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CLASS ACTIONS: SETTLEMENT APPROVAL; RES JUDICATA; CLAIMS ADMINISTRATION AND CY-PRÈS AWARDS

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I. Introduction

Class proceedings regimes are provided for in the rules of the Federal Court of Canada[1] and in the legislation of all but one Canadian province.[2] Class proceedings legislation has been adopted in each of these various jurisdictions because Canada is a federation with separately administered courts in the ten provinces and the three territories, and for matters subject to federal jurisdiction. The rules for civil proceedings in each of the fourteen courts are broadly similar. However, since Canada's Constitution allocates exclusive authority to the provinces to make laws in relation to civil procedure,[3] class proceedings legislation has been introduced independently in each of the various jurisdictions.[4]

The legislation, which was modelled on U.S. Federal Rule 23, provides for the certification of a claim as a class proceeding where:

(a) the pleadings or the notice of application discloses a cause of action;

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[1] Federal Court: Rules Amending the Federal Court Rules, 1998, amending the Federal Court Rules, 1998, S.O.R. 98-106, available at http://canadagazette.gc.ca/partII/2002/20021204/html/sor417-e.html.

[2] Quebec: *An Act Respecting the Class Action*, R.S.Q. c. R-2, and *Code of Civil Procedure*, RSQ 1977, C-25, arts. 999-1051, available at http://www.canlii.org/qc/laws/sta/r-2.1/20060412/whole.html; Ontario: Class Proceedings Act, S.O. 1992, c. 6 ("Ontario *CPA*"), available at http://www.e-laws.gov.on.ca/DBLaws/Statutes/English/92c06_e.htm; *Law Society Amendment Act (Class Proceedings Funding)*, S.O. 1992, c. 7; British Columbia: *Class Proceedings Act*, R.S.B.C. 1996, c. 50 ("British Columbia *CPA*"), available at http://www.qp.gov.bc.ca/statreg/stat/C/9605001.htm see Sullivan, R., *A Guide to the British Columbia Class Proceedings Act (1997)*; Saskatchewan: *Class Actions Act*, S.S. 2001, c. 12.01 ("Saskatchewan *CAA*") available at http://www.qp.gov.sk.ca/documents/english/statutes/statutes/c12-01.pdf; Newfoundland and Labrador: *Class Actions Act*, S.N.L. 2001, c. C-18.1 ("Newfoundland and Labrador: *CAA*"), available at http://www.canlii.org/nl/laws/sta/c-18.1/20040706/whole.html; Manitoba: *The Class Proceedings Act*, C.C.S.M. c. C130 ("Manitoba *CPA*"); Alberta: Following a recommendation by the Alberta Law Reform Institute in 2000, Class Actions (Final Report No. 85) (Alberta Law Reform Institute, December 2000), "Alberta Law Reform Institute – Work in Progress – Current Projects – Class Actions" available at http://www.law.ualberta.ca/alri/crrntproj/classaction.html, the legislature enacted the *Class Proceedings Act*, S.A. 2003, c. C-16.5 ("Alberta *CAA*"), available at http://www.canlii.org/ab/laws/sta/c-16.5/index.html; Nova Scotia: *Class Proceedings Act*, S.N.S. 2007 c. 28 ("Nova Scotia *CPA*"); New Brunswick: *Class Proceedings Act*, S.N.B. 2006, c C-5.15 ("New Brunswick *CPA*"), Prince Edward Island does not have class proceedings legislation.

[3] Section 92.14 of the Constitution Act, provides that "In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say – The Administration of Justice in the Province, including the Constitution, Maintenance and Organization of Provincial Courts, both of Civil and Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts".

[4] Branch, W., *Class Actions in Canada*, Aurora, 1998, and Eizenga, M., Peerless, M. and Wright, C., *Class Actions Law and Practice* , Markham, 1999.

