

## CLASS ACTIONS IN CANADA – THE CONSUMER’S BEST FRIEND?

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SUMMARY: I. *Introduction*. II. *Class actions to the rescue?* III. *North American Developments*. IV. *Canadian Developments*. V. *Impact of the Legislation*. VI. *Structure of the Legislation*. VII. *The Answer to the Title of this Paper*.

Canada has a federal system of government. In the consumer protection area, jurisdiction is divided between the federal government (located in Ottawa) and the provinces. Canada has ten provinces, with constitutionally entrenched powers, and three Territorial units with powers of self government delegated by the federal government. In the post-World War Two era, much consumer protection legislation has been adopted at the federal and provincial levels.<sup>1</sup> The major problem has been not lack of legislation but serious lack of enforcement of the legislation. Canadian consumers are poorly organized and have little political clout. As a result, federal and provincial governments have little incentive to establish properly funded consumer protection agencies with effective powers.<sup>2</sup> The agencies that exist are seriously underfunded and are usually not encouraged to exercise their powers aggressively.

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<sup>1</sup> For the details see Ziegel, Jacob “*Canadian Consumer Law and Policies 40 Years Later: A Mixed Report Card*”, 2010, 50 Canadian Business Law Journal (CBLJ) 259.

<sup>2</sup> Quebec is an exception to the general rule and has had an active programme of consumer protection since the 1980s when a left wing government was in power under the premiership of René Lévesque. The programme was (and probably remains) partly politically motivated because of Quebec’s special status in the Canadian federation and an ongoing separatist movement.

## II. CLASS ACTIONS TO THE RESCUE?

Starting in the 1970s, Canadian consumer activists and law teachers working and writing in the area turned to class actions as a promising remedy for the lack of enforcement by government agencies. In common law jurisdictions, class actions have their origin in the remedies long provided by Equity courts in England where a class of complainants was adversely affected by a defendant's wrongful conduct. However, the equitable remedies were very limited and did not include an award of damages to the members of the aggrieved class. Damages could only be awarded by common law courts and common law courts did not recognize class actions.

In England, the fusion of common law and Equity courts in 1873 conferred on all courts the power to grant common law and equitable remedies. However, the courts construed very narrowly their powers to grant damages in class actions.<sup>3</sup> As a result, prior to the modest reforms introduced in England in the late 1990s, class action damage claims never took root. The English rules of practice were also very deficient in providing rules for the actual conduct of class actions.

## III. NORTH AMERICAN DEVELOPMENTS

In the United States, the position changed significantly with the adoption of class actions rules in the Federal Rules of Procedure in 1939, and still more so with the extensive revision of the Rules in 1966.<sup>4</sup> These rules still govern class actions in federal US courts and have been widely copied in state class action rules. Consequently, class actions in the US have become a major social, economic and legal phenomenon at both the federal and state levels.

## IV. CANADIAN DEVELOPMENTS

In Canada, in 1978, Quebec, a civil law jurisdiction, was the first province to adopt class action rules and these were heavily influenced, in con-

<sup>3</sup> A leading case was *Markt & Co. vs. Knight Steamship Co.* [1910] 2 K.B. 1021 (C.A.), which held that damage claims were personal to each member of the alleged class and therefore could not be the subject of a class action. The English courts took this position even though the losses suffered by members of the class in this case were readily assessable and could have been ascertained in subsequent proceedings once the issue of liability was determined.

<sup>4</sup> Legislation restricting the use of state actions was adopted by the US Congress in 2005. See Elizabeth J. Cabrasee, Fabrice Vincent and Paulia do Amaral, "The Class Action Fairness Act of 2005: The Federalization of U.S. Class Action Litigation" (2006) 43 CBLJ 398.

cept if not in structure, by the US Federal Rules.<sup>5</sup> However, for the first ten years or more there was little class action activity in Quebec and the Quebec initiative attracted little attention outside Quebec.

The changing interest in class actions in common law Canada resulted from the 1982 release of the three volume seminal report on Class Actions by the Ontario Law Reform Commission (OLRC).<sup>6</sup> The Report strongly supported class actions on three principal grounds: 1. Consumer Justice. 2. Economy of Judicial Resources, and 3. Behavioral modification of potential defendants. The Commission perceived the need for consumer class actions because of the rapid changes in the Canadian market place since World War II, the sophistication of many of those goods and services in the market place, and the disparity in bargaining powers between the typical consumer and the powerful (and often multinational) corporations offering those goods and services. The two other rationales offered in the Report for the need for a class action remedy were really subsidiary to the first. Economizing on judicial resources only comes into play if class actions are made possible and easy to invoke. Behavioral modification of potential defendants is a worthy goal though difficult to prove in practice. Price fixing and other antitrust behavior seems to continue to flourish in both Canada and the United States despite the existence of class action legislation, so does insider trading in securities markets and false advertising by large and small corporations.

