Class Actions: Bordering on Insanity
Inter-Provincial & Inter-National Aspects of Class Actions

Presented by
Association of Corporate Counsel, Ontario Chapter
and
McCarthy Tétrault LLP

MINUTES

Participants:

Keynote Speaker:
The Hon. Mr. Justice Maurice Cullity, Superior Court of Justice

Panel:
The Hon. James Farley, Q.C., Senior Counsel, McCarthy Tétrault LLP
James D. Gage, Partner, McCarthy Tétrault LLP
Daniel J. Kramer, Partner, Paul, Weiss (New York)
F. Paul Morrison, Partner, McCarthy Tétrault LLP
Jonathan C. Lisus, Partner, McCarthy Tétrault LLP
Shaun Finn, Associate, McCarthy Tétrault LLP (Montréal)

Co-Chairs:
Carla Swansburg, Senior Counsel, RBC Law Group; Member, ACC Litigation Committee
Michael E. Barrack, Partner, McCarthy Tétrault LLP

Introduction:

- Welcome on behalf of the ACC by Sanjeev Dhawan.
- Introduction to program participants by Carla Swansburg and Michael Barrack.

Keynote Speech by the Hon. Justice Maurice Cullity:

- Traditionally, class counsel and defence counsel (as opposed to the courts) have raised and dealt with issues arising from the involvement of multiple jurisdictions.

- There has not been a great deal of consultation and coordination between judges. However, what there has been has proven very useful.

- In class proceedings, because of wording of legislation there is a built in "bias" against defendants and in favour of plaintiffs.

- The bias arises in part from the view that class proceedings are intended to provide access to justice.

- The contrary view is that class actions essentially amount to "legalized blackmail" – a view which is overstated.

- Very few class actions go to trial. Most class actions are settled, particularly if they are certified. When settled, the settlement amount generally bears no relation to the initial amount claimed on behalf of the class.

- The following are factors which encourage settlement:

    1. the amounts claimed are generally very large;

    2. it is generally possible to settle for a much smaller amount and to get a binding release;

    3. there are significant legal costs and demands placed on business resources if litigation proceeds.

- The inevitability of settlements tends to undermine the class action process and increase the bias in favour of the plaintiffs. This can lead to settlement of unmeritorious claims.

- Plaintiffs know that once the action is certified, they have a significant advantage.

- As a result, although the certification does not involve the merits and is procedural in form, its effects are substantive.

- If the defendant believes the claims are unmeritorious, it is entitled to defend on that basis at the certification stage. The test is whether it is plain and obvious that the claim cannot succeed even if all of the facts alleged are assumed to be true. This tests creates

a very low threshold for the plaintiffs and it is generally possible to plead around problems.

- The bias in favour of plaintiffs is further increased because motions judges in Ontario have been instructed not to decide difficult questions of law (if the issue involves a developing area of law, it is generally to be left to be tried on a full factual record).

- This "new liberal approach to certification" in Ontario has been rejected by courts of appeal in BC and Saskatchewan.

- Given the similar legislation and the diverging provincial Court of Appeal decisions, this issue may be addressed by the Supreme Court of Canada.

Introduction by Michael Barrack to panel discussion:

- Increasingly, parallel class actions are being commenced in multiple Canadian provinces and in the US. One possible way of dealing with the challenges raised by multiple jurisdictions is to attempt to coordinate proceedings through the use of a protocol for court to court communications like that used in the insolvency context.

The Honourable James Farley, Q.C.:

- Courts have been communicating for many years informally through the receipt of decisions and formally by letters rogatory – but this is awkward, time consuming and prone to miscommunication.

- In the insolvency context, it is vital to deal with matters on an instantaneous basis.

- In the early 1990s, courts on a global basis started exploring the possibility of protocols between jurisdictions to coordinate proceedings but without the loss of jurisdiction or sovereignty.

- Ultimately, this resulted in the American Law Institute's *Guidelines Applicable to Court to Court Communications in Cross-Border Cases.*

- The *Guidelines* are flexible and can be adjusted to meet circumstances that arise.

- The *Guidelines* have now been adopted by the National Conference of Bankruptcy Judges in the US, the Toronto Commercial List, the Supreme Court of British Columbia, and the Canadian Judicial Council (the latter body being composed of all the Chief Justices across Canada).

- The principles reflected in the *Guidelines* are also consistent with the activity encouraged by the Court of Appeals for the Third Circuit in *Stonington Partners v. Lernout & Haspie Speech Products* N.V., 310 F. 3d 118 (3rd Cir. 2002).

- Protocols are now becoming routine in insolvency matters and are working very well in that context.

- Although it will take time, protocols are also likely to be very useful in the class actions context.

- When considering whether to implement a protocol, courts should take the position of the parties into account. However, courts can adopt a protocol based on their own inherent jurisdiction.

    - See, for example, *Re Nakash* where the debtor was vehemently opposed to the approval of the protocol – US Bankruptcy Court SDNY Case No. 94B44846 (May 23, 1996) and District Court of Jerusalem Case No. 1595187 (May 23, 1996).

Jamie Gage:

- These days, almost every significant insolvency file has a multi-jurisdictional aspect.

- Protocols, governing cross-border aspects of the file, have been used in a wide variety of insolvency matters.

- Protocols generally involve the following elements:

    (1) a statement of the purposes of the Protocol

    (2) a statement of each court's independence and jurisdiction over its own case

    (3) provisions regarding cooperation, including a direction to key stakeholders to cooperate and to coordinate proceedings and a statement that each court will use its best efforts to coordinate and defer to decisions of the other court

    (4) provisions regarding communication between courts including adoption of the ALI Guidelines, and provision for joint hearings including dialogue between courts to see if consistent decisions can be achieved

- The Protocols also address specific matters which arise on a case by case basis (for example, they may set out the matters to be dealt with at joint hearings or a process to govern litigation of particular claims).

