STRATEGIC MANAGEMENT OF MASS LITIGATION

THE CANADIAN EXPERIENCE

Compared to our American cousins, mass litigation in Canada, as managed through the class action process is relatively recent. Although the common law provinces adopted the British rule on representative actions, this rule was applied sparingly. It was in the early 1990s that the first common law provinces enacted legislation.\(^1\) Gradually more provinces enacted legislation so that now, a well-developed body of case law has developed and courts have put into place management processes to ensure that class actions are dealt with expeditiously without losing the fundamental requirements that all parties to the action be treated fairly and the result is just.

This paper addresses three aspects of managing complex litigation in Canada. First, I deal with some of the particular challenges that Canadian judges address in class action litigation. Second, I talk about the management of complex litigation in general since class actions are simply one kind of complex litigation. The lessons learned from other large cases can be used in ensuring efficient management of class actions. Third, I give three examples of complex litigation. Each is illustrative of one or more issues that judges in Canada deal with.

CLASS ACTION LEGISLATION

There are some principles of the judicial system and class action legislation which are key to understanding the current practices and challenges in Canadian courts. First, jurisdiction over class action legislation is held by the provincial legislatures. Thus, each province has the ability to enact class action legislation. Moreover the provisions of the legislation are not uniform, although those differences are not relevant to effective management of a class action.

There is, however, one provision of the legislation that can have a significant effect on the management of a class action. It arises precisely because class action legislation is a provincial responsibility. Part of the process of certifying a class action is to determine the make-up of the class of people who are claimants. While some actions may be local, for example, a case where it is alleged that city parking meters have been malfunctioning so that citizens have been overcharged for their parking, many wrongs have affected people from more than one province, sometimes, more than one country. Examples include claims against pharmacological companies, environmental claims and actions against the federal government. Each class action legislation must provide for how potential members of the class participate or not participate in the action. This is important because if a person is a member of the class, then the decision of the judge in the case will be binding on that person. So, if you are a member of a class of people who, it is alleged, took a harmful kind of medication and if at the end of the trial, the judge

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\(^1\) Quebec had enacted legislation in the 1970s.
decides that the drug company is not liable, you cannot later sue individually. The doctrine of res judicata precludes you from so doing.

Currently, provinces differ in how the legislation treats potential class members who do not reside in the province. First, in all provinces, the legislation provides that residents of the province who are affected by the particular claim are members of the class unless they opt out of the action; that is, residents of the province will be bound by the result unless they expressly state that they are opting out. Many of the large provinces provide that if a non-resident does not want to be part of the class action once the action is certified, that person must opt out, that is, actively express his or her desire not to be part of the claim and therefore not bound by the result (multijurisdictional actions). This provision has the potential to have competing actions commenced in two provinces where people are members of the class in both actions. Judges in each of the provinces decide independently whether or not to certify the action. There is potential for confusion for litigants and unnecessary legal costs for all parties.

Recent litigation concerning the drug Vioxx is illustrative. The timeline for the litigation is as follows:

1. Action certified in Quebec relating only to Quebec residents.
2. Multijurisdictional action certified in Saskatchewan, excluding only Quebec residents on the basis of comity.
3. Multijurisdictional action certified in Ontario, excluding residents of Quebec and Saskatchewan.
5. Appeal of decision not to stay Ontario action to Ontario Court of Appeal.
6. Appeal of decision to certify action in Saskatchewan to Saskatchewan Court of Appeal – appeal granted for reasons unrelated to multijurisdictional issue.²

The problem for the litigants is that at the time the Saskatchewan Court of Appeal was considering the certification of the Saskatchewan action, all Canadians except those from Quebec and Saskatchewan were members of two class actions, the one in Ontario and the one in Saskatchewan. The legal chaos that could result from such a situation is obvious. What if both proceed? What if in one the plaintiffs win and in the other, they lose?

The resolution of the potential for competing multijurisdictional actions likely lies with a decision from the Supreme Court of Canada in a case where two courts certify actions. The Supreme Court will need to determine which action proceeds on a multijurisdictional basis and what happens to the other action.

