

STEPS IN A SUCCESSFUL CLASS ACTION

1) Issue a Statement of Claim

The first step in a class action is the same as in any action: issuing a statement of claim. A statement of claim is a concise statement of the facts that are alleged and a request for an award from the defendant.

2) Defendant issues a Statement of Defence: Within 30 days

The defendant refutes or admits the allegations in the statement of claim.

3) Bring a Motion to Certify the Class Action: Within 90 days

In Ontario, all class actions must be certified by a court. In order to successfully certify a class action, the moving party must demonstrate to a judge that:

- (a) the pleadings or the notice of application discloses a cause of action;
- (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
- (c) the claims or defences of the class members raise common issues;
- (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
- (e) there is a representative plaintiff.

An important decision to be made at this time is who will be the representative plaintiff. The motion must be supported by an affidavit sworn by the representative plaintiff. As well, it is necessary to present a preliminary litigation plan at this time – a plan on how to proceed with the litigation if it gets certified as a class action.

4) Pre-Certification Conference

This step assumes that the employer will oppose a motion for certification of a class action. After the motion to certify the class action is initiated, but before the motion is heard, most judges hold pre-certification case management conferences. This conference would be attended by the lawyers for the two sides. In these conferences, the judge tries to narrow down the issues to be argued about certification and sets a schedule for how things are to proceed until the motion itself is heard.

5) Pre-Certification Discovery

The Employer may have the opportunity to cross-examine the representative plaintiff on his or her affidavit. To do so, it must demonstrate that it is cross-examining the representative plaintiff to discover facts relevant to the certification motion itself, not to inquire into the merits of the action.

6) Certification Hearing (Stage 1)

In Ontario, the certification stage is usually split into two parts. In the first stage of the hearing, the Court will determine the threshold questions relating to whether the proceeding is appropriate for a class action – namely, whether the 5 conditions listed above, in topic 2, are satisfied.

7) Certification Hearing (Stage 2)

Stage 2 of the hearing deals with the details of the certification. It will set out items such as:

- (a) the precise class description;
- (b) the description of any sub-classes (if necessary);
- (c) defining the common issues; and
- (d) setting out the litigation plan in detail.

To prepare for this stage, we will have carefully constructed the class definitions and prepared a detailed litigation plan.

8) Notice to Class Members

After the certification order has been made, the Court will approve a method of providing notice to all class members of the class action. This procedure is in place to let every class member know that a class action has been commenced on their behalf, and to give them the opportunity to opt out of the class action if they feel it necessary. The notice describes the proceeding, including the names and addresses of the representative plaintiffs.

Notice can be sent a variety of ways, including mail, advertisements and posting.

Notice can be an expensive part of the litigation. For that reason, many courts require the defendant to pay at least part of the costs associated with notice. Also, it is common for the defendant to pay the costs of notice as one of the terms of any settlement.

9) Opting Out: Usually 30-90 days

After notice of the class action is sent out, there is a window of opportunity for disinterested class members to opt out of the class action. This window has tended to range from 90-120 days, but could be longer in some cases. Usually, opting out involves writing to the representative plaintiff, the lawyer or the court.

10) Mediation: After date for trial set

The Court requires all cases to go to mediation before they are ever tried in a courtroom. Our experience has been that more than half of employment-related cases are settled at, or shortly after, mediation. Any settlement of a class action has to be approved by the Court.

Even if a matter is not fully settled at mediation, it may be possible to resolve some/all of the common issues, and/or to draft an agreed statement of facts.

11) Examination for Discovery

At this point, the defendant may choose to cross-examine the representative plaintiff. We have the right to examine the employer's representative as well.

12) Trial of Common Issues

Class Action trials are almost always done in two parts. In the first part, the court will decide the merits of the common issues.

13) Individual Damage Assessment

Part two of the trial involves the damage assessment for each individual class member. This is usually not done in a formal trial setting, but instead in front of arbitrators, mediators or other non-judicial dispute resolution experts. The individual damage assessment process will settle issues such as the length of the notice period that each class member would receive, and the value of each class member's pension entitlement.

(a) Particulars of Claims by each class member

Each class member prepares a written document explaining their situation, i.e. how long they have worked for the employer, how old they are, what their job was, what they were earning, etc.

(b) Mediation of individual claims

The individual claims of class members will be mediated in an effort to settle them.

(c) Arbitration of any claims that do not settle at mediation

After arbitration, an award will be issued.