(b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;

(c) the claims or defences of the class members raise common issues;

(d) a class proceeding would be the preferable procedure for the resolution of the common issues; and

(e) there is a representative plaintiff or defendant who,

(i) would fairly and adequately represent the interests of the class,

(ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

(iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

However, the legislation goes further than U.S. Federal Rule 23, in providing that the following matters are not a bar to certification of the claim as a class proceeding:

1. The relief claimed includes a claim for damages that would require individual assessment after determination of the common issues.
2. The relief claimed relates to separate contracts involving different class members.
3. Different remedies are sought for different class members.
4. The number of class members or the identity of each class member is not known.
5. The class includes a subclass whose members have claims or defences that raise common issues not shared by all class members.

During the certification motion, the Court has broad discretion in defining the class and in approving the notice to be sent to the class members. Most classes are defined on an opt-out basis: persons falling within the class are permitted within a specified time to exclude themselves from the class.

II. Settlement Approval

1. *Legislation*

The legislation in the various parts of Canada provides that proceedings that have been certified as class proceedings may be discontinued or abandoned only with the approval of the court, on such terms as the court considers appropriate.[5] Any settlement is binding only upon approval by the court. Once approved, the settlement binds all class members. In determining whether and on what basis to certify a class action, the court must consider whether notice should be given to the members of the class, and whether the notice should include an account of the conduct of the proceeding, a statement of the result of the proceeding; and a description of any plan for distributing settlement funds.[6]

Like other civil disputes, class proceedings are usually resolved before trial. In a class action, the result will usually take the form either of a proposed settlement fund from which individual plaintiffs may receive relief, or a mechanism for individuals to present their claims. Defendants may prefer to establish a settlement *fund* because it ensures that they will know how much is involved. Determining how large a fund to create may be challenging and it may require sampling or statistical evidence.[7] Plaintiffs

[5] Ontario *CPA*, s. 29; British Columbia *CPA*, s. 35; Saskatchewan *CAA*, s. 38; Newfoundland and Labrador *CAA*, s. 35; Manitoba *CPA*, s. 35.

[6] Ontario *CPA*, s. 17(3); British Columbia *CPA*, s. 19(3); Newfoundland and Labrador *CAA*, s. 19(3); Saskatchewan *CAA*, s. 21(3); Manitoba *CPA*, s. 19(3).

[7] Ontario *CPA*, c. 6, s. 23; British Columbia *CPA*, s. 30; Saskatchewan *CAA*, s. 32; Newfoundland and Labrador *CAA*, s. 30; Manitoba *CPA*, s. 30.

may prefer to have a settlement *mechanism* because they will know how much each claimant will receive, but this may create uncertainty for a defendant concerning its exposure. One compromise involves setting a cap, which, if exceeded, triggers a pro-rating of the amounts for individual claimants, known as "ratcheting down".

2. *Current Issues*

Regardless of the complexities that must be incorporated to satisfy the parties, a settlement requires court approval to be binding.[8] Accordingly, counsel for the class and for the defendant must make a joint application to the court for approval of the terms of the agreement that they have reached. This part of the proceeding is often described as a "fairness hearing".

In its 1982 Report, the Ontario Law Reform Commission anticipated special difficulties for common law courts in the management of fairness hearings. The difficulties arise out of a combination of features of class proceedings that are different from ordinary litigation. First, because the class counsel's financial interest is out of all proportion to that of any individual class member's interest (class counsel stands either to lose or to gain far more from the outcome than any individual class member) the class counsel's interest in arriving at a settlement may be in conflict with the class.

For example, since the negotiations will also involve a discussion of class counsel's fee, counsel could be tempted to compromise the recovery for the class to secure a promise of a more favourable fee. More generally, since class counsel is often responsible for bearing the expense and risk of financing the litigation through a contingency fee arrangement, counsel may be under pressure to accept a lower settlement than might otherwise be available to avoid further lengthy negotiations and uncertainty. This concern is a pervasive one. Accordingly, in certifying the claim as a class proceeding, courts are required to assess whether the proposed representative would fairly and adequately represent the class. This assessment includes an assessment of the plan for the litigation and, in this way, an assessment of class counsel. One of the concerns that is anticipated in this assessment is the potential for counsel to accept an unfavourable offer of settlement as a result of the financial strains of protracted negotiations.

