Defending Class Actions in Canada

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3rd Edition

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CHAPTER 1

INTRODUCTION TO CLASS ACTIONS

1. Concept and Role

Since the publication of this book's first edition in 2002, the Canadian legal landscape has been altered dramatically by a proliferation of class actions against corporations, governments, and individuals. The allegations vary widely, involving mass accidents, environmental harm, consumer practices, employment and pension disputes, securities fraud, constitutional rights, and defective products. While it is more recent than its American counterparts, the Canadian class action is no longer novel. The evolving jurisprudence and the introduction of enabling class action legislation in additional jurisdictions since 2002 requires elucidation and analysis.

For businesses that are (or may become) class action defendants, it is important to understand the nature of Canadian class litigation, how it differs from traditional litigation and from class litigation in the United States, and the strategies and options available at various stages of the proceedings. This book is intended to be a guide to current class action law and practice in Canada. Its primary focus is the provision of practical, strategic advice to executives and legal counsel of corporations and institutions carrying on business in Canada and elsewhere who may find themselves named as defendants in Canadian class actions.

A class action is a civil lawsuit brought by one or more persons on behalf of a larger group of persons (the class members). It seeks to have common or similar claims resolved in a single proceeding, with the result binding on all class members and opposing parties. Historically, the assertion of such group or collective claims faced numerous difficulties.[1] However, in the United States and in most Canadian jurisdictions, legislation has been passed to facilitate class actions and to control the circumstances in which they may be brought. The Supreme Court of Canada even delineated essentially judge-made principles to make class actions more readily available in provinces that had not yet enacted reform legislation.[2]

Business people may be forgiven for regarding the modern class action as yet another scheme designed to enrich plaintiffs' lawyers and their clients at the expense of defendants. A less skeptical view recognizes class action reform as legislation that is intended to be in the public interest. In class actions, the rules governing private individual litigation are altered in order to encourage claims in furtherance of goals that legislators and judges consider to be socially desirable. These goals were articulated decades ago by the Ontario Law Reform Commission in its 1982 *Report on Class Actions*. The Report was the impetus for, and the basis of, class action reform in the Canadian common-law provinces.[3] The goals are (1) improved access to justice; (2) judicial economy; and (3) behaviour modification.[4] These goals are regularly invoked by Canadian courts in construing class action legislation and in granting or denying class action status.[5]

The first goal, improved access to justice, is furthered through special rules to encourage the assertion of "non-viable" claims, that is, individual claims that might not otherwise be pursued because the amounts at stake cannot justify the cost of litigating them. Arguably, this is the most important goal of class action reform, at least in the Canadian context, where the costs of litigating even relatively significant claims are higher, and the compensation available to a successful plaintiff usually lower, than in the United States.

The second goal, judicial economy, is advanced by avoiding the duplication of fact finding and legal analysis that the repeated trial of issues common to similar claims would entail, if such claims were litigated individually. The resolution of common issues in one proceeding, with the results binding on all parties, is said to save judicial time and resources and to avoid the possibility of inconsistent findings. Opponents of class actions point out, of course, that this rationale is relevant only where the claims in question are individually viable; in fact, encouraging the aggregation of claims that would not be litigated individually increases the burden on the judiciary and the courts.

The third goal, behaviour modification, is perhaps the most controversial of the three, as there are many class actions involving small consumer claims in which plaintiffs' lawyers are awarded fees that seem astronomical when they are compared to the very small amounts of compensation obtained by individual class members. The rationale for encouraging such claims through the mechanism of the class action is that the very threat of a class action acts as a deterrent to actual and potential wrongdoers. Without class actions, such persons might engage in unlawful or harmful activities, inflicting small harms on large numbers of persons who would be unable or

disinclined to seek redress individually. By forcing wrongdoers to bear the cost of illegal or harmful activities, class actions are said to encourage increased compliance with the law.

