more pre-emptive stance. Organizations that pro-actively anticipate potential lawsuits and position themselves accordingly can mitigate their risk of exposure to significant fiscal loss and damage to their brand.

"The merits of investigating pre-emptive strategies cannot be undervalued," says Khan. "Having this in place earlier can maximize your opportunities for a favourable outcome."

"Some companies don't want the public notoriety of being the defendant in a class action," says Graham. "Long-term litigation can be a drag on operations. Even if it isn't financially material, the matter may be sufficiently sensitive that you don't want your name in court for years on end."

Defendants that pre-emptively settle cases tend to retain more control over the process. Additional benefits of adopting pro-active measures such as a voluntary compensation program include:

- Refocusing management on revenue generating priorities
- Preserving investment in brand image and goodwill
- Maintaining or enhancing employee loyalty and satisfaction
- Adhering to corporate governance requirements
- Reducing the economic incentive of plaintiff counsel
- Isolating affected groups and providing immediate remedy
- Establishing a legal challenge to preferable procedure requirements



Quantifying the damages

Once defendants are notified that there is a class action, they have an immediate requirement to save the data. “You shouldn’t misplace it, change it or otherwise lose control of it,” says Joelle Gott, a Deloitte associate partner with extensive experience in damage quantification and who has appeared as an expert witness before the court. “The consequences of violating this can be severe.” As businesses now rely on complex technological systems, data management becomes a growing challenge.

Where is my data?

No one solution perfectly captures everything you’re looking for. That’s because most corporate information systems were never designed with class actions in mind. Rather, they were designed to support day-to-day business operations. The relatively long timeline of class action lawsuits means data must be obtained from multiple systems – some of which may no longer be operational.

“You must understand what happened within the business if your case is to be credible before the court,” says Bob Low, who has worked on numerous class actions in his over 25 years in dispute consulting and business valuation. “You establish credibility by identifying an accounting record for each transaction. Failing that, you need to find some other way to quantify it. Electronic data plays a significant role in this, so you’ll need access to specialists who routinely do this kind of work. The courts don’t look favourably on ill-prepared defendants.”

After the data set is identified and preserved, it might be used to calculate an appropriate figure for damages. Data analytics reduces the time and effort required to analyze each scenario and determine appropriate damages for all members of a class. Turning datasets and unstructured data into a competitive advantage requires huge back-end horsepower.

Within this context, proper analysis ensures a greater degree of fairness in assessing damages. Because of today’s advanced computing capabilities, more refined analysis methods can be applied by both sides to the dataset. This helps forensics teams assess which components of transactions are excessive, and who should be awarded how much. By avoiding excessive damage claims, both plaintiffs and defendants stand to benefit from settlements that reflect the needs of all parties.

“Organizations that have invested in the hardware, software and highly trained people to do this kind of analysis for their clients gain a significant advantage,” says Low. “It takes something that normally requires a few days to execute and reduces it down to, potentially, a few minutes.”

As plaintiffs raise the expectations to have access to relevant corporate data, defendants have no choice but to match their efforts to identify and secure corporate information that can defend against class action lawsuits. The access to a computer forensics/data analytics laboratory is emerging as a best practice for data analysis, giving counsel greater flexibility in assessing the data to build a stronger case and greater credibility in the eyes of the court.

How much exactly are we talking about?

It is vital to accurately identify, analyze and quantify damages, a process that is becoming more complex. Just as plaintiff counsel leverage data forensics to more accurately calculate damages of class members, corporate counsel must match these efforts with equally compelling data. Failure to do so could result in plaintiff claims proceeding unchallenged – a scenario which could lead to larger settlements and greater risk to the organization.

Damage quantification typically involves the following steps:

- Loss modeling and scenario development
- Size estimation of class population
- Definition of class and subclass groups
- Determination of class period
- Quantification model development
- Performance of “what if” calculations to size the potential loss to the company
- Advice on tax implications and reporting requirements

During the final phase of damages assessment, third party partners can provide additional litigation support to counsel during settlement discussions or during trial, mediation or arbitration. This can include assistance in developing examination questions and reviewing opposing expert reports.

Administering the class

Administration is the final lifecycle component of a class action case. During this phase, third party partners can provide a broad range of support to counsel, including:

- Design and implementation of a credible and transparent compensation plan
- Development of protocols and procedures for consistency and accuracy
- Review of eligibility for participating claimants
- Securing releases from participating claimants
- Determination of benefit entitlement amounts
- Distribution of compensation to eligible claimants
- Monitoring of appeals
- Reporting on a scheduled basis

During this phase, members of the potentially eligible population are notified and provided a means of submitting their claims and obtaining supporting documentation and other materials. This process sets expectations around response times, communication processes and what respondents are expected to provide. Forms must be designed using language appropriate for the intended audience. Complex language, for example, often results in low response rates that reduce the credibility of the class administration – and ultimately the case. “You must choose carefully the right timeline, communication and processes for inviting response,” says Graham. “You’ll want to work with an experienced group that routinely orchestrates processes like this.”

Provincial differences shape national strategy

Because cases must be certified in every province where a class is registered, plaintiff counsel must consider which provinces to target first. The province with the most potential class members is not necessarily the one with the greatest overall population. The more provinces that are onside with registering a class, the more compelling the case becomes in court. Corporate counsel must be aware of this to better plan how to defend against a lawsuit and where their resources will be allocated in a multi-province case. For parties on both sides of the case, better data analysis virtually always facilitates better planning, and therefore better outcomes.

“The more you know about how the business operates and the nature of the issue that lies at the root of the case, the more precisely you can define who you’re targeting, how you’ll reach them and what information you’ll need to gather along the way,” says Graham. “That’s the basis of successful class action administration.”

Litigate or negotiate?

Professional guidance throughout this process allows counsel to optimally position the firm whether the case goes to litigation or is settled through negotiation. Courts tend to look more favourably on defendants that are well prepared, that have identified and assessed the relevant data and that prioritize a fair settlement that’s satisfactory to the broadest range of stakeholders. Enhanced credibility reflects a wider degree of organizational capability, which can in turn be used to the firm’s advantage throughout the case.

Whether they are litigated or negotiated, the frequency and impact of class action cases in Canada will continue to grow. Corporate counsel need to prepare themselves and their organizations for an environment where they are increasingly likely to face class action lawsuits. An organization’s systems environment must be capable of responding to more complex e-discovery and compliance requests without compromising day-to-day operations. Beyond the raw technology, they must evolve the organizational capability and processes to assess potential class actions and determine optimal courses of action. Knowing whether to wait to potentially litigate or pre-emptively negotiate, for example, demands a level of process maturity that hasn’t been necessary in Canada until recently.

The growing scope and complexity of these cases makes it clear that corporate counsel shouldn’t follow that path on their own. By working with professionals who have experience in guiding organizations in all sectors and the expertise to make a difference, organizations facing similar action can minimize risk, reduce costs and maintain their focus on operating their business.

Best in class

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