- Further information regarding protocols, as well as many sample protocols, can be found at www.iiiglobal.org.

Paul Morrison:

- The types of claims that are generally pursued as class actions are difficult to confine within borders. As a result, they often involve multiple jurisdictions in Canada and the US.

- Plaintiffs' counsel in Canada and the US routinely communicate and coordinate efforts.

- It is absolutely essential that defence counsel also communicate and coordinate proceedings in multiple jurisdictions.

- Courts have certified classes comprised of residents in multiple provinces. However, given that class legislation is provincial, this gives rise to a constitutional issue that has not yet being squarely addressed by the courts, i.e. whether it is possible to bind people in other provinces who are not before the court in question.

- The constitutional issue has not been squarely addressed because much of the Canadian jurisprudence developed while there were only three class action jurisdictions (BC, Ontario and Québec).

- Historically, in the settlement context, this issue was addressed by certifying a proposed class for settlement purposes that included all persons in Canada except residents of BC and Québec and then brining separate proceedings in BC and Québec to deal with those jurisdictions.

- The constitutional issue has now become more significant because of the introduction of class legislation in other provinces. We now see very similar cases brought in all jurisdictions. This duplication of proceedings can be extremely wasteful.

Shaun Finn:

- The "bias" in favour of the plaintiffs is more pronounced in Québec.

- In Québec, petitioners do not have to file affidavits in support of certification so there is no automatic right to cross-examine them.

- In addition, the defence has no right to submit written materials with respect to certification (although the defendant may get leave to file materials to augment the oral argument).

- In addition, only the plaintiff has the right to appeal the certification decision.

- Essentially, in Québec, certification is a filtering mechanism to eliminate frivolous cases. As a result, certification is much more likely and this increases the number of settlements.

- It is now generally very easy for plaintiffs to meet the low certification threshold. This often results in settlements even where there is no meritorious claim.

- However, recently there has been a movement towards granting more and more defendants the right to file affidavits and evidence in opposition to certification and to examine petitioners (see *Bouchard v. Agropur Coopérative*, 2006 QCCA 1342 (CanLII)).

- The following factors make it difficult to coordinate parallel proceedings brought in Québec:

    1. Procedural differences, particularly with respect to certification;
    2. Significant differences in the substantive law in Québec; and
    3. Courts in Québec are jealous of their jurisdiction, particularly because they see themselves as guardians of the civil law.

Dan Kramer:

- The US has a long standing and active history with class actions. Over the last ten years, there has been an average of 150 to 300 new securities class actions commenced each year. Much of this is "bet your business" litigation.

- Historically, there was a perception that many of the securities class actions commenced in the US were meritless strike suits.

- In 1995, Congress implemented special rules to address these concerns. These rules included an early test for validity prior to discovery, and raised the standard required of the plaintiffs' pleading.

    - The US Supreme Court has recently increased this pleading standard even further.

- Coordination of parallel proceedings in Canada and the US is essential.

- In the US, where there are multiple cases in different jurisdictions, a party may move before the "Multi District Litigation Panel" to consolidate the proceedings. Where consolidation occurs, one judge is appointed for all pre-trial purposes. In addition, one lead plaintiffs' counsel is appointed for all of the proceedings and a consolidated complaint must be filed. As a result, the defendant is required to fight in only one place, can communicate with only one plaintiffs' counsel, and is only required to attack one pleading. If that pleading is successfully attacked (as it was in the *CP Ships* class action), all of the underlined cases are dismissed and there is only one appeal.

- The *Hollinger* proceedings involved multiple jurisdictions in Canada and in the US. All of the parties had an interest in determining whether a global settlement could be reached. There is now a settlement agreement in place which involves a $30,000,000 settlement

from insurance proceeds. The intention is to put all of the cases on hold while efforts are made to get approval of the insurance settlement.

- The legal systems in Canada and the US are very different. It is critical that defence counsel coordinate their efforts and understand the nuances in the various jurisdictions.

Jonathan Lisus:

- Class actions amplify the usual litigation problems.

- The following are suggestions to mitigate and manage those problems:

1. Review your policies and procedures:

   - Are any of them relevant to litigation?
   - For example, do you have a litigation hold procedure for preservation of documents and electronic data?
   - Consider whether the policies and procedures are necessary, and, if so, what they should say.

2. Consider implementing an e-mail policy:

   - Employees need to be educated regarding the potentials perils of e-mail (individuals often start musing in the face of litigation and this frequently occurs in e-mails – the effect can be devastating on the litigation);
   - E-mail should be used cautiously, if at all, after a litigation triggering event;
   - Consideration should be given to protecting privilege (for example, should in-house counsel or external counsel be copied on communications?).

3. All key and court documents should be reviewed:

   - For example, do they contain arbitration clause?
   - Do the governing law clauses make sense?
   - Are there termination provisions that make sense?

4. Consider how will you respond to litigation before litigation is commenced:

   - For example, to put a procedure in place to identify key individuals, documents and data.

5. Consider to use of arbitration clauses:

   - Despite amendments to the *Consumer Protection Act*, there may still be room to use arbitration clauses to mitigate the risk of class actions (see *Dell Computer Corp. v. Union des Consommateurs*, 2007 SCC 34 and *Rogers Wireless Inc. v. Muroff,* 2007 SCC 35).

6. When faced with the potential for class action litigation, consider whether there is a "preferable procedure" that can be proposed (i.e., a good alternate process that can be presented to the court). Consider also whether there may be some advantage in bringing an early application to the court framed in an alternate preferable procedure (i.e., a mediation mechanism).