

is permitted to assume the electronic signature is that of the sender. In this instance, the recipient is under a duty to carry out such procedures.

- Should the sender dispute they sent the electronic message with the electronic signature attached, it will be for the sender to demonstrate that they did not send the message.

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# The Canadian experience with class actions: access to justice or just a new moneymaking product line for lawyers?

by Professor Garry D Watson QC

## BACKGROUND

The most significant development in litigation in Canada in the past decade is the emergence of class actions. To understand the introduction of class actions into Canada, and their rapid growth, one needs to appreciate a basic fact – the high cost of litigation and its negative impact on access to justice. As in England, the cost of litigation in Canada is very high, and its impact is much exacerbated by the risks resulting from the loser pay rule (which is not ameliorated in Canada by “before the event” or “after the event” insurance). With the virtual disappearance of civil legal aid (except in family law) the result is that for the average, risk averse citizen, litigation is more or less out of the question unless the individual’s

damages are very large, liability is reasonably clear, and a lawyer is willing to underwrite the cost of the litigation (on a no win, no pay basis).

Also, in Canada motor vehicle and industrial accident litigation do not play the central role that they do in the English litigation system. As far as industrial accidents are concerned, no fault workers’ compensation schemes have replaced common law actions across Canada since the 1930s. Since the 1980s, motor vehicle injury cases have been dealt with by no fault schemes in almost two thirds of the country (Ontario and Quebec) unless a claimants’ injuries are “serious and permanent”. The relevance of all this is that it makes litigation lawyers hungry for product lines. Before the introduction of class actions, we had little or no mass tort

litigation (e.g. product liability litigation): indeed, we had very little of the types of litigation that have been the subject of the more than 400 class actions commenced since they were introduced in common law Canada in 1993. The situation in Canada is quite different to that in the US, where large damages awards for pain and suffering and the absence of fee shifting has led to a vast amount of mass tort/product liability litigation (both individual and class actions), best exemplified by the asbestos litigation.

## DEFINITION AND DEVELOPMENT OF CLASS ACTIONS

A class action is one in which a representative plaintiff sues on behalf of a defined class of claimants whose claims raise a common issue of fact or law. Class actions grew out of the old representative action, which became encrusted with restrictive limitations imposed by case law both in Canada and the UK – particularly in cases where the claims made were for monetary damages. In the late 1970s Canadian lawyers attempted, unsuccessfully, to mount American style class actions using the representative action rule. In the case of *General Motors of Canada Ltd v Naken* in 1983 (involving claims for damages for misrepresentation in the sale of an alleged “lemon” motor car), the Supreme Court of Canada (SCC) held that the representative action rule would not support or permit such an action because there were too many issues raised by this type of action which were not addressed by the representative action rule (eg notice to class members, what costs regime should apply, who should be subject to discovery, and how damages should be assessed). The SCC held that whether there should be class actions and what should be the applicable rules was a matter best left to be resolved and provided for by the provincial legislatures.

## THE LEGISLATIVE RESPONSE AND THE PARTING OF THE WAYS BETWEEN UK AND CANADA

The legislatures responded to the situation. Quebec did so very early, passing a class action statute in 1978. Ontario also did so, but not until 1993, and British Columbia followed in 1995. However, it was only with the passage of the Ontario and British Columbia Acts that class actions really took off, even in Quebec.

### *The three policy underpinnings*

The threefold rationale for class actions was spelt out in the Ontario Law Reform Commission’s massive 1982 Report on Class Actions:

- Access to justice: it is an important benefit of class actions that they divide fixed litigation costs over the entire class, making it economically feasible to prosecute claims that might otherwise not be brought at all.
- Judicial efficiency: Class actions avoid the duplication of fact-finding and legal analysis, and the risk of

inconsistent decisions, inherent in multiple individual law suits.

- Behaviour modification: where manufactures, etc can inflict small amounts of damage on large numbers of people who cannot afford to litigate individually, the deterrent function of the underlying law (e.g tort law) is lost. By subjecting such defendants to the risk of a class action it is hoped that their behaviour can be modified.

