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CLASS ACTIONS: THE CANADIAN EXPERIENCE

GARRY D. WATSON*

In the last seven years, Canada has developed a vigorous class action regime. Before outlining that regime, I would like to address the question: "Why have Class Actions?"

I. WHY HAVE CLASS ACTIONS?

A foundational document in Canada on class actions is the Ontario Law Reform Commission's (OLRC) *Report on Class Actions* (1982).¹ It is an excellent three volume report that bases its recommendation of the introduction of class actions in Ontario on three underlying policy objectives.

The first, and most important objective, is to *afford greater access to justice*. Litigation has become so expensive that claims of modest amounts, and even those of significant amounts, are not economically feasible to pursue on an individual basis. In class action terminology, these are referred to as "individually non-viable claims." There are many more individually non-viable claims in Canada than in the United States for several reasons: (1) Canada has ceilings on damages for pain and suffering in personal injury cases, and relative to awards in the United States, these ceilings are very low;² (2) Canadian courts rarely award punitive damages;³ (3) the vast majority of civil actions

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1. ONTARIO LAW REFORM COMMISSION, *Report on Class Actions*, in 3 SUMMARY OF RECOMMENDATIONS § 56 (1982).

2. See *Andrews v. Grand & Toy Alberta Ltd.* [1978] 2 S.C.R. 229 (Can.). The court in *Andrews* held \$100,000 as the appropriate award for non-pecuniary loss in the case of a young quadriplegic, and save in exceptional cases, that this should be regarded as the upper limit on any award for non-pecuniary loss; less catastrophic cases would receive less. Flexibility in the amount should be allowed to deal with changing economic factors such as inflation. The \$100,000 amount was measured in 1978 and should be adjusted accordingly. See S.M. WADDAMS, *THE LAW OF DAMAGES* 185 (1997). By 1995, this upper limit was calculated at \$225,000. See *Koukounakis v. Stainrod* [1995] 23 O.R. (3d) 299 (C.A.), 55 A.C.W.S. (3d) 93 (Can.).

3. See Joseph Y. Obagi & Elizabeth A. Quigley, *Making a Claim for Punitive Damages Against First Party Insurers*, 24 *ADVOC. Q.* 4 (2001).

in Canada are tried by judges sitting alone rather than being tried by relatively uncontrolled juries as in the United States;⁴ and (4) Canada has a fee shifting rule (generally the losing party must pay a large part of the winning party's legal fees), which is a major deterrent to litigation.⁵

The second policy objective is *to improve judicial efficiency*. Where the alternative to a class action is repetitive litigation relating to the same events, the result is judicial inefficiency. For example, when class action certification was refused for claims against Canada's blood system relating to transfusion-related AIDS transmission,⁶ more than eighty such cases were filed in Ontario alone. The filing of individual claims resulted in three very long trials without significant plaintiff-wide settlements.⁷ Such individual actions often cover the same ground time and again; they are not only inefficient, but can lead to inconsistent decisions. It is noteworthy that the judicial efficiency rationale really only comes into play where the claims asserted are individually viable; permitting class actions for individually non-viable claims brings about litigation which would, without class actions, never be brought. This may increase the judicial workload and thereby decrease judicial efficiency.

4. See GARRY D. WATSON ET AL., *THE CIVIL LITIGATION PROCESS* 18 (1999).

5. See *id.* at 363.

6. See *Sutherland v. Canadian Red Cross Soc'y* [1994] 112 D.L.R. (4th) 504 (Ont. Gen. Div.) (Can.) (denying certification of a class action for lack of common issues to people who sought to recover damages resulting from their contraction of HIV from transfusions of contaminated blood and blood products); Garry D. Watson & Michael McGowan, *Annual Survey of Recent Developments in Civil Procedure*, in *ONTARIO CIVIL PRACTICE* ci (Garry D. Watson & Michael McGowan eds., 1995) (providing a critical analysis of this decision). Subsequently, two judges who presided at lengthy HIV trials have questioned the wisdom of the decision in *Sutherland*. See *Pittman Estate v. Bayed* [1994] 112 D.L.R. (4th) 482 (Ont. Gen. Div.) (Can.); see also *Walker v. York-Finch Hospital* [1997] 66 A.C.W.S. (3d) 81 (Can.).

7. The court in *Sutherland*, *supra* note 6, observed that at the time of that decision 84 HIV cases were pending in Ontario. The court in *Anderson v. Wilson* stated: "The judicial experience of this court with individual trials in tainted blood cases suggests that individual trials are not always the best way to deal with mass medical catastrophes." *Anderson v. Wilson* [1989] 156 D.L.R. (4th) 735, 746 (Ont. Div. Ct.) (Can.). The problems of proceeding with separate trials in cases of common medical catastrophe are referred to by Judge Lang in *Pittman Estate v. Bain* [1994] 19 C.C.L.T. (2d) 1 at 202, 112 D.L.R. (4th) 257 (Ont. Gen. Div.) (Can.), and Judge Borins in *Walker v. York-Finch Hospital* [1997] O.J. No. 4017 ¶ 203ff (Gen. Div.) (Can.). As Judge Borins said, "Innovative procedures should be considered in mass tort litigation as a method of structuring multiple claims to obtain the benefit of a judicial decision in respect to issues common to all cases, which becomes binding in respect to all claimants . . . Finally, and with respect, it may be appropriate to revisit the decision of this court in *Sutherland v. Canadian Red Cross Society* [1994], 112 D.L.R.(4th) 504 with respect to whether claims of this nature are appropriate for certification as a class proceeding." *Walker v. York-Finch Hospital* [1997] O.J. No. 4017 ¶ 212 (Gen. Div.) (Can.).

The third policy objective is *to achieve behavioral modification*. When manufacturers and other entities can inflict small amounts of damage on a large number of people who cannot afford to litigate individual claims, the deterrent function of the law, such as tort law, is lost. Hopefully, subjecting potential defendants to the risk of a class action will modify their behavior.