COURT PLANNING FOR CLASS ACTIONS

Superior trial courts, courts where the judges are appointed by the federal government, are the courts where class actions are heard. In most provinces, the Chief Justice of the

The superior court has organized the assignments of the judges so that a small group of judges hear complex commercial litigation. The assignments of class action cases is also organized in this fashion. There are two reasons why this ensures the most effective and efficient management of class actions as they proceed through the court system. First, the development of class action law is done by judicial interpretation of the class action legislation as it applies to the facts in each case. The number of decisions that can be relevant in deciding issues in a case grows each year. A small number of judges who are dedicated to deciding class action cases are better able to keep up with the growing body of decisions. Second, judges become expert in managing these complex cases. The number of issues that need to be decided is usually large, the underlying issues of the claim can be complex, particularly if there is a scientific element to the claim such as in pharmacological and environmental cases and the lawyers arguing these cases themselves are expert. The judges are able to develop strategies for the efficient management of the cases. These strategies are more likely to be developed and be successful if the judges have a deep understanding of the class action process. Experience is the only way to gain that level of knowledge.

From the perspective of court planning, the creation of a small group of judges to hear particular kinds of cases means that the court as a whole must make adjustments. The commercial or class action judges must be given time outside their courtrooms to do the case management. On the other hand, assignment of cases as between the commercial and class action judges on the one hand and other judges on the other hand must continue to be handled fairly to ensure that an atmosphere of collegiality exists amongst all the judges. That can be a challenge given the increasing amount of work of all kinds generally within the Canadian courts.

THE PROCESS FOR CERTIFICATION OF A CLASS ACTION

A class action begins as any other lawsuit. One or several plaintiffs file a claim against the defendants. For the action to proceed as a class action, it must be certified. The legislation provides that one judge will hear all of the pre-trial motions and will manage the action to trial. An apt description of the role of the case management judge in a class action is as follows:

Permitting the same judge to hear all motions and to remain seized of a matter encourages co-operation amongst counsel. It also reassures counsel that any concessions that they may make will not be misused to their detriment at later stages in the proceedings. As in most aspects of class proceedings, the role of the case management judge is informed by the goals of access to justice, judicial economy, and behaviour modification.3

The certification application is heard by a judge on the basis of affidavit evidence filed by the plaintiff and, sometimes the defendants, and any examination of the affiants on their affidavits. To certify the action, the plaintiff must address five issues:

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3 National Judicial Institute Bench Book on Class Actions
whether the claim discloses a cause of action;
- whether there is an identifiable class of two or more people who would be represented by the representative plaintiff;
- whether the claim raise common issues;
- whether a class proceeding would be the preferable procedure, meaning whether the class action would be fair, efficient and manageable and whether there are other reasonably available methods of resolving the claims;
- whether there is a representative who
  o can fairly and adequately represent the class;
  o has a workable plan for advancing the claim;
  o does not have a conflict of interest with the class members.

At this stage, the judge’s decision is not an evaluation of the merits of the claim but rather a determination of the preferable manner of proceeding. The fundamental question which the judge must ask is whether the claim is suited to the purposes of class action legislation: serving judicial economy, enhancing access to justice and encouraging behaviour modification by those who cause harm.4

Certification applications can be lengthy because they are a significant step in the class action process. The certification process allows both sides to evaluate the claim. Although the merits of the claim are not decided by the judge, counsel for the plaintiffs must articulate the issues that make up the claim. Both sides must be able to explain why a class action is, in the case of the plaintiff, or is not, in the case of the defendant, the appropriate way to proceed. During that process, one side or the other may conclude that their position is not strong and there will either by a discontinuance (if it is the plaintiff) or settlement (if it is the defendant). If an action is certified, it then proceeds through pre-trial document and oral discovery process and trial. The pre-trial process after certification can be lengthy and very expensive. Once certification is granted, defendants seriously evaluate the risks if the action proceeds to trial. More often than not such an evaluation results in a settlement amongst the parties.

Because certification is a significant step, the parties want to be fully prepared for the application. That pre-certification stage requires management by the judge because of the potential to unduly delay the application because the parties are not proceeding efficiently to the certification hearing. However, it is the parties, not the judge, who are in charge of their cases. The judge’s role is to coordinate the preparatory activities of the parties, ensure that no party is unduly delaying the process and ensuring that only relevant steps are being taken. This involves establishing effective methods of communicating with counsel, including an email system or website, regular case management meetings, the establishment of timetables that are fair but efficient and being firm about what pre-certification activities are truly necessary.

