The Developing Role of Class Actions in Canadian Civil Justice Reform

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by Paul J. Martin

Background

Class action legislation is a relatively recent development in Canadian jurisprudence. Compared to the American legislative counterpart, Rule 23 of the Federal Rules of Civil Procedure, enacted in 1966, the availability of the Canadian class action mechanism is only a few steps from its infancy. In Canada, the provinces (as opposed to the federal parliament) have exclusive jurisdiction over matters of civil proceedings. The first Canadian province to enact any type of class action legislation was Quebec in 1979. Following more recently were Ontario and British Columbia, each enacting a Class Proceedings Act, in 1992 and 1995 respectively. Although the remaining provinces have yet to reform their civil proceedings rules to allow for such actions, Canadian class action litigation has firmly taken root, and will continue to expand Canadian jurisprudence.

Existing Canadian class action legislation was created with the intention of implementing three major goals: access to justice, judicial economy and behaviour modification. The class action legislation in the three Canadian provinces shows a clear understanding and adherence to these objectives, as does Rule 23 in the U.S. legislation upon which much of our Canadian legislation was modeled. However, to many observers, the Canadian class action legislation has sought to expand the boundaries of the class action mechanism and, with a particular emphasis on the goal of access to justice, has rejected certain perceived restrictions of the U.S. model to make class proceedings in Canada more liberally available. In fact, the drafters of Ontario's legislation explicitly commented that the legislation was designed to overcome some of the obstacles encountered in Rule 23.

Given Canada's relative inexperience with the class proceedings mechanism, the American jurisprudence in the field has been readily drawn upon to promote the development of this very significant procedural tool. This article addresses three particular developments in Canada which owe much to an understanding of the more mature American experience. Reference is made to these issues as being illustrative of not only the benefit of comparative law but also to highlight the impact such an analysis can have on achieving significant strides in the area of civil justice reform. The three concepts we discuss are the national class, settlement bar orders, and the Canadian reaction to U.S. style strike suits.

National Class

The concept of a national class has perhaps best been articulated in Canada in Carom v. Bre-X Minerals Ltd. et al. (1999), 44 O.R. (3d) 173 (S.C.J.). In that case, the Court held that under the

Ontario class action legislation a proposed class plaintiff could represent a national class of persons, that is, a class involving residents from provinces other than Ontario. Unlike in the U.S., if multiple actions were commenced in Canada, no procedure akin to a multi-district litigation panel exists to streamline the efficient handling of competing claims. Further, in Ontario and Quebec, the legislation provides that any person may be part of a class without regard to residency. In British Columbia, however, the legislation provides that only a resident may commence a class proceeding, and that non-residents may "opt-in" if they desire.

In Carom the defendants opposed the definition of a class on a nation-wide basis, and in response the court rejected the constitutional arguments against a national class and found that the inclusion of a national class "accorded with order and fairness". Further, the court found that the various claims had a "real and substantial connection to Ontario" and provided the basis for the court to assume jurisdiction with respect to the claims of a national class of plaintiffs.

The Carom decision was subsequently followed in Webb v. K-Mart (2000), 45 O.R. (3d) 389, leave to appeal refused, 45 O.R. (3d) 638. On leave to appeal being refused, the court stated that it was a "sensible solution to a practical problem" to certify the claim on a national class basis.

The fact that the courts of at least one province have accepted a national class in class proceedings is an important factor in the development of future class proceedings in Canada. As the jurisprudence develops, this factor may establish one or more provinces as the jurisdiction of choice for Canadian class proceedings due to the wide scope of eligible persons able to join in the proceeding. A national class allows for the opportunity to unite a greater number of persons together as a party under the same litigation proceeding. This, in turn, serves all three goals of class action legislation.

Bar Orders

A settlement bar order is a device which has long been used in the American class action experience, but which has only recently made an appearance in Canadian jurisprudence.

A bar order is a settlement device which permits settling defendants, where there are a variety of defendants, to cap their exposure and ensure that they are no longer subject to further liability or costs. Where a bar order is granted, a partial settlement may bar the non-settling defendants from asserting cross-claims for contribution against the settling defendants. The effect of the bar order may be to convert the remaining claims of the plaintiffs as against the non-settling defendants from "joint and several" to "several" claims with a cap on the liability of the non-settling defendants at a percentage of the total damages to be proven at trial.