Canadian courts refer to the above social or policy objectives constantly when interpreting class action legislation.⁸

II. ARE THERE WORKABLE ALTERNATIVES TO CLASS ACTIONS IN THE CANADIAN CONTEXT?

For certain types of personal injury claims, Canada has non-class action solutions. These, however, are not tailored specifically to widespread injury problems. First, part of Canada's social safety net is a national, government-run "medicare" system. The "medicare" system provides health care for all Canadians, including the medical and hospitalization expenses of injured persons.⁹ Second, some Canadian provinces have introduced "no-fault" automobile accident insurance schemes that provide accident victims with benefits on a no-fault basis and without having to sue in court.¹⁰ Third, for several decades, all provinces have had worker's compensation legislation, providing persons suffering from work-related injuries with compensation on a no-fault basis and forbidding resort to the courts in relation to such injuries. This explains why Canada, unlike the United States, has not had asbestosis litigation.¹¹

8. See, e.g., *Chadha et al. v. Bayer Inc.* [1999] 45 O.R. (3d) 29 at 36 (Ont. Gen. Div) (Can.). In *Chadha*, a case involving many small price-fixing claims, Sharpe, J. stated: "Three important objects have been identified as underlying the Act: (1) judicial economy, (2) improved access to the courts for those whose actions might not otherwise be asserted, and (3) modification of behaviour of actual or potential wrongdoers who might otherwise be tempted to ignore public obligations. . . . If the present action is to be certified, among these three objects, the primary one to be served would be behaviour modification. Certification would provide access to the courts in circumstances where the claims might not otherwise be asserted. However, it is apparent from the nature and size of the claim of any individual that the goal of providing a procedure to ensure that victims of wrongdoing are actually compensated is secondary. Similarly, as it is unlikely that any claim would come before the court absent a class action, judicial economy would not be significantly enhanced."

9. See DIANE LONGLEY, *HEALTH CARE CONSTITUTIONS* 21 (1996).

10. See J. McCarthy & Joseph Pasquariello, *The Threshold in Ontario Automobile Insurance Litigation: A Serious and Important Question*, 16 *THE ADVOCATES' QUARTERLY* 63 (1994).

11. See, e.g., *Workplace Safety and Insurance Act, S.O., ch. 16 (1997) (Can.)*. See generally RESEARCH IN CANADIAN WORKER'S COMPENSATION (Terry Thomason & Richard Chaykowi eds., 1995).

Although there may be ad hoc schemes for individual disasters (e.g., farm disasters, floods, transmission of HIV infection through the national blood bank systems), Canada has no government-administered compensation schemes generally aimed at mass wrongs. Interestingly, however, in cases in which a government or government agent is the defendant, the existence and institution of class actions have led to government-financed compensatory packages (e.g., those resulting from claims by persons infected with Hepatitis C through the national blood bank system¹² and recent cases involving pollution of a town's water supply by e-coli bacteria).¹³

As discussed previously, individual litigation, including joinder of multiple parties, does not generally compensate the victims of mass wrongs because it is too expensive, discouraging actions from being brought. Therefore, in Canada there is really no viable alternative to class actions once it is acknowledged that there is a need to provide access to justice and to compensate people for mass wrongs.

III. AN OVERVIEW OF THE CANADIAN CLASS ACTION REGIME¹⁴

Class action legislation has existed in Quebec since 1978, but class actions only became a major force in Canada with the passage of the Ontario Class Proceedings Act in 1993¹⁵ and the subsequent British Columbia Class Proceedings Act in 1995¹⁶ (which in many, but not all respects, mirrors the Ontario legislation).

The procedures provided by the legislation in each of the three provinces are structurally similar to those prescribed by Rule 23 of the U.S. Federal Rules of Civil Procedure, although in certain respects the Canadian legislation is *more liberal* in facilitating class actions than its American counterpart.¹⁷ The Canadian legislation per-

12. See *Parsons v. Canadian Red Cross Soc'y* [1999], 40 C.P.C. (4th) 151 (Ont. Sup. Ct.), 101 A.C.W.S. (3d) 694 (Can.).

13. See Colin Perkel, *Walkerton Victims Want to Sue*, THE TORONTO STAR, Jan. 15, 2001, available at <<http://www.thestar.com>>.

14. The leading textbooks on the subject are M. EIZENGA ET AL., *CLASS ACTIONS LAW AND PRACTICE* (1999) and WARD K. BRANCH, *CLASS ACTIONS IN CANADA* (1996). Two brief guides are JAMES M. SULLIVAN, *A GUIDE TO THE BRITISH COLUMBIA CLASS PROCEEDINGS ACT* (1997) and MICHAEL G. COCHRANE, *CLASS ACTIONS: A GUIDE TO THE CLASS PROCEEDINGS ACT, 1992* (1993).

15. *Class Proceedings Act*, S.O., ch.6 (1992) (Can.).

16. *Class Proceedings Act*, S. B. C., ch.21 (1995) (Can.).

17. See M. McGowan, *Certification of Class Actions in Ontario: A Comparison of Rule 23 of the U.S. Federal Rules of Civil Procedure*, in 16 *CARSWELL PRACTICE CASES* 172 (1993).

mitting class actions embodies, as does the regime in the United States, a “lawyer-entrepreneur model.” It relies upon lawyer-entrepreneurs to initiate and drive class actions, allowing lawyers to risk non-payment for losing cases in the hopes of recovering substantial court-awarded contingency fees when the cases are successful.¹⁸

The Canadian criteria¹⁹ for certification of a proceeding as a class action are relatively undemanding. The claim must disclose a cause of action. There must be an identifiable class of two or more persons. The claims of the class must *raise common issues*. A class action must be the *preferable procedure* for resolving these *common issues*. The representative plaintiff must *fairly and adequately* represent the interests of the class, *not have a conflict* on the common issues with other class members, and have a *workable plan* for processing the action.²⁰ The only criteria of those enumerated that usually are difficult to satisfy are the existence of common issues and determining whether a class action is the preferable procedure.

The following are the other major features of the Canadian class action regime.²¹

A. Notice

Notice to class members of certification and settlement is normal but not mandatory. The court may determine how it is to be given or dispensed with and who will bear the cost.

B. Opt Out

Once the proceeding is certified, members of the class are presumed to be in the proceeding and are bound by the court’s determination, unless they take active steps to “opt out” within a time set by the court.

18. See *Gagne v. Silcorp Ltd.* [1998] 41 O.R. (3d) 416 (C.A.) (Can.); see also *Ontario’s New Class Proceedings Legislation—An Analysis*, in 2 ONTARIO CIVIL PRACTICE 751 (Garry D. Watson & Michael McGowan eds., 2001).