There may also be differences in the interests of the various class members that emerge in the course of negotiations, and class counsel may be tempted to overlook the benefits of certain members of the class in order to obtain a prompt settlement for the class as a whole. Whatever conflicts of interest threaten to undermine counsel's commitment to obtaining a result in the best interests of the class, the problem is made worse by the fact that members of the class are unlikely to be as involved and as well informed of the details of the negotiation as counsel.

These are the reasons for having a fairness hearing. However, there are fundamental difficulties with fairness hearings because common law judges have almost no experience in non-adversarial hearings. In almost every other situation, their role is to observe the evidence presented and follow the arguments made on each side to determine the best result. They have little if any opportunity to gain experience in developing their own lines of inquiry and the honing the skills of questioning witnesses to test their evidence during a hearing.[9]

Moreover, the healthy suspicion of counsel's motivations that must form an integral feature of a civil law judges' competencies, is an awkward attitude for a common law judge to adopt –common law judges are used to responding to counsel who seek to be helpful in order to persuade a judge to favour their client's cause. The situation is further

[8] Ontario *CPA*, c. 6, s. 29; British Columbia *CPA*, s. 35; Saskatchewan *CAA*, c. C–12.01, s. 38; Newfoundland and Labrador *CAA*, c. C–18.1, s. 35; Manitoba *CPA*, s. 35.

[9] Jasminka Kalajdzic, *Self-Interest, Public Interest, and the Interests of the Absent Client: Legal Ethics and Class Action Praxis*, 49 Osgoode Hall L.J. 1 (2011).

complicated by the fact that the source for that suspicion relates to counsel's interest in maximizing fees at the expense of the client's interests, and it necessarily entails a suspicion that goes to the root of matters that, in the common law system, affect counsel's professional integrity.

All of this makes it procedurally very difficult to ensure that the proposed settlement is fair for the class. A judge will not necessarily have a clear idea what would count as a fair result independently of the explanations of counsel. All settlements involve compromise, but class actions involve claims that the claimants might not otherwise be able to bring because they are not economically viable. Accordingly, class action settlements involve compromises that may not be easy to measure against a full recovery minus the expense and risk of obtaining it, as would be the case in individual claims.

To ensure that the fairness hearing serves its purpose, it is sometimes necessary to present the proposed settlement to the court twice –first in a preliminary way as a basis for obtaining approval to circulate a notice to potential class members, and second in a more thoroughgoing way at a hearing in which potential claimants may appear and voice any objections that they may have.

Potential class members receiving the notice of the proposed settlement may be given an opportunity to forward written objections or to appear at the hearing and express their objections at that time. In addition, lawyers who may have wanted to serve as class counsel may intervene to object, and so too may consumer and other public organizations concerned with the welfare of groups such as those likely to fall within the plaintiff class.

These objectors serve a valuable, if imperfect means of assisting the court in determining whether the settlement is fair, reasonable, and adequate. The intervenors are not in the same position as counsel to appreciate all the details of the negotiations because they have not been parties to the settlement negotiations, but they may be more familiar with the various considerations and options than the court, and they will be able to raise issues that might otherwise be missed. Without them, the court has only the submissions made by class counsel whose independent judgment of the settlement may be affected a keen interest in obtaining approval for it so as to collect its fee. While the court is not in a position to re-write the agreement, if serious concerns emerge, counsel may be required to reappear on another occasion with a fresh proposal for consideration.

Where class certification and approval of a settlement are sought at the same time, particular vigilance is required on the part of the court. This is because there is a concern that defendant's counsel might have chosen the class counsel with whom it would present the settlement offer to the court on the basis of the offer counsel was prepared to accept. The prospect of choosing class counsel willing to accept the lowest offer as the counsel with whom the defendant chooses to appear is described as a "reverse auction." This situation can be avoided only through the most diligent of review on the part of the Court.

