

Class Actions in Canada:
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Jasminka Kalajdzic ♦

Introduction

A lengthy report prepared in September 2007 by Professor Bill Bogart, Jasminka Kalajdzic and Ian Matthews provided a comprehensive overview of the class actions system in Canada, its various costs regimes, certification requirements, and the like.¹ In this short update, a summary of key developments in 2008 is provided, with brief discussion of four principal topics: the development of secondary market securities class actions; conflicts between class counsel and client; costs; and national classes.

Developments in Canada's Class Action Regime

This past year, Nova Scotia² became the ninth province to enact class actions statutes, leaving only one province (Prince Edward Island) and the three territories remaining without such legislation.

♦ Jasminka Kalajdzic, Adjunct Professor, Faculty of Law, University of Windsor, LLM Candidate (Toronto). I am grateful to Kirk Baert, Won J. Kim, Sharon Strosberg and Jay Strosberg for their helpful comments.

¹ W. A. Bogart, J. Kalajdzic & I. Matthews, "Class Actions in Canada: A National Procedure in a Multi-Jurisdictional Society?" (Paper prepared for the *Globalization of Class Actions Conference, Oxford University, December 2007*)[unpublished]. A condensed and updated version of the Report is also available: J. Kalajdzic, W.A. Bogart & I. Matthews, "Class Actions in Canada: Country Report Prepared for the Globalization of Class Actions Conference" (2009) *Annals of the American Academy of Political and Social Sciences* [forthcoming].

² S.N.S. 2007, c. 28.

Securities Class Actions

Several provinces now have specific provisions within their securities legislation³ that confers secondary market liability on issuers and corporate officers for intentional misconduct in their mandatory disclosure obligations. Reliance and loss causation need not be proven. The creation of this new civil cause of action potentially has significant repercussions for the class actions regime, as cases in misrepresentation were previously difficult to prosecute on a collective basis due to the reliance requirement.⁴ Peculiar features of this new cause of action include damages caps⁵ and the presumption of costs in favour of the successful party, notwithstanding the applicable provincial class actions statute.⁶ In addition, the proposed representative plaintiff must obtain leave of the court before commencing the litigation.⁷ According to one securities expert,

The combination of the leave provisions and the liability cap make it likely that actions will be sought only for the most egregious conduct or where the conduct can be easily established, such as following an earnings restatement with a significant market price drop immediately following the restatement. ... Unsuccessful allegations of deliberate misrepresentation or other fraud do expose plaintiffs to having to pay the defendant's legal costs on a much higher substantial indemnity basis rather than the usual party and party costs. This exposure may also deter all but the most egregious cases from being the source of a class action.⁸

³ Most recently, see British Columbia *Securities Act*, R.S.B.C. 1996, c. 418, B.C. Reg. 215/2008, s. 4.

⁴ Difficult, but not impossible: *eg.*, *Carom v. Bre-X Minerals Ltd.* (1999), 46 O.R. (3d) 315 (Div.Ct.), revd (2000), 51 O.R. (3d) 236 (C.A.).

⁵ Ontario *Securities Act*, R.S.O. 1990, c. S.5 (“OSA”), s. 138.7. The damages caps do not apply in cases of intentional fraud.

⁶ OSA, s. 138.11.

⁷ OSA, s. 138.8(1). The court is to grant leave only when satisfied that the action is brought in good faith and where there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff.

⁸ Janis Sarra, “Securities Class Action Suits, New Statutory Remedies in the Canadian Financial Services Sector” (Paper presented at the 5th Annual Symposium on Class Actions, Toronto, 10-11 April 2008) [unpublished], at 16.