## KEY ELEMENTS OF THE CLASS ACTION PROCEDURE

A class action is brought by a named representative plaintiff on behalf of a defined class. If the action passes the tests for certification (see below) it proceeds as a class action, in which case issues common to the class are decided at a “common issues hearing” and then if there remain individual issues (e.g. individual damage assessments) these are decided at individual hearings. The plaintiff class action lawyer is remunerated by a court ordered fee typically paid out of the “common fund” produced by the litigation. Any settlement must be approved by the court to be binding on the class. The class action device is purely procedural. It in no way changes substantive law, and the litigation is conducted according to the substantive law principles applicable to individual actions such as negligence, contract, fraud, misrepresentation, etc.

In order to proceed as a class action it must be certified as such: in effect leave of the court is required for it to proceed as a class action. The essential (and quite minimal) requirements are:

- The pleadings must disclose a cause of action;
- The claims of the class members must raise common issues;
- A class proceeding would be the preferable procedure for resolution of the common issues.
- There are also the requirements of adequate class definition, and that the representative plaintiff be an adequate representative without a conflict of interest with other class members.

Canadian certification requirements are less demanding than the US, which has further criteria including that common questions must predominate over individual issues, and that a class action must be superior to other possible procedures. If certified, the action proceeds as a class action; if certification is denied it is the end of the proceeding as a class action.

Notice must then be given to class members of the class action, its nature and how the class is defined (this can be, and often is, by newspaper advertising). Class members then have the right to opt out; if they do not they are bound by the decision in the action whether favourable or unfavourable. Both Canada and the US follow a “lawyer

entrepreneur” model; the expectation is that lawyers will pursue class actions on a “no win/no fee” basis in the hope of court awarded fees if they are successful. This is the “oil” that makes the system run.

### WHICH JURISDICTIONS HAVE CLASS ACTIONS?

The US has class actions in the federal courts and in virtually every state, while in Australia they are permitted in the federal court and in Victoria. In Canada, Quebec, Ontario, British Columbia, Saskatchewan, Newfoundland and the Federal Court have class actions. Class action legislation has also been proposed in Manitoba and Alberta. In fact, Canada now has class actions in every province after the recent SCC decision in *Western Canadian Shopping Centres* in which the court effectively overruled its old decision in *General Motors of Canada Ltd v Naken* (above). The court held that in the absence of comprehensive legislation, the courts must fill the void under their inherent power to settle the rules of practice and procedure as to disputes brought before them, and that class actions should be allowed to proceed under general representative action rules. The court emphasized the importance of class actions as a procedural tool in modern litigation to bring about access to justice and relied upon the class action legislation in Ontario and British Columbia for guidance as to the appropriate procedure to be followed. The court’s extraordinary decision underlines how far class actions have come in Canada in a short time and their perceived important role in providing access to justice.

### THE CANADIAN CASE LAW EXPERIENCE

Class actions in Canada have had great success. They have provided access to justice and compensation to hundreds of thousands of people who, in the absence of such actions, would likely never have sued and therefore would have received nothing. There have been approximately 400 class actions since 1993. This figure represents the total number of actions commenced, and not all were certified or successful. The actions referred to below were all successful (in that they resulted in settlements compensating the class). The types of cases have varied, but the examples given in the following groupings give some flavour of what is happening.

#### **Torts: product liability/consumer protection**

- defective household dryers
- defective plastic furnace venting systems
- defective toilets.

#### **Torts: Product Liability – Personal Injury**

- silicon gel breast implants;
- defective heart pacemakers (*Nantais*);
- tainted blood (blood products contaminated with

hepatitis C);

- claims in respect of prescription weight loss drugs.

#### **Mass Torts**

- railway accidents (action on behalf of persons injured in subway and railway collisions);
- damages arising from a fire in a subway system;
- water pollution (e coli in a town water supply);
- clinical negligence (patients who had received EEG tests at five clinics run by the
- defendant doctor and contracted hepatitis B);
- release of toxic gases from an industrial plant.