In this respect, the class action may be viewed as a potentially powerful regulatory enforcement tool. In an age of deregulation and decreasing government resources, regulators may be unable or unwilling to prosecute many regulatory offences. Class actions, utilizing plaintiffs' lawyers as "private attorneys general", can be employed to advance such societal goals as consumer protection, environmental safety, price competition, investor confidence in capital markets, and compliance with human rights legislation.

On a number of occasions, the Supreme Court of Canada has endorsed the claimed importance and utility of the class action as a vehicle for litigating issues affecting large numbers of persons with similar claims. In *Western Canadian Shopping Centres Inc. v. Dutton* ("*Dutton*"), the court stated:[6]

> The class action plays an important role in today's world. The rise of mass production, the diversification of corporate ownership, the advent of the mega-corporation, and the recognition of environmental wrongs have all contributed to its growth. A faulty product may be sold to numerous consumers. Corporate mismanagement may bring loss to large numbers of shareholders. Discriminatory policies may affect entire categories of employees. Environmental pollution may have consequences for citizens all over the country. Conflicts like this pit a large group of complainants against the wrongdoer. Sometimes, the complainants are identically situated *vis-à-vis* the defendants. In other cases, an important aspect of their claim is common to all complainants. The class action offers a means of efficiently resolving such disputes in a manner that is fair to all parties.

2. The Status of Class Action Reform in Canada

At present, modern comprehensive class action legislation is in force in nine Canadian provinces. In 1978, Quebec became the first Canadian jurisdiction to adopt class action legislation.[7] Ontario followed suit in 1993 with the *Class Proceedings Act, 1992*.[8] British Columbia enacted its *Class Proceedings Act*[9] in 1995. Saskatchewan and Newfoundland and Labrador's class action statutes came into force in early 2002.[10] Class proceedings legislation was proclaimed in force in Manitoba in 2003, in Alberta in 2004, in New

Brunswick in 2007, and in Nova Scotia in 2008.[11] In addition, the Rules governing litigation within the statutory jurisdiction of the Federal Court of Canada[12] were amended in 2002 to provide for an expanded class action procedure.[13]

Canadian class action legislation is modelled on Rule 23 of the United States Federal Rules of Civil Procedure. Rule 23 was introduced in 1938 and substantially revised in 1966.[14] Federal Rule 23 governs class actions in U.S. federal courts, and it is the model for class action rules in approximately two-thirds of American state jurisdictions. However, the Canadian statutes differ significantly from Rule 23, and they are generally considered to be more conducive to the bringing of class actions. It is also important to note that there is no national legislation in Canada comparable to Rule 23 that governs class actions involving multiple provinces or states.

In the remaining Canadian jurisdictions that have not implemented statutory reform of class action procedure, class actions are governed by Rules of Court that are based on Rule 10, which is scheduled to the English *Supreme Court of Judicature Act, 1873.* Historically, these Rules were thought to severely limit the potential for class actions. Indeed, cases decided under these Rules, most notably the Supreme Court of Canada's decision in *General Motors v. Naken Ltd.*,[15] had been widely cited as evidence of the need for statutory reform. In *Dutton,* however, the Supreme Court held that class actions brought under provincial Rules of Court should not be approached restrictively. The court noted the advantages of comprehensive statutory codes of class action procedure when resolving such issues as threshold "certification" of class actions, notice, rights of discovery, and the like. But according to the Supreme Court, "[a]bsent comprehensive legislation, the courts must *fill the void* under their inherent power to settle the rules of practice and procedure as to disputes before them" and they must "strike a balance between efficiency and fairness" in doing so.[16]

The effect of *Dutton* was, essentially, to "judicially enact" modern class action regimes in provinces that had not even passed reform legislation. The courts in Prince Edward Island and the three territories[17] now have an obligation to "fill the void" created by the lack of a comprehensive code of class action procedure and to make the class action rules in these jurisdictions work. As a result of *Dutton,* it would appear that the receptive and liberal approach underlying modern class action legislation must now be accorded to class actions brought in the non-statutory jurisdictions.