Despite the powerful reasoning of the Ontario Report, class action legislation in Ontario was only enacted in 1992,<sup>7</sup> and then only because there had been a change of governments since the publication of the OLRC Report in 1982 and because of the appointment of an attorney general, Iain Scott, who was very sympathetic to consumer issues. Since 1993 (and especially during the past decade) substantially similar class action legislation has been adopted in the other common law provinces, with the exception of Prince Edward Island (Canada's smallest province).<sup>8</sup> At

<sup>5</sup> Quebec, Code of Civil Procedure, R.S.Q. 1977, c.C-25, art 999-1051, enacted by S. Quec. 1978, c.8, s 3, as am. Since Quebec is a civil law jurisdiction, its willingness to embrace a quintessentially common law procedural device seems to contradict the view of some comparativists that legal systems are deeply rooted in the culture and history of their societies and that concepts and doctrines peculiar to one system cannot readily be transplanted to a different cultural milieu.

<sup>6</sup> Ontario Law Reform Commission, *Report on Class Actions*, 3 vols., 1982. See also the follow-up report commissioned by Attorney General Ian Scott, Ontario, *Report of the Attorney General's Advisory Committee on Class Action Reform*, 2 vols., Toronto, February, 1990.

<sup>7</sup> Stat. Ont. 1992, c. 6.

<sup>8</sup> The Uniform Law Conference of Canada also adopted a Model Class Actions Act in 1996 and amended it in 2006. For further detail, see: <http://www.chls.ca/en/us>. There are now

the federal level, class action rules of procedure have been adopted by the Federal Court without the benefit of substantive legislation.<sup>9</sup>

## V. IMPACT OF THE LEGISLATION

The class action legislation has proved immensely popular with plaintiffs' lawyers across Canada as a challenging and potentially very profitable source of new business. Defence counsel have also benefitted greatly, and perhaps even more, because they do not have to worry about being paid for their services.<sup>10</sup> Although official statistics are not available,<sup>11</sup> it is reasonable to assume that more than five hundred class actions have been initiated

several ongoing commentaries on the provincial legislation and the case law interpreting the legislation. The main differences among the common law Acts are the following: 1. About half the provincial Acts do not permit the inclusion in the action of extraprovincial members of the class without the consent of those members ("opt-in" provision); the Ontario and other acts impose no such restrictions but leave the issue to be decided by the courts. 2. Awarding of costs. Under the Ontario Act, the normal cost rules apply, i.e., that the losing party must pay the costs of the other party. However, s. 31(1) of the Ontario Act allows the court to relieve an unsuccessful plaintiff from having to pay to pay the defendant's costs if the court finds that the case raised issues of public importance or novel and difficult points of law. Under the Quebec legislation, an unsuccessful plaintiff is only liable to pay costs on the Small Claims Court scale, which is very modest.

<sup>9</sup> This difference in approach arose because of the remarkable decision of the Supreme Court of Canada in *Western Canada Shopping Centres Inc. vs. Dutton* 2001 SCC 46 holding that Canadian superior courts had inherent jurisdiction to alter the rules of practice to facilitate class actions. The Supreme Court had previously reached the opposite conclusion in *Naken v. General Motors of Canada* [1983] 1 S.C.R. 72. Arguably the two decisions can be justified on the following grounds. In *Naken* the plaintiffs did not argue that the trial court had an inherent jurisdiction to change the rules of practice but contended that their claims could be accommodated within the existing jurisprudence governing class actions. The Ontario Court of Appeal accepted the argument but the Supreme Court of Canada disagreed. In *Dutton*, the Alberta Court of Appeal followed *Naken*, but the issue of the Court's inherent jurisdiction to adapt the rules of practice *ex mero motu* does not appear to have been raised. It was raised in the Supreme Court of Canada and was accepted in the Court's unanimous judgment. What the Supreme Court of Canada did not make clear in *Dutton* was whether a trial or appellate court could change the rules of practice to fit the needs of a particular case or whether the change had to be effected by following the appropriate statutory procedure for changing the rules of practice.