The number of new secondary market securities class actions has risen sharply in the past year,⁹ though none has reached the certification and leave to commence stages. The first such motion is to be heard the week of December 15, 2008 in a Brampton, Ontario courtroom.¹⁰

An Ontario judgment released on December 3, 2008 might have a sobering effect on the development of secondary market class actions. In *Ainslie v. CV Technologies Inc. et al.*,¹¹ the court was asked to consider the threshold issue of whether defendants are required to file affidavit evidence on the plaintiffs' motion for leave to commence the action. One of the defendants in the case filed no affidavit material in response to the plaintiffs' leave motion; the plaintiffs objected on the basis of their interpretation of the relevant *Securities Act* provision, and the argument that the facts relevant to the defendant's due diligence efforts (or lack thereof) in respect of the accuracy of the public disclosure at issue in the proceeding were in the possession of the defendant, and therefore should be subject to cross-examination by the plaintiffs. The defendant offered its own interpretation of the relevant statutory provision, and the principal argument that a plaintiff cannot dictate the evidence on which a defendant can rely, and that requiring

⁹ See for example, the \$550 million action launched by the London, Ontario firm, Siskinds LLP, in November 2008 against AIG and others for alleged misrepresentations in relation to credit default swaps: <http://www.classaction.ca/content/actions/american.asp>. The Siskinds firm alone commenced eight such class actions in 2008.

¹⁰ Imax class action. See <http://secure.strosbergco.com/source/src/imax-classaction.com>.

¹¹ *Ainslie et al. v. CV Technologies Inc. et al.* (Court file no. 07-CV-336986 PD1), [unreported decision dated 3 December, 2008] (on file with author).

corporate defendants to file evidence on the leave motion “improperly shifts the onus from the plaintiffs to the defendants contrary to its legislative intent.”¹²

Justice Lax found in favour of the defendants, and relied extensively on the legislative background to secondary market liability provisions in doing so. Both this background, and the judge’s reliance on it, underscores a concerted effort to avoid the controversial experience of securities class actions in the United States. The genesis of the leave provision was the perceived need to “dissuade plaintiffs from bringing ‘strike suits’ – that is, coercive and unmeritorious claims which are aimed at pressuring a defendant into a settlement in order to avoid costly litigation.”¹³ As a result, “[t]he section [requiring that leave be obtained before commencing an action on behalf of shareholders in the secondary market] was not enacted to benefit plaintiffs or to level the playing field for them in prosecuting an action under Part XXIII.1 of the Act. Rather, it was enacted to protect defendants from coercive litigation and to reduce their exposure to costly proceedings.”¹⁴

Some class counsel have suggested that this decision will make it very difficult for plaintiffs to satisfy the leave application judge that “there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff.”¹⁵ With the legislation still in

¹² *Ibid.* at 3.

¹³ *Ibid.* at 4.

¹⁴ *Ibid.* at 6.

¹⁵ OSA, s. 138.8(1).

its infancy, the future of securities class action litigation on behalf of secondary market participants is, for the moment, uncertain.

Representative Plaintiffs and Class Members

A few recent decisions have highlighted the potential for discord between representative plaintiffs and class counsel. In *Romanchuk v. Poyner Baxter*,¹⁶ the representative plaintiff brought a small claims court action against class counsel seeking compensation for time spent and monies expended in a concluded class action. The plaintiff successfully claimed that he had a binding agreement with lead counsel pursuant to which he was to be paid \$40 per hour for time spent fulfilling the representative plaintiff function. Class counsel argued that no such agreement was in place, and that, in any event, any payments to representative plaintiffs must be approved by the court which had not been done in the class action. While not strictly required by class actions legislation, the practice has developed for class counsel to seek court approval before making any payments for service to representative plaintiffs, as a way of avoiding charges of unethical behaviour. In ruling in favour of the plaintiff, however, the judge found that since any payment was to be made out of counsel's legal fees, and not the class members' compensation fund, approval by the presiding class actions judge was not required. The small claims court judge awarded the plaintiff \$4000 on the following basis:

It is clear from the correspondence here that Mr. Romanchuk instigated the Canadian branch of the litigation, was responsible for getting the defendants appointed by Siskinds as counsel, and as I said at the outset, "spearheaded" the B.C. claim. He did also take an active role in the action, and he carefully considered both the terms of the settlement and the

¹⁶ 2008 BCPC 188 (Prov.Ct.). I am grateful to Ward Branch and his class actions blog for alerting me to this and the following case. See <http://classactionsincanada.blogspot.com/>.