In reviewing the proposed settlement, the court will consider factors such as the likelihood of recovery, or likelihood of success; the amount and nature of discovery evidence; the settlement terms and conditions; the recommendation and experience of counsel; the future expense and likely duration of litigation; the recommendation of neutral parties if any; the number of objectors and nature of objections; and the presence of good faith and the absence of collusion.[10]

The court will bear in mind that "it is not the court's function to substitute its judgment for that of the parties who negotiate the settlement. Nor is it the court's function to litigate the merits of the action. [However,] [...] it is not the function of the court [to] simply rubber-stamp the proposal." In recognizing that "settlements are by their very nature

[10] *Dabbs v. Sun Life, Assurance Company of Canada* [1998] O.J. No. 1598 (Gen. Div.).

compromises, which need not and usually do not satisfy every single concern of all parties affected. Acceptable settlements may fall within a broad range of upper and lower limits."[11]

For all the reasons discussed, the fees paid to class counsel will also be an important feature of the settlement process, both in terms of providing a practical incentive to class counsel to resolve the matter, and as an important issue in assessing the fairness of the outcome for the class.[12] In some settlements described as "common fund" settlements, the defendants offer a global sum to cover all of these expenses, with the costs of notice, settlement administration and the costs of the litigation being deducted from the total before the remainder is distributed to the members of the class. In other situations, the defendant offers to pay the claims of class members who come forward and, separately, the other associated expenses including costs up to an agreed amount.

In some cases, the class counsel will seek a percentage of the settlement, either of the common fund, or of the estimated total value of the claims made, while in other cases, counsel will seek an amount based on the time spent on the matter augmented by a multiplier reflecting the risk involved in the matter and the result obtained. Determining a reasonable award of fees for class counsel may be complicated by the involvement of many counsel representing different plaintiff groups and the challenge of ascertaining the work done in reaching a negotiated result.

In theory, counsel fees may be approved in the same hearing as the settlement itself or they may be approved at a separate subsequent hearing. However, addressing the fees in the course of the settlement hearing itself may give rise to concerns that the fees that class counsel hope will be approved by the court have an impact on the nature of the settlement that class counsel is prepared to recommend.

In this regard, the submissions on costs may place defendants' counsel in an awkward position vis-à-vis their duty to their client as well. While it may be in their clients' interest to resist the amount sought in fees by class counsel, it was in their clients' interest during the negotiations to encourage class counsel to support the settlement proposal that they had negotiated. Accordingly, defendants' counsel sometimes agree not to contest class counsel's submissions on costs and disbursements up to an agreed amount.

III. The Res Judicata Effect of Class Action Judgments

1. *Legislation*

The legislation in the various parts of Canada provides that a judgment on common issues of a class or subclass shall set out the common issues, name or describe the class or subclass members; state the nature of the claims or defences asserted on behalf of the class or subclass; and specify the relief granted.[13]

A judgment on common issues binds every class member who has not opted out of the class, but only to the extent of the common issues, the claims or defences, and the relief sought that are set out in the certification order. The judgment does not bind a person who has opted out of the class, or a party to the class proceeding in any subsequent proceeding involving that person.[14]

[11] *Sparling v. Southam Inc.* (1988), 66 O.R. (2d) 225 (H.C.J.) at 230-231.

[12] *Parsons v. Canadian Red Cross Society* [2001] O.J. No. 214 (C.A.), leave to appeal refused, [2001] S.C.C.A. No. 27; *Endean v. British Columbia (Attorney General)* [2000] B.C.J. No. 2330 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 27; and *Alfresh Beverages Canada Corp. v. Archer Daniels Midland Company* [2001] O.J. No. 6028 (S.C.J.).

[13] Ontario *CPA*, s. 27; British Columbia *CPA*, s. 25; Newfoundland and Labrador *CAA*, s. 25; Saskatchewan *CAA*, s. 27; Alberta *CAA*, s. 26.

[14] Ontario *CPA*, s. 27; British Columbia *CPA*, s. 26; Newfoundland and Labrador *CAA*, s. 26; Saskatchewan *CAA*, s. 28; Alberta *CAA*, s. 27.

A party may appeal from an order refusing to certify a proceeding and from an order decertifying a proceeding. A party may appeal from an order certifying a class proceeding,[15] but in Ontario, this may be done only with leave.