19. The criteria in the text appear in both the Ontario and British Columbia legislation; the criteria in Quebec are slightly, but not materially, different: see Quebec Code of Civil Procedure, R.S.Q., ch. C-25., §§ 1000 et seq. (Can.).

20. See Class Proceedings Act, S.O., ch. 6, § 5 (1992) (Can.); see also Class Proceedings Act, S.B.C., ch. 21, § 4 (1995) (Can.).

21. Again, these features are based on the legislation in Ontario and British Columbia; the Quebec legislation is slightly, but not materially, different. For Ontario procedure, see Class Proceedings Act, S.O., ch. 6 (1992) (Can.); for B.C. procedure, see Class Proceedings Act, S.B.C., ch. 21 (1995) (Can.). For a more detailed summary of the major features of Canadian class action regime, see *Ontario’s New Class Proceedings Legislation—An Analysis*, *supra* note 18, at 753-758.

C. Discovery

At the certification and common issues phases, discovery is *prima facie* limited to the named parties. The defendant is given the right to examine for discovery (i.e., depose) only the class representative and not other individual class members; after deposing the class representative, the defendant may request leave from the court for discovery of other individual class members (this regime is consistent with the general approach in Canada to the availability of discovery).

D. Settlements

To ensure the protection of absent class members, the settlement of all actions commenced under the Class Proceedings Act, whether or not they are certified, must be approved by the court.

E. Fee Shifting

This has been an area of considerable difficulty for class actions in Canada. Unlike in the United States, the general rule in litigation in Canada is the so-called "English rule," that a losing party must usually pay the winning parties' legal fees, or a good portion thereof. The challenge has been synthesising this rule with class actions: if the class action fails, who is liable for the defendant's legal fees and other costs? For litigation in which the class does not prevail, each Province's class action statute stipulates that the representative plaintiff is the only class member liable for defendant's legal fees and other costs. When and to what extent the representative plaintiff is liable varies amongst the three provinces. British Columbia adopted the Ontario Law Reform Commission's recommendation,²² rendering the representative plaintiff virtually immune from paying costs – she is only liable if the action is "frivolous or vexatious" (merely losing is not enough). Quebec allows for costs against the representative plaintiff, but after one very large costs award the legislation changed, allowing only nominal costs to be paid (on the scale of the small claims court).²³ Ontario is the most extreme. The legislation provides that costs can be awarded against a losing representative plaintiff, unless the court is of the view that the action was a "test case, raised a

22. See *Report on Class Actions*, *supra* note 1; see also Class Proceedings Act, S.B.C., ch. 21, § 37 (1995) (Can.).

23. See *Ontario's New Class Proceedings Legislation—An Analysis*, *supra* note 18, at 757; see also L. Fox, *Liability for Costs: A Comparison of Bill 28 and Bill 29 and the Quebec Legislation*, in PROCEEDINGS OF THE FIRST YVES PRATTE CONFERENCE (1992).

novel point of law or involved a matter of public interest.”²⁴ To date, relatively few significant costs awards have been made against plaintiffs, and representative plaintiffs have largely avoided having to pay costs.²⁵ Most cases were settled, and very few cases have been adjudicated to a conclusion. The Ontario costs rule is problematic and causes difficulties because it raises the issue of who, properly advised, would agree to become a representative plaintiff. After all, the representative plaintiff in successful claims will only recover her pro-rata share of damages (e.g., \$5000 or \$10,000) but will risk being held liable for the costs of a million dollar action. Although it is not clear what is happening “out in the field,” possibly plaintiff class counsels are not properly advising representative plaintiffs of the risks involved, are choosing judgment-proof plaintiffs, or are agreeing to indemnify the representative plaintiff for the costs of the action. If the former—if plaintiff class counsels are not informing their clients of the risks—a malpractice action might be necessary to clear the air.

An Ontario Class Proceedings Fund exists²⁶ primarily to relieve the representative plaintiff from liability for the defendant’s costs. It works in the following way: when a plaintiff applies to, and receives assistance from, the Fund, the Fund becomes liable to pay any costs awarded to the defendant, and in such circumstances, the representative plaintiff is relieved of any liability for the defendant’s costs.²⁷ However, the Fund has been a failure in that, due to inadequate financing, it has given funding to very few class actions (approximately

24. Class Proceedings Act, S.O., ch. 6, § 31(1) (1992) (Can.).

25. For example, in *Elliot v. CBC* [1994] 24 C.P.C. (3d) 143 (Gen. Div.) (Can.), in the absence of any of the factors enumerated in § 31(1) or any other special circumstances, the court applied the customary rule that costs “follow the event,” and costs were awarded against the unsuccessful representative plaintiffs. In *Joncas v. Spruce Falls* [2000] O.J. No. 1721 (Ont. Gen. Div.) (online Quicklaw), 97 A.C.W.S. (3d) 72 (Can.), in dismissing a class action brought by employees seeking entitlement to certain shares, costs were ordered against the representative plaintiffs. In *Smith v. Canadian Tire Acceptance Ltd.* [1995] 22 O.R. (3d) 433 (Gen. Div.) (Can.), the costs of an unsuccessful class action were awarded against *non-parties* who had promoted the action and had purported to have sold rights in the proceeds of the action to the public.

26. See Law Society Amendment Act (Class Proceedings Funding), S.O., ch. 7 (1992) (Can.), and a regulation made under the Act (O. Reg. 771/92). Quebec also has a “fonds,” but its purpose is to fund the plaintiff’s side of class actions, and it does not relieve an unsuccessful representative plaintiff of liability for the defendants’ costs. See *Ontario’s New Class Proceedings Legislation—An Analysis*, *supra* note 18; see also An Act Respecting the Class Action, L.R.Q., Chap. R-2.1 (Can.).