wording of his affidavit in support of it. Notably, while there was a settlement that apparently benefited some of the class, Romanchuk was not one of those who benefited.¹⁷

The impact of this decision is uncertain given the courts' and the bar's sensitivity to potential conflicts of interest between representative plaintiffs and counsel. While no study has yet been conducted to determine the prevalence of payments by class counsel to representative plaintiffs, with or without the approval of the court, anecdotal evidence suggests that class counsel, for the most part, will not make payments to the representative plaintiff absent court order. The *Romanchuk* case draws attention to an important policy issue not yet fully resolved in Canadian jurisprudence; should counsel be permitted to contract with representative plaintiffs to pay for services rendered in that role, and if so, should courts utilize a deferential or a paternalistic approach when deciding whether to approve the bargain?

Another recent case addresses the issue of who controls class action litigation – the client or the lawyer?¹⁸ In *Fantl v. Transamerica Life Canada*,¹⁹ class counsel sought an order requiring the plaintiff, himself a retired lawyer, to accept class counsel and his new firm as solicitors of record or alternatively, to replace Mr. Fantl as proposed representative plaintiff. The judge rejected the application, thus allowing the representative plaintiff to sever his relationship with the then existing lead counsel. The judge held that the Court

¹⁷ *Ibid.* at para. 41.

¹⁸ Sandra Rubin, "Who's driving the bus here?", *National Post*, (13 May, 2008) [available at <http://www.reportonbusiness.com/servlet/story/RTGAM.20080513.wlawmain0513/BNStory/robLawPage/home/>].

¹⁹ [2008] O.J. No. 1536 (motion to set aside a notice of change of solicitor); [2008] O.J. No. 2593 (Div. Ct) (leave to appeal granted).

should defer to the plaintiff's choice, unless that choice is "inadequate". More problematically, he held that "the test of representation for the class in a class action is one of adequacy not of superiority and it is not a test of what is in the best interests of the class or proposed class."²⁰ Leave to appeal to the Divisional Court was granted mid-2008,²¹ and the appeal argued in October, with the bench reserving judgment.²² In September 2008, a tentative settlement of the proposed class action was announced, in which the representative plaintiff's "new" counsel was described as solicitor of record.²³ The former solicitor, however, also continues to advertise the action on his firm's website,²⁴ in the hope that the Divisional Court will reverse the motion judge's ruling. The decision will have implications beyond the interests of the lawyers and the parties in the case, however; determinations of the rights of representative plaintiffs to select then discharge class counsel, irrespective of the best interests of the class, or the investment of time and money by the original class counsel, will be significant for all stakeholders in class action litigation.

²⁰ *Ibid.* at para. 108.

²¹ [2008] O.J. No. 2593

²² Telephone interview with Won J. Kim, 1 December 2008 (notes on file with author).

²³ See class counsel's website: http://www.reolaw.ca/reo_class_trans.html.

²⁴ <http://www.kimorr.ca/FL-Transamerica.html>.

Funding and Costs

Class counsel continue to fund the bulk of class actions in Canada.²⁵ Ontario's Class Proceedings Fund remains well-funded by virtue of the 10% levy it collects on successful, funded litigation.²⁶ While the Fund is still underutilized, 2008 has witnessed some progress: whereas only three applications for funding were received by the Fund in 2007, in the first eight months of 2008 the Fund approved six new applications, denied one, and deferred the eighth.²⁷

Concerns about the courts' greater willingness to impose adverse costs on unsuccessful plaintiffs described in last year's report²⁸ appear to have materialized. Recall that in a much publicized case, *Kerr v. Danier Leather*,²⁹ the Supreme Court of Canada confirmed the appellate court's imposition of a significant costs order (estimated to be in the seven figures) against a representative plaintiff who was unsuccessful at trial. Justice Binnie stated that "it should not be assumed that class proceedings invariably engage access to justice concerns to an extent sufficient to justify withholding costs from the successful

²⁵ Less often, class counsel arranges for a consortium of third party investors to fund the litigation by way a loan to the representative plaintiffs, repayable only in the event of success in the litigation. See e.g. *Nantais v. Telectronics Proprietary (Canada) Ltd.* (14 September 1995), Windsor 95-GD-31789 (Ont. Ct. (Gen. Div.) [unreported]). See also "Investors betting lawsuits will bring big payoffs", *Toronto Star* (22 February 1998) A3.