A party may appeal from a judgment on the common issues[16] and from orders concerning the assessment of damages, other than those relating to individual assessments where these have formed part of the outcome of the class proceeding. If a representative party does not appeal or seek leave to appeal any class member may seek leave to act as the representative for the purposes of making an appeal.

2. *Current Issues*

The main debates concerning the *res judicata* effects of class action judgments have arisen from the implications of this effect for the proceeding at the time of certification. This is because courts will stay any related proceedings once a class action is certified.[17] In anticipation of this, counsel in Canada have often established arrangements to cooperate in the certification and prosecution or settlement of the claim. Where this does not occur, the court must choose between counsel in a "carriage motion." This has given rise to considerable debate over how the court should evaluate on a competitive basis the capacity of each team of lawyers to represent the class and, in one case, over the weight to be given to the representative plaintiff's views.[18]

A further issue has arisen with respect to "bar" orders. Class actions are often commenced against more than one defendant, for example, where there are several manufacturers of a product that is found to be defective, or several parties involved in the manufacture and distribution of the product. Class counsel may reach settlements with the defendants at different times, and they may wish to seek approval for the settlement of the matter as against some but not all defendants. The settling defendants will want an order protecting them from further involvement in the suit by way of additional liability either to the claimants or to other defendants. Bar orders balance the rights of settling defendants and other parties to the suit. Their use and operation have been subject to debate, but they are now an accepted part of class actions practice.[19]

IV. Administration and Distribution of Awards

1. *Legislation*

Under the legislation, the court may direct any means of distribution of amounts that it considers appropriate, including ordering that the defendant or some other person distribute directly to class members the money to which class member is entitled by any means authorized by the court, including abatement and credit. Alternatively, the court may direct that the defendant pay into court or some other appropriate depository the total amount awarded to the class until further order of the court. In deciding how to distribute the award, the court must consider whether distribution by the defendant is the most practical way for any reason, including the fact that the amount of monetary relief to which each class member is entitled can be determined from the records of the defendant.

[15] Ontario *CPA*, s. 30; British Columbia *CPA*, s. 36; Newfoundland and Labrador *CAA*, s. 36; Saskatchewan *CAA*, s. 39; Manitoba *CPA*, s. 36; Alberta *CAA*, s. 36.

[16] Ontario *CPA*, s. 30; British Columbia *CPA*, s. 36; Newfoundland and Labrador *CAA*, s. 36; Saskatchewan *CAA*, s. 30; Alberta *CAA*, s. 36.

[17] Ontario *CPA*, s. 13; British Columbia *CPA*, s. 13; Newfoundland and Labrador *CAA*, s. 14; Saskatchewan *CAA*, s. 15; Manitoba *CPA*, s. 13.

[18] *Fantl v. Transamerica* [2008] O.J. No. 1536 (S.C.J.); *Richard v. British Columbia* [2004] B.C.J. No. 1202 (C.A.)

[19] *Ontario New Home Warranty Program v. Chevron Chemical Co.* [1999] O.J. No. 2245 (S.C.J.); *Gariepy v. Shell Oil Co.* [2002] O.J. No. 4022 (S.C.J.), leave to appeal denied [2004] O.J. No. 5309 (Div. Ct.).

Where appropriate, the Court may appoint a Claims Administrator to assist in the evaluation of claims and the management of the process. In addition, the Court may appoint individuals to mediate or arbitrate claims. These individuals are usually compensated from the proceeds of the settlement or by the defendant. While the Court may delegate significant authority to them in dealing with individual claims, their work will be subject to review by the Court.[20]

The court may also order that all or a part of an award that has not been distributed within a time set by the court be applied in any manner that may reasonably be expected to benefit class members, even where the order does not provide for monetary relief to individual class members, if the court is satisfied that a reasonable number of class members who would not otherwise receive monetary relief would benefit from the order. The court can make such an order whether or not all class members can be identified or all of their shares can be exactly determined. It can make such an order even if the order would benefit persons who are not class members or persons who may otherwise receive monetary relief as a result of the class proceeding.