#### **Contract**

- pension and benefits cases (including entitlement to pension plan surplus; action by a class of beneficiaries to determine pension entitlements; claim by retired employees regarding withdrawal of promised health care benefits; claims by members of an employee pension plan alleging breach of fiduciary duty by the actuary for the pension plan);
- “vanishing premiums” life insurance cases;
- illegal interest charges;
- mass wrongful dismissals;
- solicitor’s negligence (class action brought against a solicitor for negligence arising out of a syndicated mortgages scheme where a rogue had converted the invested funds for his own use; an action against the rogue proved fruitless and hence the action against the solicitor);
- misrepresentations concerning a golf course housing development
- defectively constructed condominiums.

#### **Financial markets**

- misrepresentation re sales of shares in both the primary and secondary markets.

#### **Competition Law**

- price fixing

#### **Miscellaneous**

- native land claims;
- copyright infringement

### RECOVERIES, SETTLEMENTS AND FEE AWARDS

Settlements must be approved by the court and must be “fair and reasonable” (see below). In making fee awards

(which are made by the court) Canadian courts have shown more restraint than US courts, but fees can still be very substantial. Expressed as a percentage of the damages recovered, fee awards in Canada mostly range from 15 per cent – 26 per cent, but fees awards have been as low as 2.4 per cent, and as high as 60 per cent. A higher percentage fee is usually justified where the recovery is relatively low.

The amount of the fees that will be awarded can be hard to predict because all the factors to be taken into account are not yet clear. Moreover, there are two competing methods in use:

- (i) Multiplier method: base fee (hours worked x hourly rate) x multiplier (to reward risk taking):
- (ii) Percentage of recovery to reflect all elements of the litigation

However, the Ontario Court of Appeal has recognized that the legislative objective of enhanced access to justice requires that solicitors conducting class proceedings have a real opportunity to obtain a multiple of the base fee, the multiplier should generally be in the range of one to four and fees awarded must be appropriate to make the system run and attract lawyers to take the necessary risks

### EXAMPLES OF SETTLEMENTS AND FEES AWARDED

In one silicone gel breast implants action there was a settlement of \$29 million, with a counsel fee of approximately \$2 million dollars awarded. (There have been several breast implant cases; total settlements on behalf of Quebec and Ontario claimants alone amounted to \$75,000,000, and there have been additional actions in British Columbia). In another case involving defective heart pacemakers, a settlement of \$23.1 million was reached with the 1,005 class members sharing approximately \$16.8 million. A total of \$6.3 million in fees and disbursements was awarded. There have been numerous “vanishing premiums” life insurance policy cases. In one such case the settlement was for \$65 million with an award of \$3 million in fees. In another such action the total settlement recovery was \$240 million, and the fee award was \$6.5 million (approximately 2.7 per cent of the amount recovered).

In the Hepatitis C tainted blood litigation, the global amount of the settlement was \$1.5 billion. Fees totaling about \$52.5 million were approved in Ontario and British Columbia actions, ranging from 2.36 per cent to 4.26 per cent of the recovery of the class depending on whether the actions were brought in Ontario or British Columbia, and whether it was the transfused action or the hemophilic action.

### HOW CLASS ACTION LITIGATION IS CONDUCTED

Typically class actions are hard fought. Much procedural battling takes place over certification, and there are

frequent pre certification motions by defendants in an attempt to get rid of the case or wear the plaintiffs down. However, in some cases settlement comes quite early (before certification); this can often be for business reasons, or where governments are parties, political reasons. It is quite common for certification to lead to settlement. Few cases have proceeded to trial; most settle, as with individual litigation, and probably at about the same rate. There is a whole jurisprudence on certification. Courts have been somewhat disingenuous and have used the “preferable procedure” requirement to give themselves a discretion and the ultimate power to say which class actions will be allowed to proceed (and this often seems to be exercised subjectively). A particular problem is posed by cases involving oral misrepresentations, where it can be difficult to find a “common question”. A small number of plaintiff specialist firms have emerged. Defence work tends to be in the hands of the elite corporate law firms, who have generally eschewed plaintiff’s work – essentially because their major clients, corporations, are typically defendants and it is perceived they would not like to see their law firm acting for “the enemy”.