²⁶ As of 31 August, 2008, the Fund had a balance of almost \$6,500,000.

²⁷ Semi-Annual Report, available at <http://www.lawfoundation.on.ca/cpcreport.php>.

²⁸ http://www.law.stanford.edu/display/images/dynamic/events_media/Canada_National_Report.pdf at 30-32.

²⁹ 2007 SCC 44.

party.”³⁰ Echoes of this sentiment appeared in a number of recent cases, in which costs of \$351,000,³¹ \$215,000,³² \$160,000³³ and approximately \$84,000³⁴ were ordered against the representative plaintiffs. These courts reiterated similar themes, including the ordinary rule that costs follow the event, and that an action, particularly one that was denied certification, does not invariably amount to test case litigation. The courts agreed that such considerations are to be balanced against the objectives of class proceedings. Ultimately, determinations of costs in those provinces that retain a two-way costs rule³⁵ are discretionary decisions and represent a significant risk – and potential deterrent – for proposed representative plaintiffs who have neither an indemnity from one of the class proceedings funds by virtue of the legislative provisions,³⁶ nor a contractual indemnity from class counsel.

Frequency and Outcomes of Class Actions

Determination of the number of new case filings remains an imprecise art, with law firms not consistently reporting the initiation of claims to the Canadian Bar Association’s

³⁰ *Ibid.* at para. 69. For recent comments on the potential impact of the Court’s pronouncements on future class action litigation, see Kirk M. Baert and Anthony Guindon, “Class Proceedings in Ontario: the Growing Risk of Adverse Costs Awards Against Representative Plaintiffs” (Paper presented at the 5th Annual Symposium on Class Actions, Toronto, 10-11 April 2008) [unpublished].

³¹ *Sutherland v. Hudson's Bay Company*, 2008 CanLII 5967 (ON S.C.J.). Costs were ordered after unsuccessful trial to be paid out of class members’ pension plan, not by representative plaintiffs personally.

³² *Ruffolo v. Sun Life Assurance Company of Canada*, 2008 CanLII 5962 (ON S.C.J.). Note that the representative plaintiffs were indemnified as against these costs by the Class Proceedings Fund.

³³ *Mclaine v. London Life Insurance Company*, 2008 CanLII 28442 (ON Div.Ct.).

³⁴ *038724 Ontario Ltd. v. Quizno's Canada Restaurant Corporation*, 2008 CanLII 27822 (ON S.C.J.).

³⁵ British Columbia is one notable exception.

³⁶ *Law Society Act*, R.S.O. 1990, c. L.8, as am. by *Law Society Amendment Act (Class Proceedings Funding)*, 1992, s.O. 1992, c. 7, s. 3; and *An Act Respecting the Class Action*, R.S.Q. c. R-21.

National Class Action Database.³⁷ This database reveals that from January to November 2008, approximately 94 actions were commenced, the majority in Ontario, British Columbia or Québec.³⁸ This figure marks a 30% decrease in class proceedings as compared to the same period last year.³⁹

The vast majority of cases continue to be settled before trial, though 2008 has witnessed a number of class proceedings going to trial or other determination on the merits.⁴⁰ Many others are scheduled for trial, though precise numbers were not available at the time of writing.

National Classes

National classes and competing actions remain one of the most problematic aspects of class actions in Canada. There is no Canadian equivalent to the US. M.D.L. system, and no effective rule-based system has yet been adopted to address inter-jurisdictional conflicts. Tests for *forum conveniens* traditionally employed to determine the proper jurisdiction of a claim are less helpful in the context of proposed class proceedings. The residency of plaintiffs, location of harm incurred, and applicable law likely differ from

³⁷ There is a disclaimer on the CBA's website that specifically states the reported data does not accurately reflect the true number of new case filings, as reporting by class counsel remains primarily a voluntary exercise.