27. See Law Society Amendment Act (Class Proceedings Funding), *supra* note 26, at § 59.1(2), § 59.4.

six to date).²⁸ It started out with an initial capital of \$500,000,²⁹ to be “topped up” by a levy of ten percent of any settlement or judgment in any action *it has funded*.³⁰ The Fund has been extremely cautious in funding class actions because one cost order could wipe it out. Presumably, the expectation of the drafters establishing the Fund was that *all* representative plaintiffs would apply to the fund. However, applications to the fund have been few (approximately thirty cases), and most importantly, the “big, successful” cases have not applied.³¹ The Fund received a levy in one case and it now has a balance of about \$700,000, together with a liability for an as yet unpaid cost award of \$240,000.³² Had the big cases applied for funding, the Fund would actually be in a position of extreme (and perhaps embarrassing) wealth because to date there have been a number of substantial settlements in Ontario class actions (e.g., the heart pacemaker litigation settled for \$23.1 million,³³ the breast implant litigation for \$29 million,³⁴ and the vanishing life insurance premium cases for approximately \$140 million³⁵). The total recovery for the class members in these actions alone was \$206 million; a ten percent levy on these recoveries would have yielded the fund an additional \$20.6 million. This is without even taking into account the \$1.5 billion settlement in

28. As explained in the text, the Fund's initial capitalization was low—approximately \$500,000—and the mechanism designed to provide the Fund with a periodic income flow, the “levy” device, has not been successful. This is because the “big cases” which could have provided a substantial income flow did not apply for funding, and hence were not subject to paying the levy. The information in the text as to the number of applications to the Fund and the number of successful cases comes from first-hand knowledge; the Author has been a member of the committee administering the Fund. The Law Foundation of Ontario has responsibility for overseeing the Fund. The Foundation's web page provides annual reports on the Funds operations at <http://www.lawfoundation_on.org/LF.pdf>

29. See Law Society Amendment Act (Class Proceedings Funding), *supra* note 26, at § 59.1(1).

30. The ten percent levy is provided for in Ontario Regulation 771/92, *see supra* note 26.

31. See cases *infra* nn. 33-36.

32. The Fund received a levy as a result of a settlement favorable to the plaintiff class in *Mangan v. Inco Ltd.* [1998] 38 O.R. (3d) 703 (Gen. Div.) (Can.). The unpaid cost award arises from an order made against the Fund in *Edwards v. Law Society of Upper Canada* [2000] 188 D.L.R. (4th) 613 (Can.).

33. *Nantais v. Telectronics Proprietary (Canada) Ltd.* [1995] 129 D.L.R. (4th) 110 (Ont. Gen. Div.) (Can.), *prob. juris. noted*, 127 D.L.R. (4th) 552 (Can.). Details of the amount of the settlement were given in *THE GLOBE AND MAIL MONDAY*, Oct. 6, 1997, at A1.

34. *Serwaczek v. Medical Engineering Corp.* [1996] 3 C.P.C. (4th) 386 (Gen. Div.) (Can.).

35. There have been settlements in two such cases. See *Dabbs v. Sun Life Assurance Co. of Canada* [1998] 40 O.R. (3d) 776 (Gen. Div.) (Can.); *McKrow v. Manufacturers Life Ins. Co.* [1998] O.J. No. 4692 (Ont. Gen. Div.) (online Quicklaw).

the Hepatitis C case.³⁶ How can the Fund meet its objective more successfully? One approach might be to change the legislation to apply a much lower levy (e.g., one to two percent) on all class action recoveries, whether or not funded by the Fund. Another approach could be to simply let the Fund expire (on the grounds that class actions are alive and well in Ontario without a successfully functioning Fund). Alternatively, in light of the failure of the Class Proceedings Fund to adequately deal with the fee shifting issue, it can be argued that Ontario should amend its Act and resort to the British Columbia model, which virtually abandons fee shifting in class actions.

F. Class Counsels' Fees

The court determines the fees for class counsel, typically using a combination of a multiplier test (i.e., hours worked multiplied by the hourly rate) and a percentage contingency fee.³⁷ Usually these fees come out of the damages recovered by the class.

G. National Classes

Because the courts (particularly in Ontario) have permitted national classes (i.e., actions in which the class as defined is not limited

36. See *Parsons v. Canadian Red Cross Soc'y*, *supra* note 12.

37. The Ontario Act specifically provides for the use of a multiplier approach in fixing counsel's fees. See *supra* note 26, at §§ 32-33. However, *Nantais v. Teletronics Proprietary (Canada) Ltd.* [1996] 134 D.L.R. (4th) 47 (Ont. Gen. Div.) (Can.) held that the fee arrangements permitted by the Class Proceedings Act are not limited to the "multiplier" approach set out in §§ 32-33, and contingency fees are also permitted. In practice, Ontario courts have tended to use a combination of a multiplier fee and a contingency fee. See, e.g., *Parsons v. Canadian Red Cross Soc'y*, [2001] 46 C.P.C. (4th) 236 (Ont. Superior Ct.) (award of counsel fees in excess of \$50 million). The British Columbia legislation makes no reference to a multiplier test, having held that a percentage contingency fee should be used to fix counsel's fees. See *Endean v. Canadian Red Cross*, [2000] B.C.J. No. 1254 (B.C.S.C.) (online Quicklaw), 97 A.C.W.S. (3d) 550 (Can.). In *Gagne v. Silcorp Ltd.*, *supra* note 18, the court addressed the purpose of awarding premium fees in successful class proceedings. Also, in *Parsons*, Judge Winkler restated the *Gagne* principle in the following terms:

If the *Class Proceedings Act* is to achieve the legislative objective of providing enhanced access to justice, then in large part it will be dependent upon the willingness of counsel to undertake litigation on the understanding that there is a risk that the expenses incurred in time and disbursements may never be recovered. It is in this context that a court, in approving a fee arrangement or an exercise of fixing fees, must determine the fairness and reasonableness of the counsel fee. Accordingly, the caselaw that has developed in Ontario holds that the fairness and reasonableness of the fee awarded in respect of class proceedings is to be determined in the light of the risk undertaken by the solicitor in conducting the litigation and the degree of success or results achieved.

Parsons v. Canadian Red Cross Soc'y, [2001] 46 C.P.C. (4th) 236, at 241.

to Ontario residents, but any Canadian resident),³⁸ the effect has been to extend the class action regime even to those provinces that have not enacted class action legislation.