3. Overview and Comparison of Canadian Statutory Regimes

As procedural mechanisms designed to facilitate and regulate the assertion of group claims, the various Canadian statutory class action regimes share certain common features. These features include the following: (1) judicial screening and approval or "certification" of the claims as appropriate for class treatment; (2) notice to members of the class whose rights will be affected by the outcome of the litigation, along with an opportunity to "opt out" of the action; (3) special rules governing the funding of class actions and parties' liability for costs; (4) special judicial powers to manage and shape the litigation; (5) provisions for the determination of issues common to the class and the subsequent resolution of issues peculiar to individual class members; (6) rules governing the assessment and distribution of monetary relief; (7) provisions governing the settlement or discontinuance of class actions; and (8) provisions governing discovery and appeals.

The remainder of this Chapter provides a brief description of the main features of the existing Canadian statutory regimes and of the more significant differences among them. A more detailed treatment of many of these matters is contained in subsequent chapters of this book. Although an attempt has been made to point out both the differences and the similarities of the various statutes, this exercise is by no means exhaustive. A table comparing the various statutes is located after the last chapter.

(a) Application and Class Membership[18]

Despite their common features, the various provincial regimes differ somewhat with respect to the application of the legislation and the requirements for class membership. For example, the Ontario and Nova Scotia statutes and the Federal Courts Rules apply to both plaintiff and defendant class actions,[19] whereas the other provincial statutes authorize only plaintiff class actions. In Ontario, Manitoba, and Nova Scotia, one may commence class proceedings and be a member of a class regardless of one's place of residence. On the other hand, in British Columbia, Saskatchewan, New Brunswick, and Newfoundland and Labrador, only residents of the province may commence class proceedings and only residents are automatically included as members of a certified class. Non-residents may "opt in" to the action. In Quebec, class members may be residents of more than one jurisdiction, but the representative plaintiff must be a resident of the province. Before 2003, a class action could be instituted only by an individual (a "natural person"), a non-profit corporation, a co-operative, or an employee association (if one of the association members designated by the association was a member of

the class). As of January 1, 2003, the legislation was amended to permit private corporations, partnerships, and associations with no more than fifty employees or persons under their control to qualify as class members.[20] In all other jurisdictions with class action legislation, class actions are available to any person, including corporations.

(b) Certification[21]

Unlike ordinary actions, a proceeding commenced on behalf of a class may be litigated as a class action only if it is judicially approved or "certified" in accordance with a number of statutory criteria. The certification criteria set out in the statutes of the common-law provinces and in the Federal Courts Rules are virtually identical in requiring that (1) the pleadings disclose a cause of action; (2) an identifiable class consist of two or more persons; (3) the claims raise common issues; (4) a class proceeding be the preferable procedure for resolving the common issues; and (5) the representative plaintiff can adequately represent the interests of class members, does not have interests that conflict with those of other class members, and has a workable plan for advancing the litigation. The Quebec term for certification is "authorization"; the authorization criteria are almost identical to the criteria of the common-law jurisdictions. In order to remove impediments to the assertion of group claims arising out of cases decided under the pre-existing Canadian rules of civil procedure and under United States Rule 23, the Canadian legislation, except in Quebec, explicitly states that certain factors, such as the existence of separate contracts or the need for the individual assessment of damages, shall not constitute bars to certification.

In construing the certification criteria, Canadian courts have generally adopted a generous, non-restrictive approach designed, in the words of the Supreme Court of Canada, to give "full effect to the benefits foreseen by the drafters" of the legislation.[22] In Quebec, an already liberal approach to certification was bolstered in 2003 by amendments to the *Code of Civil Procedure* that removed the requirement that a representative plaintiff file affidavit evidence in support of the motion for authorization, and severely restricted the type of evidence that may be adduced prior to and during the authorization motion.[23] However, recent Quebec case law, including major appellate judgments, suggest that a more restrained approach to certification is emerging. That trend is not appearing in the common-law provinces. The issues arising from the requirements for certification are discussed in detail in Chapter 4.