4 Cloud et al. v. Canada (Attorney General), [2004] O.J. No. 4924 (Ont. C.A.)
If the action is certified as a class action, pre-trial discovery proceeds as in any other action. It is no different than any other complex trial. As a result, the methods imposed in case management for complex civil litigation will be the same, subject only to a couple of hearings which are specific to class actions.5

One of the particular issues that must be adjudicated upon during the certification hearing is whether the plaintiff has a workable litigation plan. A good litigation plan is fundamental for ensuring procedural efficiency. The National Judicial Institute has developed a class action bench book for judges. In the section on litigation plans, the bench book lists the following as matters that may be covered in a proper litigation plan:

• ongoing reporting to the class
• mechanisms for responding to inquiries from class members
• the collection of relevant documents from members of the class as well as others
• the exchange and management of documents produced by all parties
• whether the discovery of individual class members is likely and, if so, the intended process for conducting those discoveries
• the steps that are going to be taken to identify necessary witnesses and to locate them and gather their evidence
• the need for experts and, if needed, how those experts are going to be identified and retained
• if individual issues remain after the determination of the common issues, what plan is proposed for resolving those individual issues
• a plan for how damages or any other forms of relief are to be assessed or determined after the common issues have been decided.
• the manner in which class members will be identified if not known already
• the particulars of the notice program, including a sample notice and how and where the notice will be published and made available to the public
• how those who choose to opt out will be dealt with
• the scheduling of times for delivery of such things as statements of defence, productions, delivery of expert reports and trial date
• the method of communication with the class
• the possibility of settlement

5 Those two hearings are a settlement hearing and a costs hearing. Both can be significant in terms of the work done by the judge. A judge must approve the settlement because, of course, not all members of the class can be consulted. Because class action litigation is taken on by plaintiffs’ lawyers on a contingency fee basis – payment only if the action is successful or as part of the settlement process – the judge must approve the fees proposed, again because it will affect the amount available for members of the class.
• what will happen if the common issues are decided in favour of the class
• the method for valuation of damages
• the details of the process for distribution of the damage award
• the use of claims forms or other procedures for the distribution
• what will happen to any surplus funds
• how insufficient funds will be dealt with
• how the individual issues will be dealt with

The checklist is helpful in evaluating the plaintiff’s plan, but also form the basis of the judge’s case management plan if the action is certified.

CASE MANAGEMENT IN COMPLEX CASES

Class actions are not significantly different than any complex case. It is true that the requirements to certify the action are legislated and a judge will have to decide whether the requirements have been met. While that can be an intellectually challenging activity, of equal importance is managing the case both before and after certification. At both stages it is like other complex litigation. In Canada, litigation has been and continues to be run by the lawyers. In the past, a long trial might last two or three weeks; now trials can last for months and in some cases, years. In the past, there may have been one or two issues in the case, sometimes with one or two expert witnesses. Now, even a relatively minor personal injury case can last a month or more and involve several expert witnesses. Because the trials are more complex, the process of getting to trial involves more, with the risk that the case will not be tried within a reasonable time. Of particular note is the pre-trial discovery process because of electronically stored information. As a result, while in the past, judges may have played no active role in the pre-trial stage other than to rule on a motion from time to time, now judges are specifically assigned to case manage cases up until trial.

Effective case management of complex litigation achieves three purposes, all of which are fundamental to ensuring confidence in the administration of justice. The first is to ensure that cases get to trial in a reasonable period of time. Complex litigation often

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involves commercial interests. Businesses require certainty. Certainty is only achieved when disputes are decided in a reasonably timely fashion. Tied to this is the ability of the case management judge to assist in identifying the real issues in the case which may shorten the length of time of the trial. Second, effective case management can ensure that litigation is carried on in an economically reasonable fashion. Access to justice is impaired if parties cannot afford to use the judicial system. Third, who is right or wrong, who should succeed or not is not obvious in most disputes. All parties usually have some ‘right’ on their side and some risks of losing. Effective case management permits the judge to assist the parties in identifying risks and weaknesses in their cases, which in turn promotes the possibility of a settlement of the case before trial.