IV. VOLUME AND TYPES OF CLASS ACTION LITIGATION

Although exact numbers are unavailable, it is likely that since 1993 a quite high volume of cases, some two hundred class actions, have been commenced in Ontario (and a lesser number in British Columbia). Many prospective class actions still await certification, and only two cases have been tried (although several cases have been resolved by summary judgment, typically in favor of the defendant). There, however, have been numerous settlements.³⁹

Class actions have included a wide variety of cases. Tort cases have included numerous product liability cases (e.g., defective heart pacemaker,⁴⁰ breast implants,⁴¹ Hepatitis C-contaminated blood⁴²) and mass tort cases (e.g., subway crash,⁴³ train crash,⁴⁴ water pollution,⁴⁵ sexual abuse at a residential school for native children⁴⁶). Contract cases have included consumer class actions (e.g., against utilities⁴⁷ and credit card companies⁴⁸ for alleged illegal interest rates and other charges, recovery of interest on condominium deposits,⁴⁹ recovery of damages for misrepresentations in the sale of a housing development,⁵⁰ litigation over "vanishing premium" life insurance policies⁵¹) and wrongful dismissal actions for mass dismissals usually following a

38. The case law permitting national classes is conveniently summarized in *Wilson v. Servier Canada Inc. and Biofarma S.A.* [2000] 50 O.R. (3d) 219 (Ont. Sup. Ct.) (Can.).

39. The two class actions that have gone to trial are *Windisman v. Toronto College Park Ltd.* [1996] 28 O.R. (3d) 29 (Gen. Div.) (Can.), and *Peppiatt v. Nicol* [1998] O.J. No.3370 (Ont. Gen. Div.) (online Quicklaw), 82 A.C.W.S. (3d) 243.

40. See *Nantais v. Telectronics Proprietary (Canada) Ltd.*, *supra* note 33.

41. See *Serwaczek v. Medical Engineering Corp.*, *supra* note 34; *Bendall v. McGhan Medical Corp.* [1993] 106 D.L.R. (4th) 339 (Ont. Gen. Div.) (Can.).

42. See *Parsons v. Canadian Red Cross Soc'y*, *supra* note 12.

43. See *Godi v. Toronto Transit Comm'n* (Doc. 95 CU 89529) (Gen. Div.) (Can.).

44. See *Brimner v. Via Rail Canada Inc.* [2000] 47 O.R. (3d) 793 (Ont. Sup. Ct.) (Can.).

45. See *Perkel*, *supra* note 13.

46. See *Lumley v. British Columbia* [1999] B.C.J. No. 2633 (B.C.C.A.) (Can.) (online Quicklaw).

47. See *Garland v. Consumers' Gas Co.* [1998] 3 S.C.R. 112 (Can.).

48. See *Smith v. Canadian Tire Acceptance Ltd.*, *supra* note 25.

49. See *Windisman v. Toronto College Park Ltd.*, *supra* note 39.

50. See *Peppiatt v. Nicol*, *supra* note 39.

51. See *Dabbs v. Sun Life Assurance Co. of Canada*, *supra* note 35; *McKrow v. Manufacturers Life Ins. Co.*, *supra* note 35.

takeover.⁵² There have also been various miscellaneous cases (e.g., corporate disputes,⁵³ price fixing competition cases,⁵⁴ franchising,⁵⁵ pension surplus,⁵⁶ native land claims,⁵⁷ and copyright⁵⁸).

Some have been “mega cases” with “mega” recoveries,⁵⁹ others have been relatively small cases, illustrating that there are many diverse instances where numerous people are wronged—people who would never sue or obtain recovery without class actions (e.g., the condominium deposit interest case involving defective fireplaces in a condominium development,⁶⁰ and a copyright infringement case where freelance journalists sued a major publisher for allegedly republishing print media articles in electronic form without the authors’ permission⁶¹).

V. WHAT HAVE BEEN THE MAJOR ISSUES TO DATE, AND HOW HAVE THE COURTS HANDLED THEM?

A. Certification

To date, certification has been a major battleground. Defendants have fought hard to avoid certification, with mixed success.⁶² Courts, however, have sometimes refused certification for reasons having little to do with the statutory criteria—judges identify an action as a “bad class action” (which is never really defined), and the reasons given for refusing certification may be disingenuous or lack transpar-

52. See *Gagne v. Silcorp Ltd.*, *supra* note 18; *Halabi v. Becker Milk Co.* [1998] 39 O.R. (3d) 153 (Gen. Div.), *Atkinson v. Ault Foods Ltd.* [1997] O.J. No. 5222 (Ont. Gen. Div.) (Can.). (online Quicklaw), *Webb v. K-Mart Canada Ltd.* [1999] O.J. No. 2742 (Ont. Sup. Ct.) (Can.). (online Quicklaw), 91 A.C.W.S. (3d) 18.

53. See *Maxwell v. MLG Ventures Ltd.* [1996] 30 O.R. (3d) 304 (Gen. Div.) (Can.).

54. See *Chadha v. Bayer Inc.*, *supra* note 8.

55. See *Rosedale Motors Inc. v. PetroCanada Inc.* [1998] 42 O.R. (3d) 776 (Gen. Div.) (Can.).

56. See *Cooper Industries (Canada) Inc v. Babin*, B173/95 (Can.); *Cooper Industries (Can.) Inc v. Adam*, B172/95 (Can.); *Rivett v. Hospitals of Ontario Pension Plan* [1995] O.J. No. 3270 (Gen. Div.) (online Quicklaw), 58 A.C.W.S. (3d) 1180 (Can.).

57. See *Chippewas of Sarnia Band v. Canada (Attorney General)* [1996] 45 C.P.C. (3d) 216 (Ont. Gen. Div.) (Can.).

58. See *Robertson v. The Thomson Corp.* [1993] 43 O.R. (3d) 389 (Gen. Div.) (Can.).

59. See cases referred to under the discussion of the Ontario Class Proceeding Fund, *supra* notes 33-36.

60. See *Crawford v. London (City)* [2000] O.J. No. 989 (Ont. Sup. Ct.) (online Quicklaw), 98 A.C.W.S. (3d) 527 (Can.).

61. See *Robertson v. The Thomson Corp.*, *supra* note 58.

62. See cases *supra* notes 40-58 and *infra* notes 64-67.

ency⁶³ (e.g., cases involving a tax driven real estate development,⁶⁴ fungus in the bathrooms of an apartment building,⁶⁵ a nuisance claim in respect of Toronto's garbage dump⁶⁶). Class certifications have not been awarded readily in the numerous verbal misrepresentation cases because of the apparent lack of a common issue and the presence of numerous individual issues.⁶⁷ Certification in such cases is unlikely to be granted unless the court is prepared to "compress" the individual injuries into a common issue.⁶⁸

B. Settlements

The issue of settlement in class actions is always problematic because of the risk that plaintiff class counsel will, with or without colluding with the defendant, "sell out" the class (settle for less than the case is really worth) to gain what the counsel sees as a satisfactory fee.⁶⁹ Many have observed that the ever-present risk in class actions is

63. See Honorable Mr. Justice Warren Winkler, *Advocacy in Class Proceedings Litigation*, 19 ADVOCATES' SOC. J. 6, 9 (2000) (expressing the issue of certification in highly subjective terms: "In the final analysis, a class proceeding is a visceral thing: if it feels to experienced counsel like a class action, it probably should be one. On the other hand, if it looks and feels like a series of individual actions, it is not likely to be certified as a class proceeding.")