<sup>10</sup> As explained below, overwhelmingly plaintiffs' class counsel work on a contingency fee basis and only get paid if the action is successful.

<sup>11</sup> Counsel are not required to notify a public agency, other than the court registry in which the action is started, when starting a class action. The Canadian Bar Association has agreed to serve as a depository for new filings, but there is no sanction against firms that do not comply.

since 1992, most of them in Ontario, British Columbia and Quebec.<sup>12</sup> Only about ten percent have ever gone to trial; the rest have been settled (with the courts' approval) or have been discontinued by the plaintiffs. One leading Canadian class action commentary has identified sixteen different types of claim.<sup>13</sup> Many of the cases have involved consumer interests e.g., defective products or services, injurious drugs, false representation in the sale of goods or services, usurious rates of interest charged by payday loan companies, undisclosed or unauthorized fees by banks, telephone companies and other service providers, price fixing, emission of dangerous substances from industrial enterprises and other environmental hazards.<sup>14</sup> An equally significant feature of Canadian class actions is that a significant number of them have been brought against the federal or provincial government and local governments, and public institutions such as hospitals and institutions for handicapped children.<sup>15</sup>

## VI. STRUCTURE OF THE LEGISLATION

The class action legislation of the common law provinces is not uniform<sup>16</sup> but they all share the following features: 1. Except in one case,<sup>17</sup> there

<sup>12</sup> Saskatchewan has also become an active player largely because of the entrepreneurial ambitions of a Regina based lawyer, who has also established an office in many of the other provinces.

<sup>13</sup> See Ward K. Branch, *Class Actions in Canada* (loose-leaf publication), L-1 et seq. (Canada Law Book Inc.).

<sup>14</sup> In a survey distributed among 29 leading plaintiffs' class counsel at 21 firms across Canada, Prof. Jasminka Kalajdzic found that consumer class actions, as the term was defined in her paper, were the most numerous of class actions being litigated. Actions involving defective drugs, medical devices and other products, including tainted food; securities and price fixing comprised 219 of the 332 cases reports by the survey recipients. Jasminka Kalajdzic, "Consumer (In)justice: Reflections on Canadian Consumer Class Actions" (2010) 50 *Can. Bus. L.J.* 356 (CBLJ).

<sup>15</sup> The common law rule protecting federal and provincial governments from actions in delict were generally abolished after World War Two. They still appear to remain in force, at least to some extent, at the federal and state levels in the US.

<sup>16</sup> Half of the provinces have adopted the Ontario model; the other common law provinces adopted the draft law prepared by the OLRC as parts of its Report on Class Actions or have adopted the Model Act prepared by an ad hoc group of class actions specialists under the aegis of the Uniform Law Conference of Canada.

<sup>17</sup> Under the Ontario Securities Act, as amended in 2005, Part XXIII.1, defendants cannot be sued without leave of the court and the court must be satisfied that the prospective plaintiff has a strong prima facie case. This restriction differs from the requirement in section 5 of the Ontario CPA, as interpreted by the courts, that the plaintiff must have a reasonable cause of action and "reasonable" has been interpreted very elastically. The special require-

are no restrictions about the types of plaintiffs that may initiate class actions and the types of person that may be sued as defendants and both are governed by the general provincial rules governing the types of person who may sue and be sued. 2. However, the action cannot proceed<sup>18</sup> without the court first certifying that the action is appropriate for class action treatment, that the members of the class have been properly identified, that the claims or defences raise common issues, that the named plaintiff and plaintiff's counsel are suitable persons to conduct the action, that the plaintiff has presented the court with a plausible plan for the conduct of the action, and, most important, that the court is satisfied that a class action is the "preferable" means for addressing the plaintiff's complaint.<sup>19</sup> Once the action has been certified, the court is given very broad and flexible powers to supervise the conduct of the action, to admit statistical evidence, to divide the class into subclasses, and to grant a *cy-pres* award in lieu of individually assessed damages where, in the court's opinion, individual assessments would be too time consuming and expensive and the amounts too small to justify the exercise.