While courts in the various provinces have each developed their own case management guidelines, the principles are the same. Fundamentally, judges must take control of the process. That means

- establishing a schedule for case management meetings where the lawyers report on their progress towards trial;
- ensuring that the lawyers have established a protocol for the retrieval and exchange of electronic and paper documents;
- establishing early how information produced during the discovery process is stored and produced for trial;
- establishing a schedule and protocol for oral discoveries and written questioning;
- discussing early on in the case management process what experts are being retained, whether early exchange of expert opinions is possible and whether experts can meet to discuss their opinions;
- exploring the possibility of mediation.

In our court about five years ago, a scheduling officer was hired to schedule case management meetings for the judges since the role of a judge as manager was new and the administrative system designed to schedule trials did not work for the scheduling of case management meetings. Because a judge will likely issue orders during case management meetings, there is the possibility of an appeal of those orders. The Court of Appeal has developed a special process to hear appeals from case management orders as quickly as possible to avoid the risk that the appeal process creates a significant roadblock in getting the case to trial.

THREE EXAMPLES OF COMPLEX LITIGATION

The Residential Schools Class Actions – when litigation may not be the answer

In the late 1990s and early 2000s, lawsuits were commenced in several Canadian provinces by natives who had been forced to attend residential schools during their childhood. From the late 1800s until 1980, the federal government, who has jurisdiction
over natives\(^7\), decided to provide education to Aboriginal children through a system of residential schools. The schools were operated by four churches – the Roman Catholic Church, the United Church of Canada, the Anglican Church and the Presbyterian Church. The goal of sending children out of their communities to residential schools was to achieve assimilation of the Aboriginal children into white society. There were up to 88 schools housing native children and it is estimated that over 100,000 Aboriginal children attended the schools. The lawsuits were brought against the federal government and the churches that operated the schools. The allegations against the defendants included physical and sexual abuse, breach of fiduciary duty, negligence, breach of Aboriginal rights and breach of treaty rights.\(^8\) In those provinces that already had passed class action legislation, the plan of the lawyers acting for the natives was to apply for certification of the class action and then proceed to trial. In those provinces that did not yet have class action legislation, the many individual actions\(^9\) were case managed by one or two judges.

How the cases were managed in a class action jurisdiction and one without class action legislation is instructive. In Alberta, there were 1000 claims that were managed by two judges. Of those 1000, 50 test cases were chosen to advance through the pre-trial process. The claims were commenced in 1999. By 2003, the pre-trial proceedings had advanced sufficiently to permit the case management judge to choose 6 representative claims to proceed to trial. The case management judge directed that those 6 cases would be tried by one judge. It was his view that since these 6 cases displayed a good cross-section of the various issues that would need to be decided, once a judge had made a decision on the 6 cases, other cases would settle in accordance with what the judge had decided.\(^10\)

In Ontario, where there was class action legislation during the relevant period, *Cloud v. Canada* (Attorney General) is illustrative of how a class action proceeded. The plaintiffs brought an action on behalf of approximately 1400 native children who attended one school over a period from 1922 to 1969. The claim was commenced in 1998. The certification application was heard in June, 2001. Certification was denied on several bases including the lack of an identifiable class and the large number of individual issues making a class proceeding not the preferable approach. That decision was appealed to the Divisional Court which in 2003 upheld the original decision. In December, 2004, the Ontario Court of Appeal decided that the case was appropriate for a class action, overturned the decisions of the courts below and granted certification. Thus, it was only in late 2004 that this case was able to move through pre-trial discovery to trial.

It will never be known which one of these two processes – the Alberta representative action where a decision on six discrete claims would hopefully guide settlement on all the other claims or the Ontario class action involving many claimants - would have been

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\(^7\) The Indian Act, R.S. 1985, 1-5. The federal government had the power to order these children in the residential schools because Aboriginal people were wards of the government pursuant to the *Indian Act.*

\(^8\) This summary is taken from J. Llewellyn, “Dealing with the Legacy of native Residential School Abuse in Canada: Litigation, ADR, and Restorative Justice, University of Toronto Law Journal, Summer, 2002.

\(^9\) For example, in Alberta, which did not have class action legislation at the time, there were over 1000 claims involving over 3000 claimants.