64. See *Abdool v. Anaheim Management Ltd.* [1995] 21 O.R. (3d) 453 (Div. Ct.) (Can.) (a class action by investors in a condominium scheme).

65. See *Taub v. Manufacturers Life Ins. Co.* [1998] 40 O.R. (3d) 379 (Ont. Gen. Div.) (Can.) (the court held that if widespread harm is not inherent in a class action claim, such as air crashes or pollution cases, the plaintiff must provide evidence that more than one person was affected; in alleging toxic mold in bathrooms of an apartment complex, the court required evidence that at least one person other than the plaintiff had a similar claim).

66. See *Hollick v. Toronto* [1999] 46 O.R. (3d) 257 (C.A.) (Can.) *granted leave to appeal* (holding that a court may look beyond the pleadings to the evidence to evaluate the certification criteria; in ascertaining the existence of a class, the court can include some consideration of the merits and can look beyond the statement of claimed to make that assessment).

67. See, e.g., *Rosedale Motors Inc. v. Petro-Canada Inc.*, *supra* note 55; *Mouhteros v. DeVry Canada Inc.* [1998] 41 O.R. (3d) 63 (Ont. Gen. Div.) (Can.); *Controltech Eng'g Inc. v. Ontario Hydro* [1998] O.J. No. 5350 (Gen. Div.) (online Quicklaw), 84 A.C.W.S. (3d) 836 (Can.).

68. See, e.g., *Dabbs v. Sun Life Assurance Co. of Canada*, *supra* note 35 (where the court certified a "vanishing premium" class action for settlement purposes against a life insurer based on alleged misrepresentations notwithstanding that these were allegedly made by hundreds of individual insurance agents in individual conversations with policyholders). Cf. *Williams v. Mutual Life Assurance Co. of Canada*, [2000] O.J. No. 3821 (Ont. Sup. Ct.) (online Quicklaw), 100 A.C.W.S. (3d) 387 (Can.) (certification refused in similar case where defendant opposed certification).

69. As the U.S. Supreme Court observed in its recent decision in *Ortiz v. Fibreboard Corp.*, 119 S. Ct. 2295, 2318 (1999), *rev'g sub nom. In re Asbestos Litig.*, 134 F.3d 668 (5th Cir. 1998). ("In a strictly rational world, plaintiff's counsel would always press for the limit of what the defense would pay. But with an already enormous fee within counsel's grasp, zeal for the client may relax sooner than it would in a case brought on behalf of one claimant.")

that the defendant will obtain a below-market settlement by seeing that the plaintiffs' lawyer gets an above-market counsel fee.⁷⁰ The recent report by the Rand Institute for Civil Justice documents at length the problems experienced in the United States relating to the failure of courts to adequately supervise the approval of settlements and the setting of class counsel fees.⁷¹

As previously discussed, Canada's legislation specifically provides that court approval is required for the settlement of any class action, whether or not it has been certified.⁷² After a somewhat faltering start,⁷³ the courts appear to be doing a reasonable job in this area. They are still not sufficiently aware of potential conflicts of interest, or of the potential for the parties in mass tort cases to "sell out" future claimants in favor of present claimants (which is now a well recognized problem in the United States⁷⁴), but early indications show that Canadian courts are perhaps doing a better job of supervising the approval of settlements than are their U.S. counterparts.⁷⁵ In two significant cases, courts recently refused to approve settlements. In the Hepatitis C litigation, the trial court wrote an eighty-five-page judgment on the settlement approval hearing and refused to approve the proposed \$1.5 billion settlement until changes were

70. See, e.g., J.C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343 (1995).

71. The report, based in part on 10 intensive case studies of recent class actions in the United States, suggests that the key to improving outcomes and eliminating abuses in class action litigation over money damages is increased regulation of settlements and fee awards by judges equipped with the training, resources and determination to do the job. A copy of the executive summary of this work can be found at (www.rand.org/publications/MR/MR969.1.pdf). See also DEBORAH R. HENSLER ET AL, CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN (2000).

72. See Class Proceedings Act, S.O., *supra* note 24, § 29(2).

73. See *Dabbs v. Sun Life Assurance Co. of Canada*, *supra* note 35 (holding that simultaneous negotiation of lawyers' fees and class settlement is not improper, relying upon the U.S. Supreme Court decision in *Evans v. Jeff D.*, 475 U.S. 717 (1986)). It is submitted that even if *Evans* is a sound decision in the U.S. context, it should have no application in the Canadian context, where the fee regime is quite different. Canadian courts should refuse to approve settlements where counsel for the parties have simultaneously negotiated the class lawyers' fees and the class settlement. For detailed arguments in support of this analysis, see Garry D. Watson & Michael McGowan, *Annual Survey of Recent Developments in Civil Procedure*, in ONTARIO CIVIL PRACTICE (Garry D. Watson & Michael McGowan eds., 1999).

74. See *Ortiz v. Fibreboard Corp.*, *supra* note 69; see also J.C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370 (2000).