To a non-Canadian and especially to a civilian lawyer, it may seem therefore that Canadian class actions provide an efficient and effective answer to the non-enforcement of consumer legislation and private law principles by traditional means. Undoubtedly, consumers have won some very significant class action victories but they do not represent the norm and, among many other hurdles, Canadian consumers and their counsel continue to face the following substantive and procedural hurdles:

1. *Doctrinal and Substantive Barriers.* Generally speaking, Canadian consumer law has not caught up with the realities of the modern market place. For example, the implied warranties and conditions in the provincial Sale of Goods Acts only apply as between the immediate seller and buyer and do not bind the manufacturer or producer of the goods unless the consumer buyer can show that the manufacturer had made a direct representation to the consumer *and* that the consumer saw and relied on the representation at the time the consumer purchased the goods.<sup>20</sup>

ment in securities cases was adopted as a quid pro quo of class members being able to sue without being required to show that they had seen and relied on the security issuer's allegedly false representation.

<sup>18</sup> See e.g., Ontario Act, s. 5.

<sup>19</sup> The preferability test is less demanding than the test required under the US Rules, which requires the plaintiff to prove that a class action is a "superior" means to other alternatives for addressing the class members' complaints.

<sup>20</sup> It was on this ground that the Newfoundland & Labrador Court of Appeal denied a class action brought by consumers against tobacco manufacturers for misleading representa-

2. *Mandatory Arbitration Clauses.* With a view to avoiding the headaches of class actions, many large corporations in Canada and the US have resorted to boiler plate provisions in their written and online contracts requiring consumers to arbitrate any disputes that the parties have not been able to resolve amicably. Quebec and Ontario have outlawed such provisions and Alberta law requires the province's consent before such clauses can be enforced. In most of the other provinces without such provisions (or previously without such provisions), the courts have been divided about the enforceability of mandatory arbitration provisions. This has been particularly true of the conflicting decisions of the Supreme Court of Canada in *Dell Computer Corp. v. Union des Consommateurs*,<sup>21</sup> *Rogers Wireless Inc. v. Muroff*,<sup>22</sup> and *Seidel v. Telus Communications Inc.*<sup>23</sup> It goes without saying that, unless all the other provinces fall into line or the Supreme Court reverses its position, a wide range of class actions will be jeopardized in many of the provinces.<sup>24</sup>

1. *Financial Barriers.* Class Actions are enormously expensive and, with rare exceptions, plaintiff counsel work on a contingency fee basis. This means that counsel will not be paid unless the action is successful or is settled out of court - both outcomes that counsel cannot predict in advance. At a minimum, counsel will wish to be satisfied that the prospective gains will outweigh the risks or, put more concretely, that a judgment or settlement in the plaintiff's favour will at least run to a million dollars or other substantial amount.<sup>25</sup>

tions concerning the safety of their products. In Ontario, a similar conclusion was reached with respect to a class action brought by students against a private vocational school with respects to the students' prospects of securing employment once they had obtained their diplomas. The buyers of life insurance from an insurance company, who complained of misrepresentations by the company's agents, were more fortunate because the court was satisfied that the same representations had been made to all the buyers.

<sup>21</sup> [2007] 2 S.C.R. 801.

<sup>22</sup> [2007] 2 S.C.R. 921.

<sup>23</sup> (2011) 329 D.L.R. (4<sup>th</sup>) 577. See further Shelley McGill, "Consumer Arbitration After *Seidel v. Telus* (2011) 51 CBIJ 187.

<sup>24</sup> National class actions, discussed below, will also be put in jeopardy because plaintiff's counsel will always have to worry whether an arbitration clause will be enforceable against members of the class who entered into their contracts in a province without invalidating legislation.

<sup>25</sup> In Ontario, plaintiff's counsel can apply for financial support from the Class Proceedings Committee, a statutory body established at the same time as enactment of the Class Proceedings Act. If the application is granted, the grant will cover counsel's disbursements and also indemnify counsel and the plaintiff against a costs award if the action is unsuccessful. As a *quid pro quo*, if the action is successful 10 per cent of the award must be paid to the Fund. The Committee only has limited funds at its disposal and, once those funds have been disbursed, the Committee will cease to function unless the Ontario government agrees to renew its funding, an unlikely event.

2. *Financing of Class Actions.* This is another very considerable worry plaintiff's counsel has to contend with. The disbursements of mounting and maintaining a large class action can easily run into the hundreds of thousands of dollars. Not only that, but Ontario courts have held that if counsel knows that the named plaintiff is impecunious he is obliged to indemnify the plaintiff against any cost award rendered by the court if the action is unsuccessful. To address both these concerns, plaintiff's counsel in important cases are increasingly turning to funding by outside commercial enterprises specializing in this type of funding.