\(^10\) Re Residential Indian Schools, 2003 ABQB 449.
earliest to complete the claims. Settlement discussions amongst the societies representing native claimants and the defendants resulted in a complex settlement which was approved by the courts in the various provinces in 2006. One study estimated that had the claims not been settled, the trials would have taken 53 years to complete at a cost of $2 billion.\textsuperscript{11} That was particularly problematic given the advancing age of many of the residential school survivors. While the preferability of a class action versus individual actions cannot be measured because of the settlement, what this case illustrates is that even the class action process is of questionable utility when the claims are as large and diffuse as the residential school claims.

The Inco Case – an effective use of the class action process

Smith v. Inco Ltd [2010] O.J. No. 2864 is one of the few class action cases that went to trial. Inco refines nickel at a refinery close to Port Colbourne, Ontario. The plaintiff representative alleged that emissions from the refinery contaminated the soil of the properties of the residents of Port Colbourne which negatively affected the value of those properties. The case went to trial on whether Inco was liable for the contamination and on the aggregate amount of damages caused by the contamination. The court found that Inco was liable for the discharge of the nickel particles. Negative publicity about the contamination caused significant public concern. The court found further that there was a downward drop in property values which was caused by the negative publicity which in turn was caused by the contamination. The aggregate amount of damages was $36 million, a calculation of the number of properties in the City multiplied by the per unit costs which the judge found to be between $4000 and $5000.

From a management perspective, this case is illustrative of two things. First, a class action in these circumstances made sense. The trial lasted 3 months. It was confined to three issues – liability of Inco for the contamination, whether that caused a loss in value of the property and if so, the amount of that loss. The legal issues were complex in terms of liability. It was not clear on the existing case law whether Inco could be found liable. The judge needed to interpret those cases. The experts presented different models for valuing the property and until the judge evaluated the expert opinions, it was not clear which expert opinion would be accepted. Thus, the risks for both sides were considerable. No single plaintiff could have taken on this case. The costs of a three month trial would far exceed the potential gain. The only acceptable procedure was a class action. Second, by confining the trial to three issues, it was an effective way to resolve those issues that the parties obviously could not resolve themselves. As stated above, one of the important roles of a case management judge is to assist in defining the real issues that need to be tried.

The Fraudster Cases – where pre-trial settlement may be the goal

As stated above, cases involving many plaintiffs are not always tried by way of class action. One legal reason why that is the case is that often the claims are very individual.

\textsuperscript{11} The Indian Residential Schools Settlement Agreement’s Common Experience Payment and healing: A Qualitative Study Exploring Impacts on Recipients, 2010 Aboriginal healing Foundation: Ottawa, Canada
For example, if a plaintiff alleges fraudulent misrepresentation, what was said by the defendant to the plaintiff is a key element of the claim. There needs to be an independent inquiry of each plaintiff about what was said, by whom, when and so on. Such cases do not necessarily meet the certification requirement that there be a common class.

Achieving a just result in a fraud case likewise requires careful management. In Alberta, like everywhere else, there have been pyramid scheme frauds involving millions of dollars. Very broadly, a pyramid scheme is a fraud where individuals are convinced to invest in an apparent profit-making venture. They are enticed to continue investing by being paid out dividends. Rather than coming from a legitimate scheme, the dividends come from money invested by other victims. The additional factor is that the original fraudster induces investors to find other investors in return for more profit. When the scheme collapses, as they always do, not only will there be many plaintiffs looking to recover their money, but there will be many defendants who have been part of the pyramid, and cross-claims amongst the defendants because of the very nature of the pyramid (fraudsters blaming bigger fraudsters). It is also the case that many of the people involved do not have the financial ability to engage in lengthy litigation. Finally, the central fraudster may have left the jurisdiction or disposed of all the money.

These cases rarely get to trial because of the lack of funds to prosecute a claim against many defendants or defend a claim brought by many claimants. The key to efficiently resolving the case is to identify early whether a mediated settlement will see some money returned to investors and if so to manage the case to ensure that pre-trial steps do not deplete the financial resources of the parties. Hard decisions limiting production of documents and discovery need to be made in such cases.

CONCLUSION

Class action litigation, as a species of complex litigation, can be an effective way of resolving mass disputes. However, like all complex litigation, there is the potential that the dispute is never resolved or resolved in too slowly and costly a fashion. The way to avoid these problems is by judges playing an active role in the management of the case to the point where it reaches trial.

Canadian courts have created case management systems. Canadian judges have access to seminars on how to effective manage complex cases, both before the cases reach trial and during the trial itself.