### TWO AREAS OF DIFFICULTY: COSTS AND FUNDING

#### *Costs regime*

The traditional “loser pays” costs rules do not work at all well with class actions. The rule that normally the winner should pay the loser’s costs – “fee-shifting”, or the “English costs rule” as the Americans call it – is generally not followed in the US. However, it is the normal rule in the Commonwealth countries of Canada and Australia, so fee-shifting has not been a problem for the US, but has been for Canada and Australia.

The first thing a Commonwealth class action regime must resolve is whether class members other than the representative plaintiff may be liable for the defendant’s costs. This has been resolved legislatively so that they are never liable regarding the “common issues” part of the proceeding (since they are, in a sense, involuntary litigants), though they can be liable for costs on the adjudication of individual issues (e.g. the assessment of their personal damages).

But a troublesome point remains: should the representative plaintiff be individually liable for the defendant’s costs if the action is unsuccessful? On this issue the recommendation made by the Ontario Law Reform Commission’s *Report on Class Actions* in 1982 was succinct - generally the representative plaintiff should not be liable for costs, and should only be made liable in special circumstances (e.g. if the litigation plaintiff was found to be vexatious). The reason for the recommendation was stated clearly: if the rule were otherwise why would anyone agree to become the

representative plaintiff? If the class action is successful the representative plaintiff will never recover more than her claim/share (which may be quite small, *e.g.* \$5,000) yet by acting as the representative plaintiff under a loser pay regime she would assume the full costs of a multi-million dollar class action if the action fails.

But the Ontario legislation as enacted ignored this recommendation and provided instead for a general loser pays costs regime, with a discretion in the court to relieve a losing plaintiff of liability for costs where the class proceeding “was a test case, raised a novel point of law or involved a matter of public interest”. However, British Columbia adopted the OLRC proposal so in that province there is a general rule against loser pays costs with some minor exceptions: costs may only be awarded in a class action: if there has been vexatious, frivolous or abusive conduct on the part of any party.

Notwithstanding Ontario’s retention of fee-shifting, and the OLRC’s dire prediction, class actions have thrived in the Province and there has been no shortage of representative plaintiffs. Presumably this is because plaintiffs’ lawyers are choosing judgment-proof representatives or are expressly or impliedly agreeing to indemnify the representative for any adverse cost award. [Individual class members are, naturally, liable for the cost of pursuing individual claim (*i.e.* quantification of individual damages), and at that stage of the proceeding the loser pays principle applies.]

## FUNDING

The funding of the plaintiff side of class actions was given little attention by those who designed the Canadian class action regimes (with the exception of Quebec). Class actions are not covered by legal aid. Instead the entrepreneurial, bounty hunter, plaintiff class action counsel funds the action and chases the pot of gold at the end of the rainbow; but the chase can be long, hard and very expensive. There is great risk involved for lawyers acting on a no-win/no-pay basis in class actions which are frequently complex and expensive; when the stakes are high the defendants often fight very hard with full knowledge of the financial weakness of the plaintiff class counsel. As a result, interim funding problems for the plaintiff lawyer are daunting.

Ontario has a class proceedings fund that provides disbursement funding but does not cover lawyers’ fees. Its primary purpose is to guard the representative plaintiff from an adverse costs award – if any financial support is given to a plaintiff, the fund becomes liable for any cost order against the plaintiff and the plaintiff is relieved of all liability for such costs. The fund is financed by a 10 per cent levy on any recovery in funded actions. But the Ontario fund has not worked very well. Only a small percentage of class action plaintiffs have applied for funding, few cases have been granted funding and the “big settlement cases” have typically

not applied so the fund has lacked funding.

The situation is better in Quebec. It also has a fund – known as the Fonds – which does provide lawyer fee (and disbursement) funding, financed out of a 10 per cent levy or charge on any judgments received in cases that funded by the Fonds. It appears to have much higher usage rate than the Ontario fund.

## CLASS ACTION PROBLEMS

Although class actions in Canada have had great success and provided access to justice, and compensation, to hundreds of thousands of people who would otherwise never have received anything, class actions are not problem free. Most of the problems I am about to discuss are well documented in the US. However, they are at least potential problems in Canada as well, and while we are perhaps doing better than our US counterparts, I do not believe we are yet taking the problems seriously enough.