The court is required to supervise the execution of judgments and the distribution of awards and may stay the whole or any part of an execution or distribution for a reasonable period on such terms as it considers appropriate. The court may order awards to be paid in lump sums or in instalments and, where a person is administering the distribution of the award, the court may order the costs of this distribution to be paid out of the proceeds of the award. Unless the court awards otherwise, any part of an award that remains unclaimed or undistributed after the period determined by the court will revert to the person against whom the award was made.

In principle, the remedies available in class proceedings are the same as those available in ordinary litigation, including declaratory and injunctive relief. However, some additional remedies are appropriate because the matter is a class action. For example, where the costs of identifying and distributing the award to individual claimants infeasible given the amounts involved, the courts may order *cy-près* distribution of all or part of the award. The court has considerable discretion in approving the recommendations of counsel concerning the appropriate recipients of such awards. In principle such awards should benefit the class indirectly even if they fail to do so directly.[21]

2. *Current Issues*

A range of issues has been considered in recent years in respect of the administration of claims and distribution of awards. In general, Canadian courts have been aware of controversies that have arisen in this area in the United States and they have sought to learn from them. For example, coupon settlements, *i.e.*, where claimants receive discounts on the purchase of future goods and services from defendants have been given careful scrutiny, because these kinds of settlements may fail to compensate claimants adequately and may serve as a reward to defendants by encouraging future sales rather than as a sanction against them for their wrongdoing.[22]

[20] *Nantais v. Telectronics Proprietary (Canada) Ltd.* [1995] O.J. No. 2592, 25 O.R. (3d) 331 (Gen. Div.); leave to appeal refused [1995] O.J. No. 3069, 25 O.R. (3d) 331 (Div. Ct.), at p. 347 O.R.; *Godi v. Toronto Transit Commission*, unreported (September 20, 1996), Toronto 95-CU-89529 (Ont. Gen. Div.); *Mangan v. Inco Ltd.* [1996] O.J. No. 2655, 30 O.R. (3d) 90 (Gen. Div.); *Dabbs v. Sun Life Assurance Co. of Canada* [1998] O.J. No. 2811 (Gen. Div.), appeal quashed [1998] O.J. No. 3622, leave to appeal refused [1998] S.C.C.A. No. 372; *Ernewein v. Bausch & Lomb Canada Inc.* [1997] B.C.J. No. 3175 (S.C.).

[21] *Sutherland v. Boots Pharmaceutical PLC* [2002] O.J. No. 1361. See also *Alfresh Beverages Canada Corp. v. Hoechst AG* [2002] O.J. No. 79 (S.C.J.). See also *Currie v. McDonald's Restaurants of Canada Ltd.* [2006] O.J. No. 813 (S.C.J.) and *Gilbert v. Canadian Imperial Bank of Commerce* [2004] O.J. No. 4260 (S.C.J.).

[22] *Gariepy v. Shell Oil Co.* [2002] O.J. No. 4022 (S.C.J.), leave to appeal denied [2004] O.J. No. 5309 (Div. Ct.).

Similarly, there have been debates about the propriety of *cy-près* awards and the identification of the beneficiaries.[23]

V. Law Reform Projects

While there are no major law reform projects underway directed at settlement approval, res judicata and claims administration, *cy-près* awards, *per se*, two recent projects have a bearing on the these aspects of class actions. First, in 2011, the American Bar Association adopted as best practices the Protocol on Court-to-Court Communications in Canada-U.S. Cross-Border Class Actions and Notice Protocol: Coordinating Notice(s) to the Class(es) in Multijurisdictional Class Proceedings.[24] These protocols will have important implications for the approval of settlements and the management of claims administration. Protocols developed by a task force of the Canadian Bar Association with a similar purpose, were proposed in 2011.[25]

[23] *Cassano v. Toronto-Dominion Bank* [2007] O.J. No. 4406 (C.A.).

[24] Http://www.abanow.org/wordpress/wp-content/files_flutter/1312826936101c.pdf, available at http://www.cba.org/cba/resolutions/pdf/11-03-A-bckd.pdf.

[25] Canadian Bar Association National Task Force on Class Actions, available at http://www.cba.org/CBA/ClassActionsTaskForce/Main.