The first Canadian case to implement a bar order was Ontario New Home Warranty Program v. Chevron Chemical Company (1999), 46 O.R. (3d) 130 (Gen. Div.). In that case, a number of the defendants offered to settle. However, as part of their settlement, they required that the non-settling defendants be prevented from making any claims for contribution against the settling defendants. The plaintiffs agreed to restrict their claims against the non-settling defendants to

their several liability with a limitation on that liability being set at a proportion of the plaintiffs' total damage claim not otherwise satisfied by the settling defendants. The Court held that under s.12 of the Ontario Class Proceedings Act, such an order could be granted since it would ensure the "fair and expeditious determination" of the class proceeding.

This illustrates why the bar order is such an effective tool. They work to counteract the inhibiting effect of claims for contribution on settlement. Bar orders are frequently used to achieve settlement of complex, on-going litigation. They are a useful mechanism in the development of class actions, in that they greatly increase the expediency with which they can be resolved. Bar orders encourage settlement, rather than lengthy, protracted litigation, and thereby increase judicial economy.

Strike Suits

Strike suits are perceived by many as a form of manufactured litigation. Such suits have most commonly been seen in the United States in securities litigation. In a strike suit, a plaintiff representative of a class of shareholders will intervene into matters of corporate governance with arguments that the planned proposals are harmful or damaging to that class of shareholders. However, more often than not these lawsuits have proffered essentially unmeritorious claims as a basis for extorting settlements from corporations who would rather pay out than have their corporate transactions threatened by expensive and time consuming litigation.

Strike suits were, until recently, an almost entirely American phenomena. With the appearance of class actions in Canada, however, strike suits have now been initiated in Canadian courts as well. Strike suits are especially problematic because they rely on exactly what it is about class proceedings that makes them so valuable - that they are an easily accessible form of litigation - and use that to the justice system's disadvantage. However, Ontario courts have now found a novel and effective way to keep strike suits from clogging up the courts and detracting from civil justice.

In Epstein v. First Marathon Inc. (2000), 2 B.L.R. (3d) 30 (Ont. S.C.) the court clearly stated that strike suits would not be tolerated. Having seen the American experience with this type of proceeding, the court refused to allow such "legalized blackmail", as Cumming J. referred to it, in Ontario. The court used its powers under s.29(2) of the Ontario Class Proceedings Act, which requires the court's approval of any settlement of a class proceeding commenced under the Act, to disallow the proposed settlement of the strike suit. The settlement would have provided no benefit to the proposed shareholder class and a substantial payment to class counsel. Cumming J. held that approval of the settlement "would violate the public policy objectives underlying the legislature's enactment of the [Act]", and that the "plaintiff's class proceeding is counter-productive to all these objectives". To emphasize its disfavour with such actions, the court also held that the plaintiff's lawyers were to be barred from receiving any money by way of the proposed settlement.

Epstein has sent a powerful message to anyone thinking of bringing American strike suits into Canada to profit from this manufactured litigation. The Canadian reaction to strike suits has sought to immunize Canadian courts from this less desirable product of class action legislation. It is clear that settlements generated from this type of litigation will not be accepted, and lawyers who attempt to foster this type of litigation will not be rewarded. These are both powerful disincentives which may serve to protect the core values underlying class action legislation.

Conclusion

Class actions remain a relatively new experience for the Canadian judicial system. Fortunately, American experience has provided guidance for both what is effective - mechanisms such as national classes and bar orders - and for what is to be avoided - abusive strike suits. Class action legislation is a positive step in the continuing reform of the Canadian justice system. It is certain that American experience and ingenuity will continue to be monitored in Canada to assist in our efforts to improve, enrich and reform our judicial system.

Paul Martin *is a Partner in the Toronto office of Fasken Martineau. He may be reached at (416) 865-4439. Enquiries may also be made to the firm's New York office by contacting a resident partner at (212) 935-3203.*