1. *Problematic National Class Actions.* Class action complaints frequently cover victims in more than one province; from the plaintiff counsel's point of view, therefore, it looks very attractive, financially and otherwise, to frame the action on behalf of all consumers in Canada who are similarly affected by the defendant's conduct. However, this approach encounters two difficulties. The first is that about half the provinces do not permit national class actions but require non-residents to *opt-in* into the provincial action before they can be bound by the outcome. The other difficulty is that there is still uncertainty whether a province has class action jurisdiction over non-residents. In Ontario, the majority of the courts that have considered the issue have upheld the provincial jurisdiction but there is weighty scholarly opinion in the opposite direction.<sup>26</sup>

2. *Concurrent Class Actions in Several Provinces.* This is the reverse side of the coin involving the validity of national class actions. Obviously, if a province has jurisdiction over non-provincial class members, the same must be true of the jurisdiction of other provinces that can show a close connection between the plaintiff and the defendant. From the defendant's point of view, this creates a dilemma, especially if both provinces insist on retaining their jurisdiction. In practice, reasonable counsel will try to reach a compromise, but counsel are not always reasonable! The ideal solution would be for the provinces to follow the US precedent of establishing the Canadian equivalent of Multidistrict Litigation Panels (MDLP) that would have jurisdiction to decide which of several competing federal district courts should be given the nod. However, the analogy is not entirely apt. In the US, the choice is

<sup>26</sup> See the collection of materials in Watson, Gary D. (ed.), *Class Actions and Materials*, Spring term 2011, Vol. 1, pp. 256-93 (Univ of Toronto, Faculty of Law). The Supreme Court of Canada had an opportunity to address the issue in *Canada Post Corp. vs. Lepine*, 2009, S.C.R. 216, but LeBel J., who wrote the Court's opinion, sidestepped the issue and said he hoped the provinces would collaborate in finding a common solution. The issue has arisen again in the context of securities class actions brought in Ontario where the action purports to represent aggrieved securities holders, including those outside Canada.

made among competing courts within the same judicial system and all are bound by the same Federal Rules of Procedure. This is not true in Canada where, constitutionally, each province is autonomous within its sphere of jurisdiction.

3. *Settlement of Class Actions and the Cy-Pres Doctrine.* Section 24 of the Ontario Act allows the loss and/or damages suffered by members of the class to be calculated on an aggregate basis where individual assessment of the loss or damages would be too difficult or expensive e.g., with respect to the losses suffered by cardholders where a bank has levied unauthorized charges.<sup>27</sup> However, Section 24 does not answer the question how the aggregate amount is to be disbursed and whether the courts can order the assessed amount to be paid *cy-pres* to a charitable agency or other philanthropic institution where the cost of calculating the amount to which each member of the class would be entitled is out all proportion to the potential benefits. The Ontario courts have said yes and the *cy-pres* doctrine is now well established in Canadian jurisprudence. However, Canadian and US scholars<sup>28</sup> have questioned whether the *cy-pres* doctrine has always been wisely applied and whether, somewhat perversely, the defendant may come out smelling like a rose because of its close connection with the beneficiary of the *cy-pres* award and because of the tenuous connection between the *cy-pres* award and the losses suffered by members of the class.

## VII. THE ANSWER TO THE TITLE OF THIS PAPER

To the question are class actions in Canada a consumer's best friend, the answer must be: it depends. If enough consumers are involved and class action counsel feel confident that a multimillion dollar award is likely if the action is successful, then a class action will be the consumer's best friend; in other cases the question must be no. The status quo will continue and aggrieved will either have to seek other remedies or take their lumps.

For civilians and comparativists at large, the question will be a different one. For them the question will be whether their legal culture is compatible with the entrepreneurial model of class actions practiced in Canada and the United States. So far almost all civil law jurisdictions, and most common law jurisdictions outside Canada and the United States, have found

<sup>27</sup> See e.g., *Markson vs. MBNA Canada Bank*, 2007, O.J. No. 1684 (OCA) and cf. *Cassano vs. Toronto-Dominion Bank*, 2007, No. 4406 (OCA).

<sup>28</sup> With respect to Canada, see the criticisms voiced in the article by Prof Kalajdzic, *supra*, n. 14.

the price too high and have resisted making the conversion. For them, the question must be what alternative regimes they have developed to ensure that consumer legislation is effectively enforced and remains more than an aspiration.