³⁸ http://www.cba.org/ClassActions/class_2008/main/index/default.aspx.

³⁹ There were approximately 134 new cases commenced in the same period in 2007.

⁴⁰ According to <http://classactionsincanada.blogspot.com>, at least four such actions were determined on the merits: *Sharbern Holdings Inc. v. Vancouver Airport Centre Ltd.*, 2007 BCSC 1262 (common issues trial); 2008 BCSC 245 (settle terms of order – common issue), 2008 BCSC 442 (certification of remedies issues and production of documents), 2008 BCCA 250 (strike portions of factum); *Macaraeg v. E Care Contact Centers Ltd.*, 2006 BCSC 1851 (ruling on points of law), rev'd 2008 BCCA 182; *Denis v. Bertrand & Frère*, [2008] O.J. No. 1284 (S.C.J.); *Vidal v. Placement Etteloc*, 2008 QCCS 2434.

province to province. In light of these realities, one judge found that “there is a reduced likelihood that one jurisdiction will clearly be more appropriate than the others, and it will be correspondingly more difficult for a defendant to obtain a stay in any of the jurisdictions. The result, he said, is that there are likely to be many cases of identical or overlapping class actions in which no stay would be justified on *forum non-conveniens* principles.”⁴¹

A number of high profile carriage battles were waged this year, including the ongoing multi-jurisdictional battle in the Vioxx class actions. More than two dozen actions were commenced against the pharmaceutical manufacturer, Merck Frosst Canada, after it withdrew Vioxx from the market. Multiple competing class actions were filed in provinces across Canada, including two in Ontario by different class counsel groups. In the ensuing carriage battle in Ontario, the judge awarded carriage to an Ontario counsel group and stayed the action brought by a Saskatchewan law firm;⁴² the same firm then certified a class proceeding in Saskatchewan with a national opt-out class.⁴³ Over the objections of Merck, the Ontario action was also certified with a national class. Merck successfully sought leave to appeal the refusal of the certification motion judge to stay the Ontario proceeding pending the final disposition of the overlapping multi-

⁴¹ Paul B. Vickery, “Notes for Panel Discussion on National Classes and Carriage Fights” (Paper presented at 5th Annual Symposium on Class Actions, Toronto, 10-11 April, 2008)[unpublished] at 6, referring to *Sollen v. Pfizer Canada Inc.*, 2008 CanLII 8618 (ON S.C.J.).

⁴² *Settlington et al. v. Merck Frosst Canada Ltd. et al.*, [2006] O.J. No. 376 (S.C.J.).

⁴³ *Wuttunee v. Merck Frosst Canada Ltd.*, [2008] S.J. No. 324.

jurisdictional opt-out class action previously certified in Saskatchewan.⁴⁴ In granting leave, the Divisional Court stated:

Given the earlier decision in Saskatchewan, there is good reason to doubt the correctness of the refusal to grant a stay. ... In my view, his decision is indeed open to very serious debate, given the potential results of allowing two overlapping multi-jurisdictional class actions in different provinces to proceed *in tandem*. Generally, the real possibility that significant confusion may arise where plaintiffs are included in multiple actions addressing similar claims leads courts in one province to give “full faith and credit” to the judgments given by a court in another province or territory. It is seriously debatable whether, in refusing to stay this proceeding pending the Saskatchewan action’s ultimate conclusion, the learned motion judge gave “full faith and credit” to the judgment of the Saskatchewan Court of Queen’s Bench in *Wuttunee*.