(c) Opting In/Opting Out[24]

Under the Federal Courts Rules and under Ontario, Quebec, Nova Scotia, Alberta, and Manitoba legislation, persons who do not wish to be part of a certified class proceeding and be bound by its result must take active steps to opt out of the proceeding; otherwise, for purposes of those jurisdictions' courts, regardless of where they reside, such persons will become members of the class, as long as the class is described without reference to any territorial restrictions.

British Columbia, Saskatchewan, New Brunswick, and Newfoundland and Labrador have separate regimes for residents and for non-residents. Residents of those provinces who do not wish to be bound by the result of a class proceeding must opt out of it. Non-residents will not become members of the class unless they take affirmative steps to opt in.

As will be discussed in Chapter 3, this distinction between the two types of regimes has important consequences for the certification of "national" classes. Such classes seek to extend the effect of a class proceeding certified in one jurisdiction to class members who reside in other jurisdictions.

(d) Notice[25]

Notice is commonly necessary at several stages of a class action in order to inform absent class members of their rights. Class members will be bound by the results of a certified class action unless they take active steps to opt out of it. Notification of the right to opt out and of the manner in which this right may be exercised will, therefore, ordinarily be required immediately following certification. Notification will also be required where the common issues are resolved in favour of the class and the participation of class members is necessary to resolve individual issues. Notice of a proposed settlement will also ordinarily be given.

The statutes make express provisions for notice at the various stages of a class action[26] and grant the court broad additional powers to order notice wherever necessary to protect the interests of class members or to ensure the fair conduct of the action. The courts have a broad discretion to determine the manner of giving notice. The Federal Courts Rules and the statutes of the common-law provinces also explicitly grant the court discretion to determine who should bear the cost of notice, as well as the power, where appropriate, to dispense with giving notice.

(e) Judicial Management Tools[27]

Class actions involve a far greater degree of ongoing judicial management than does ordinary litigation. In order to protect the interests of absent class members and to realize the efficiencies the procedure was designed to achieve, the courts are given powers to make orders respecting the conduct of a class proceeding to ensure its fair and expeditious determination as well as the power to stay related proceedings.

(f) Funding Class Actions and Parties' Liability for Costs[28]

In Canada (but not in the United States), the losing party in a traditional civil lawsuit is liable not only for his or her own legal costs but also for a significant share of the costs of the successful party. This "loser pay" rule, coupled with the high cost of financing complex group litigation, was recognized by the architects of Canadian class action legislation as constituting a serious disincentive to the initiation of class actions by class members. The individual claims of class members will often be quite small compared to the cost of litigation and to their potential liability for the opposing party's costs. The various class action regimes have adopted significantly different approaches to this problem.

With the exception of Alberta, all jurisdictions provide that, in the event of an unsuccessful class claim, only the representative plaintiff, and not the other class members, may face liability for a defendant's costs.[29] In addition, all jurisdictions rely, to a greater or lesser extent, on plaintiffs' lawyers to initiate and fund class litigation through court-approved contingent fee arrangements. Such arrangements subject the lawyer to the risk of non-payment in the event of failure in return for the possibility of a generous fee award in the event of success.

In all Canadian provinces, contingency fees are available for class actions and, except in Quebec, for other forms of civil litigation. The class action statutes in British Columbia, Saskatchewan, Manitoba, Newfoundland and Labrador, and the Federal Courts Rules also abolish the traditional loser pay costs rule for class proceedings, leaving a representative plaintiff liable for a defendant's costs only in cases of abuse or in other exceptional circumstances.

On the other hand, Ontario, Alberta, New Brunswick, and Nova Scotia have retained the traditional costs rule for class actions. However, in Ontario and Nova Scotia, the court is specifically authorized to depart from the ordinary rule and to deny a successful defendant costs where the class