75. An explanation for this would be that Canadian judges do not share the "docket clearing mentality" that the Rand study, *supra* note 71, attributes to the U.S. judiciary.

made.⁷⁶ Another recent decision from the Ontario Superior Court, *Epstein v. First Marathon Inc.*,⁷⁷ underscores the importance of courts taking seriously (as stressed in the Rand Study) their statutory duty to scrutinize proposed settlements. The court in *Epstein* refused to approve the settlement of a class action attacking a merger transaction. Under the terms of the settlement, the plaintiff lawyer would have received a payment of \$190,000, conditional upon dismissal of the class proceeding, but the agreement did not provide any benefit to any class members on whose behalf the action was originally filed. Mr. Justice Cumming emphasized that policymakers imposed the requirement of judicial approval to check the potential abuse of class actions. Citing legislative debates at the time the Ontario Class Proceedings Act was introduced, Mr. Justice Cumming noted, “the court’s role in the implementation of class-action reform would be critical to the effectiveness of the new legislation.”⁷⁸ In *Epstein*, the court determined that “Mr. Epstein’s action is in the nature of a ‘strike suit.’”⁷⁹ Approving the settlement would in effect reward conduct counter-productive to the “important policy objectives” of “access to justice, judicial economy and behaviour modification,” and was therefore rejected.⁸⁰

C. Counsel Fees

Courts have recognized explicitly that the success and survival of the class action regime depends upon risk-taking by lawyer-entrepreneurs who must be given a premium fee when they win.⁸¹ To date, Canadian courts have avoided the enormous U.S.-type fees resulting from fee awards based on thirty-three percent or forty percent of the settlement amount.⁸² In the Hepatitis C litigation, which settled for \$1.5 billion, plaintiffs’ counsel received fee awards in the 2-4%

76. See *Parsons v. Canadian Red Cross Soc’y*, *supra* note 12. The changes were subsequently made and the settlement was approved.

77. [2000] O.J. No. 452 (Ont. Sup. Ct.) (online Quicklaw), 94 A.C.W.S. (3d) 1062 (Can.).

78. *Id.* at ¶ 39.

79. *Id.* at ¶ 71.

80. *Id.*

81. See *Gagne v. Silcorp Ltd.*, *supra* note 18.

82. On the approach of U.S. courts to the determination of counsel fees in “common fund” class actions, see HERBERT NEWBERG & ALBA CONTE, *NEWBERG ON CLASS ACTIONS*, § 14.03 (3d ed. Supp. 2000) (there is no general rule as to what is a reasonable fee award in common fund cases, but the upper limit seems to be 50%; for securities and antitrust suits, 20-30% of the fund is a normal fee; these percentages decrease with large recoveries and increase with smaller recoveries).

range, which still netted them \$53 million nation-wide.⁸³ However, there have been numerous 20-25% fees, particularly in British Columbia and Quebec.⁸⁴

VI. SOME OTHER ISSUES THAT HAVE ARISEN IN CLASS ACTIONS

Other issues that have been addressed to date in Canadian case law on complex civil litigation include when and how both plaintiffs and defense lawyers may communicate with class members,⁸⁵ how the principles of *res judicata* apply to class action decisions,⁸⁶ and whether defendants' settlement proposals in the form of Alternative Dispute Resolution Programs should be treated as a "preferable procedure" within the meaning of the class action statutes.⁸⁷

A range of issues regarding class actions, however, either have not yet been addressed in Canadian case law or adequately dealt with by the courts. On the issue of certification, it is unclear what evidence, if any, should be before the court on certification motions. It seems that the courts have not been sufficiently aware of the cost im-

83. See *Parsons v. Canadian Red Cross Soc'y*, *supra* note 12; *Kreppner v. Canadian Red Cross* [1999] O.J. No. 3572 (Ont. Sup. Ct.) (Can.) (online QuickLaw) (joint reasons approving counsel fees in two companion hepatitis C class proceedings; the first action related to transfused patients and the second to hemophiliac patients). On the same day, the British Columbia (B.C.) decision was handed down, *Endean v. Canadian Red Cross Society*, *supra* note 37, approving similar fees in the B.C. action.

84. See discussion in *Parsons*, *supra* note 12.

85. See *Mangan v. Inco Ltd.*, *supra* note 32 (holding that communications from class counsel to potential class members explaining how to obtain settlement proceeds was "notice" within the meaning of the class action legislation, and granting injunctive relief and sanctions against class counsel for making the communications without prior court approval). Subsequently, in *Bywater v. TTC* [1999] O.J. No. 1402 (Ont. Gen. Div.) (Can.) (online Quicklaw) the court held that the issuance of a press release by class counsel following the granting of certification was not a "notice" requiring prior court approval.

86. See *Allan v. CIBC Trust Corp.* [1998] 39 O.R. (3d) 675 (Gen. Div.) (Can.). The only case to date on the application of *res judicata* to class proceedings held that because of the wording of the Class Proceedings Act, this doctrine operates quite differently than in non-class proceedings. In non-class proceedings it is well established that claim preclusion applies not only to matters that were actually litigated in the prior proceeding, but also to matters which could and should have been litigated, such as matters arising out of the same transactions or occurrences that were litigated in the first action. However, § 27(3) of the Ontario Class Proceedings Act limits the binding effect of the judgment on the common issues "set out in the certification order." See *Class Proceedings Act*, *supra* note 15.

87. For suggestions (in obiter) that such proposals constitute a "preferable procedure" that may lead to a denial of certification, see *Brimner v. Via Rail Canada Inc.*, *supra* note 44, and *Williams v. Mutual Life Assurance Co. of Canada*, *supra* note 68. For criticism of this approach by the present Author, see *Watson & McGowan, Annual Survey of Recent Developments in Civil Procedure*, in *ONTARIO CIVIL PRACTICE* (Watson & McGowan eds., 2001).

plications of an expansive view of the admissible evidence on such motions. Concerning settlements, unresolved issues include under what circumstances, if any, the parties should be entitled to simultaneously negotiate damages and costs payable to the plaintiff or fees payable to plaintiff's counsel,⁸⁸ and how the plaintiff's counsel and the court should deal with the defendant's desire to pay the plaintiff's costs (or fees) as part of the settlement. Should the court appoint counsel to advise the court on the fairness of the settlement, at least where there are no well-funded and well-represented objectors?