This proposed appeal involves matters of importance not only in Ontario, but also on an inter-provincial scale and is important to the development of the law regarding the conduct of class proceedings. The *2005 Report of the Uniform Law Conference of Canada’s Committee on the National Class and Related Interjurisdictional Issues* offers important insight into the seriousness of the problem of overlapping classes in multi-jurisdictional class actions in this country. Inevitably, this problem will only become more prevalent as more provinces purport to have jurisdiction to certify national opt-out classes. Unless the resulting conflicts between parallel class actions on substantially the same subject matter in different provinces are resolved, as the Committee recognized, “the potential for chaos and confusion remains high.”⁴⁵

As alluded to in the reasons for judgment, in 2005 the Uniform Law Commission of Canada produced a set of proposals.⁴⁶ These proposals recommend that: a) a registry be

⁴⁴ *Tiboni v. Merck Frosst Canada Ltd.* [unreported decision dated 24 November, 2008], 2008 CanLII 37911 (ON S.C.J.) [certification granted; motion to stay denied].

⁴⁵ *Tiboni v. Merck Frosst Canada Ltd.*, [unreported decision dated 24 November, 2008] at paras. 20-21. For an excellent overview of these and related issues see C. Poltak, “Ontario and Her Sisters: Should Full Faith and Credit Apply to the National Class?” (2006), 3 *The Canadian Class Action Review* 437.

⁴⁶ Letter from Rodney L. Hayley to the Uniform Law Conference of Canada (9 March 2005) online: Uniform Law Conference of Canada <http://www.chlc.ca/en/poam2/National_Class_Actions_Letter_En.pdf>; Uniform Law Conference of Canada, Civil Law Section, “Report of the Uniform Law Conference of Canada’s Committee on the National Class Action and Related Interjurisdictional Issue: Background Analysis” (9 March 2005) online: Uniform Law Conference of Canada <http://www.chlc.ca/en/poam2/National_Class_Actions_Rep_En.pdf>; Uniform Law Conference of Canada, Civil Law Section,

established for all class actions filed in any Canadian jurisdiction and b) legislation be passed in all jurisdictions that would specifically require a court, on a certification motion, to take into account factors, set out in the legislation, relating to the national aspect of the action before it and the relevance of any related actions in other jurisdictions. The aspiration is that, when there is potential class litigation that could be certified in several jurisdictions, only one jurisdiction will be certified, but it will be the “preferable” one. Much work remains to be done in terms of these proposals. Having the various jurisdictions cooperate in terms of the registry and pass the legislative amendments will be a daunting task. Absent coordinated legislative reform among the provinces, however, it appears likely that the complexities of national class, multi-jurisdictional suits will have to be resolved by the Supreme Court of Canada.

Public Debate About Class Actions

Debate about the merits of class proceedings continues to be fleeting. While there is no organized opposition to class proceedings *per se*, commentary in the public press is generally mixed. By way of recent example, the president of a prominent Canadian company said, in response to the numerous class action suits brought against his company after a deadly listeria outbreak was traced back to one of its meat plants,

Whether guilty or not, we have accountability for some compensation. I absolutely respect that – we are highly supportive. However, that isn’t where a class action lawyer makes his or her claim, or their money. They collect outrageous (multiple millions) in fees – miles beyond normal legal

“Supplementary Report on Multijurisdictional Class Proceedings in Canada (August 2006) online: Uniform Law Conference of Canada <http://www.chlc.ca/en/poam2/National_Class_Actions_Supplementary_Report_En.pdf>; Uniform Law Conference of Canada, “Uniform Class Proceedings Act (Amendment) 2006” online: Uniform Law Conference of Canada <http://www.chlc.ca/en/us/Uniform_Class_Proceedings_Amendment_En.pdf>.

fees – to try and extract money for large, large bodies of people who make the faintest, thinnest of claims of so called emotional stress or illness (tummy ache stuff)... There is no question it is absolute fraud...Both the attorneys who make millions from this, and those that participate in these illegitimate classes nauseate me.⁴⁷

Nevertheless, public support for class actions, as gauged by the numbers of potential litigants who contact class action firms seeking advice and assistance, remains high. Similarly, while there is limited academic scholarship on issues related to class actions generally, there is virtually none that mounts a serious critique of class proceedings of the kind encountered south of the border.

⁴⁷ “Emails a window on listeria outbreak”, *Toronto Star* (8 November 2008), A1, A33, quoting Maple Leaf Food Company president, Michael McCain.