### *The “clientless” lawyer*

Many of the problems stem from the fact that the class action lawyer is, effectively “client-less” and this gives rise to agency problems. The lawyer is client-less in the sense that often the lawyer will have chosen the class representative and, in any event, once the class action is certified his client is the whole class, not just the named representative plaintiff. There is no one to give the lawyer binding instructions and effectively the class action is the lawyer’s action, not that of the class or the representative plaintiff. The overarching feature of class actions is that the principals (the class members) cannot effectively monitor their agent (the class lawyer), so the monitoring role ordinarily played by clients in non-class actions is absent in class actions. This is further reinforced by the fact that the lawyer will typically have (i) invented or devised the class action, and (ii) he or she will be funding the action personally through his or her firm.

### *Settlements and the risks of conflict of interest and collusion*

These agency problems are most apparent in the settlement of class actions. Like most other cases, most class actions settle. Unlike most settlements, class action settlements raise very serious questions. The settlement of class actions differs from other civil suits in an important respect. In an ordinary (non-class) action, any settlement reached between the parties will be binding only upon them; accordingly, the settlement will be legitimate so long as the named parties consent to it. By contrast, in a class action any settlement will affect the rights of everyone within the defined class, without the explicit consent of individual class members. Hence, to protect these absent class members from being bound by unfair settlements, under our legislation class actions may be settled only with court approval.

A further problem with class action settlements is the conflict of interest inherent in the process and the opportunity for collusion between plaintiff's counsel and the defendant. The Ontario Law Reform Commission was well aware of this, and in its Report on Class Actions the issue is discussed in terms which have been repeated by subsequent US commentators. The OLRC noted that:

*"There is a real possibility that, without the benefit of appropriate safeguards, parties and their counsel might be tempted to abuse the class action procedure in reaching a settlement. For example, the representative plaintiff might use the class action to enhance his individual bargaining position, or class members' interests could be sacrificed for lawyers' fees ... Moreover, in the context of a settlement negotiated on behalf of the entire class, the agreement reached could be inadequate or unfair to the class members "[I]t has also been suggested that the interests of the class lawyer and the class members might diverge; this would occur where the lawyer negotiates a settlement that maximizes the lawyer's compensation at the expense of the ultimate recovery achieved for class members. The most obvious manner in which such a result might occur is where the defendant offers to absorb the fees of the class lawyer, calculated at a premium rate, in return for the acceptance of an inadequate class award and discontinuance of the class action. Such a result might also occur, however, through indirect financial pressures, without any conscious misbehaviour on the part of the lawyer."*

This phenomenon is not peculiar to class actions and can be present in ordinary PI litigation where lawyers simultaneously negotiate both damages and costs. For example, D proposes a settlement of \$50,000 for damages and \$5000 for costs. P says that he could not recommend that to his client. D responds with an offer of \$45,000 for damages and \$10,000 for costs, and the plaintiff says that would be acceptable. But in non-class actions we see client monitoring as the answer; the individual client can accept or reject the proposed settlement.

Little or nothing has changed since the OLRC wrote its 1982 Report. Recently, Professor John Coffee stated the problem in similar terms:

*"Collusion within the class action context essentially requires an agreement – actual or implicit – by which the defendants receive a "cheaper" than arm's length settlement and the plaintiffs' attorneys receive in some form an above-market attorneys' fee. In return for this ... settlement, defendants either pay the plaintiffs' attorneys' fees themselves or agree not to contest the plaintiffs' attorneys' application for court-awarded fees..."*

And Judge Richard Posner makes the same point:

*"The lawyer for the class will be tempted to offer to settle with the defendant for a small judgment and a large legal fee, and such an offer will be attractive to the defendant, provided the sum of the two figures is less than the defendant's net expected loss from going to trial"*.