Regarding fees to class counsel, there are also various unresolved issues, such as whether fees should be set and approved early in the action subject to later review, whether fees should be awarded (as suggested in the Rand study) by reference to amounts actually paid to class members rather than by reference to the global amount of the settlement, and what the defendant's role should be, if any, in the court's determination of plaintiff's counsel's fees.⁸⁹

In mass tort cases it has become common for a "national class action" to be commenced in Ontario (excepting residents of B.C. and Quebec) and separate provincial class actions to be commenced in B.C. and Quebec.⁹⁰ However joint settlement discussions typically take place, with the defendants treating the three proceedings as one. This pattern raises the question of the need for inter-provincial cooperation in class actions—for example, the desirability of joint hearings by the several provincial courts when there are pending actions in several provinces. (Without a joint hearing, if a settlement is approved first in, say Quebec, it is difficult for an Ontario court to then disapprove the settlement, even if it has reservations.) If such joint hearings are indeed desirable, how can they be achieved? A related issue is how to prevent the appearance of competing national classes in more than one province giving the defendant the opportunity, as has arisen in the United States,⁹¹ to conduct a "reverse auction" for settlement.

88. See *supra* text accompanying note 73.

89. See *Parsons v. Canadian Red Cross Soc'y* [2001] O.J. No.214 (Ont. C.A.) (Can.) (online Quicklaw) (holding that the defendant had no standing to appeal the fee determination in favor of plaintiff's counsel).

90. See, e.g., *Endean v. Canadian Red Cross Soc'y*, *supra* note 37; *Parsons v. Canadian Red Cross Soc'y*, *supra* note 12.

91. See *Coffee*, *supra* note 74.

VII. OVERALL, HAVE CLASS ACTIONS IN CANADA BEEN A GOOD THING FOR THE CITIZENRY?

Although it is apparent that some judges are unsympathetic to some class actions, on the whole, the Canadian judiciary seems to have recognized that class actions have an important and valuable role to play by affording access to justice to many who could never in their wildest dreams hope to litigate individually. Proposals have been made to extend the class action regime by introducing them in the Federal Court of Canada,⁹² in Manitoba,⁹³ and in Alberta.⁹⁴ On the issue of whether class actions have been a good thing for the citizenry of Canada, if the “proof of the pudding is in the eating,” one could ask the class members who shared in the proceeds of the class actions settled or litigated to date (e.g., the \$5,000 recovered by each of the class members in the action relating to wrongly withheld interest on deposits on condominium purchases,⁹⁵ \$50 million-plus recovery in the breast implant litigation,⁹⁶ the \$140 million recovery in the vanishing premium cases,⁹⁷ and the \$1.5 billion recovery in the Hepatitis C litigation⁹⁸), keeping in mind that without a class action regime, it is unlikely that any of this money would ever have been recovered in Canada. On the other hand, there is little if any evidence to date of the “successful”⁹⁹ use of class actions as a form of litigation blackmail—bringing groundless class actions to extract unfounded settlements from defendants.

92. See *Class Proceedings in the Federal Court of Canada*, Federal Court of Canada Circular No.2/2000, http://www.fct-cf.gc.ca/bulletins/notices/circular2_e.shtml.

93. See MANITOBA LAW REFORM COMM’N, *Class Proceedings, Report #100* (Manitoba Publications Branch, Jan. 1999).

94. See ALBERTA LAW REFORM INSTITUTE, *Class Action, Final Report #85* (Dec. 2000).

95. See *Windisman v. Toronto College Park Ltd.*, *supra* note 39 (successful class action by purchasers of condominiums against the developer for interest on monies paid as deposits; at trial the amount recovered was approximately \$2.6 million).

96. See, e.g., *Serwaczek v. Medical Eng’g Corp.*, *supra* note 34 (breast implant litigation settled for some \$29 million). This is only one of several such breast implant settlements in Canada.

97. These cases involve alleged misrepresentations by life insurers that if premiums are paid for a number of years the policies will become fully paid as a result of favorable investment of the premiums by the insurers. See *Dabbs v. Sun Life Assurance Co. of Canada*, *supra* note 35; *McKrow v. Manufacturers Life Ins. Co.*, *supra* note 35 (court approval of the settlement of “vanishing premium” life insurance policy cases). There have also been approvals of other similar settlements in British Columbia and Quebec.

98. See *Parsons v. Canadian Red Cross Soc’y*, *supra* note 12.

99. See *Epstein v. First Marathon Inc.*, *supra* note 77. *Epstein* was just such a case in which the court “thwarted” payment to plaintiff’s lawyer in order to settle the case.

VIII. WHAT CAN OTHER JURISDICTIONS LEARN FROM THE CANADIAN EXPERIENCE?

Other jurisdictions should give serious thought to introducing class actions if, as was the case in Canada, there are many types of lawsuits arising from mass wrongs which are simply not being brought because of prohibitive costs. I suspect this is likely to be the case in many jurisdictions.

In the political battle that will almost certainly ensue over any proposal to introduce class actions, I suggest that little weight be given to the views of those who will likely be defendants, such as manufacturers and corporations. They will of course object, but the fact is that the high cost of individual litigation often permits them to escape liability. If they are not liable at law, then class actions will not impose liability on them. (If I were in their position and were concerned only for my own self interest, I would oppose class actions, but that does not mean the opposition should be taken seriously.)

In light of the Canadian experience with class actions, it is recommended that other states engaged in drafting class action protocols not set the certification hurdle too high or make the certification process too expensive. Indeed, policy makers should consider whether certification is a necessary step for group litigation.¹⁰⁰ There must be procedures for defining the class and giving its members notice, but it is not axiomatic that such actions should only be brought, in effect, with leave of the court. Also, the judiciary should be involved in drafting the legislation or policy so that when it comes time to implement the laws, the judiciary will be better able to decide the legislative intent.

If the jurisdiction in which the class action legislation is to be implemented is not a "fee shifting" jurisdiction, policy-makers should consider the compatibility of class actions and fee shifting. If a decision is made to introduce class actions, the procedure may not work if the representative plaintiff is liable for the successful defendant's costs. In administering a class action regime, the judiciary must be aware of the potential for conflict of interest between the class mem-

100. For example, the class action procedure in the Federal Court of Australia has no requirement of certification by the court. However, the procedure spells out the (minimal) requirements for the bringing of proceedings as a class action, and if in any given case the defendant believes these requirements have not been met, a motion to dismiss the proceeding will be brought. See Federal Court of Australia Act 1976 (as amended 1991), Part IVA Representative Actions, s.33P

bers and class counsel, and be vigilant in the processes of settlement and fee approval.