The OLRC, having anticipated these problems under a

new class action regime, recommended judicial scrutiny (court monitoring in place of client monitoring) as the solution and the requirement that class action settlements be subject to court approval has been incorporated into class proceedings legislation. But is this "remedy" sufficient, and in applying it what limitations exist? And most importantly, can this "remedy" be improved? I believe the real issue here is inability of a common law, adversary system judges to adequately conduct inquisitorial fairness hearings regarding settlement without the aid of counsel to oppose the settlement. At the fairness hearing a judge is faced with two counsel who are both claiming that this settlement is a good thing i.e. fair and reasonable for the class members. Unlike the usual situation in an adversary hearing, the judge is deprived of adversarial presentation. I have suggested on several occasions that judges should appoint counsel to oppose the settlement, but no court has done so to date. I am of the view that if defendants are willing to throw \$10 million or a billion dollars at a case to settle it, then the case can afford the cost of paying a counsel to oppose the settlement or at least independently advise the court as to the reasonableness or otherwise of the settlement. Our judges have taken some steps towards assuring the reasonableness of settlements. There is a principle (not clearly and universally recognized) that the parties should not simultaneously negotiate damages and fees. I would go further and adopt a principle that the defendant should have no say in the plaintiffs lawyer's compensation in a common fund case at all. The court can just let the plaintiff's counsel make his/her pitch to the judge as to what should be awarded as counsel fees: the defendant should not be allowed to take part in, or make representations at, the fairness hearing otherwise this becomes a trading point between the parties (e.g., P agrees to settle for \$3M if D agrees to support P's request for a \$1M fee.) We have had two cases in which judges have refused to approve settlements until they were improved (two tainted blood cases). In another case the court refused outright to approve a settlement of a corporate "strike suit" where counsel had entered an agreement for a dismissal of the action with the defendant paying the plaintiff counsel's fees. (The lack of adversarial presentation becomes even more acute at hearings to fix counsel fees. Here we have the somewhat ludicrous scene of the supposed counsel for the class standing up unopposed and asking to have a sizeable portion of the classes' money given to him as a counsel fee.)

### ARE CLASS ACTIONS FAIR TO PLAINTIFFS AND DEFENDANTS?

A study in 2000 by the Rand Institute for Civil Justice observed:

*"Plaintiff attorneys can be motivated by the prospect of substantial fees for relatively little effort. For their part, defendants may want to settle early and inexpensively. When these incentives intersect, the settlements reached may send inappropriate deterrence signals, waste resources, and*

encourage future frivolous litigation”.

The study observed that its data did not provide a basis for estimating the proportion of litigation in which questionable practices obtain. (Hensler, D.R. et al., *Class Action Dilemmas: Pursuing Public Goals for Private Gain*, Santa Monica: Rand Institute for Civil Justice, 2000 The full text of the Rand study can found at <http://www.rand.org/publications/MR/MR969/>).

### ***The plaintiff's perspective***

Class actions would be unfair to plaintiffs if the compensation achieved was inadequate and the lawyers' fees paid were excessive. This is not perceived to be the case in Canada, but the reverse may often be the case in the US. The Rand study concluded that the “clientless litigation” represented by class actions has led to questionable practices – settlements that are arrived at without adequate investigation of facts and law and that create little value for class members or society and class counsel fees disproportionate to the effort actually invested in the case. The plaintiffs' attorney, once seen as a public-regarding private attorney general, is now viewed as a profit-seeking entrepreneur, capable of opportunistic actions and often willing to subordinate the interests of class members to the attorney's own economic self-interest.

### ***The defendant's perspective***

Currently there is no concerted outrage from defendants (or their lawyers) regarding class actions in Canada. The Rand study indicated that class actions were a continuing concern to defendants in the US because of the alleged “blackmail” they produce (*i.e.* the number and size of the claims asserted force the defendants into unwarranted and excessive settlements). But Rand concluded that assessing this claim made by defendants was “enormously difficult”; defendants' complaints about class actions are difficult to disentangle from their disappointment at now being confronted with claims of a type and size that they previously escaped.

### **CONCLUSION**

So what is the answer to the question posed by the title of this piece: do class actions really provide access to justice or are they just another product line for lawyers? The Canadian experience suggests they are both – a powerful tool of access to justice and a profitable new product line for lawyers who are prepared to accept the risks. But they are far from problem free. 

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