Class Actions in Canada

The Promise and Reality of Access to Justice

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Contents

Introduction

The justice system and all of its actors have been preoccupied with the notion of "access to justice" for decades. In all parts of Canada, access to justice is described as the overarching issue in civil justice. It is a dominant theme in law reform initiatives and government programs. It has been posited as a human right, and confirmed as a constitutional right. In its more limited conception, it refers fundamentally to the range of institutional arrangements that enable people to access the justice system for the vindication of their rights. More broadly, it refers to participation in every institution "where law is debated, created, found, organized, administered, interpreted and applied."[1] It has generated a tremendous body of legal literature, yet its content remains fundamentally contested.[2] Few would deny the importance of access to justice as a foundational principle in a liberal democracy, but how such a principle manifests itself "on the ground" elicits anything but unanimity.

In the cacophony of calls for better access to justice, a persistent claim to improved access to justice emerges: class actions, litigation commenced by one or two plaintiffs on behalf of a very large group of similarly situated individuals, are consistently touted as overcoming barriers to justice. In every province except Prince Edward Island, legislatures have passed class action statutes, empowering judges with specialized case management powers and authorizing private litigants to commence actions on behalf of those who may not have sought access to the courts, let alone been denied entry. Whatever the continuing deficits in the wider access to justice project, class actions, we are told, are the success story.

Or are they? Although every certification decision authorizing a lawsuit to proceed as a class action invokes the access to justice objective as one of its central rationales, few court decisions, and even fewer scholars, explore what is meant by "justice" or what constitutes "access." If access to justice is the central preoccupation of our civil justice system, and if class actions are thought to be a primary mechanism for achieving it, then understanding access to justice in the class action context, and measuring the extent to which it has been achieved, is of more than mere academic interest. Policymakers and consumer groups, judges and lawyers, business leaders and community activists – all have a stake in the class action enterprise. How do class actions advance justice? What is a just outcome? Are we primarily concerned with compensating large groups of people for some portion of their economic losses, or do we also accept that class actions exercise a regulatory function? However we define justice, how do we measure it, and can we create incentives to harness the power of the class action in furtherance of broader social justice goals?

This book explores these and other questions. Class actions have taken on enormous importance in Canadian civil justice systems. They command ever-growing attention from our appellate courts, and dozens of lower court decisions are released weekly across the country. Blogs and whole sections of the business pages of our national newspapers are devoted to them. The Law Commission of Ontario has undertaken a multi-year project examining several facets of class action litigation in that province. As we mark the twenty-fifth anniversary of the passage of Ontario's *Class Proceedings Act, 1992*,[3] and over fifteen years after the Supreme Court of Canada's pivotal trilogy of class action decisions,[4] the time has come to revisit and reappraise our class action regime.

Class Actions in Canada: An Access to Justice Fix or Fiction?

In 1978, Quebec enacted Canada's first class action legislative regime.[5] Ontario followed suit in 1993, British Columbia three years later.[6] Since then, the remaining provinces (except Prince Edward Island) have passed class action statutes, as has the federal government. Virtually identical in terms of the frameworks they establish, the class action statutes are all aimed at improving access to the courts for redress of mass wrongs. At the

same time, they proffer a very particular concept of access to justice. The promise of class action legislation rests singularly on the potential for purely procedural tools to achieve greater justice by levelling the playing field between consumers and corporations, between citizens and government, between harmed individuals and alleged wrongdoers. In doing so, class actions are expected not only to remedy injuries that would otherwise go unaddressed but also to exercise a public law function by encouraging a greater degree of compliance with substantive law. As one commentator put it, the class action is "[m]ore than a tool of convenience. It is entrusted with an explicitly social mission: to protect consumer rights, ensure access to justice, and sanction illicit institutional behaviour."[7]

Not all commentators agree that such lofty goals are achievable, or even appropriate. Detractors, from business representatives to economists to access to justice scholars, have sounded the alarm that with the advent of class actions, Canada is inheriting the United States' litigious legacy and promoting a form of "litigation blackmail."[8] In the popular press, class action litigation is sometimes seen as promoting greed among class counsel while providing little for the class members it is meant to serve.

Depending on whom you ask, therefore, class actions are either with the angels or with the devil, as one Ontario judge has put it. Plaintiffs' lawyers are either the courageous defenders of the rule of law or rapacious ambulance chasers. Separating the wheat from the chaff in such rhetoric is difficult. Like most jurisdictions all over the world, Canada lacks empirical data by which to measure any of the pressing questions that critics of class proceedings routinely raise. There is also a dearth of scholarly work in Canada regarding the ability of class proceedings to achieve not only access to a just procedure – the minimum aim of a procedural statute – but also access to a just result. This book aims to fill that void by providing qualitative and small-scale quantitative data on how class actions function on the ground, focusing primarily on Ontario but with considerations of the rest of English-speaking Canada. It also strives to move beyond the rules and precedents by offering a critical and principled appraisal of class action law; at this juncture in the development of the class action, it is vital to assess judicial approaches to key elements of this form of litigation, and to determine whether the reality of the class action device matches its promise.

Public Goals by Private Means?

Canadian courts repeatedly state that class action statutes are purely procedural in nature: they neither create substantive rights nor revise existing law. To be sure, a cause of action that is unsustainable in a suit launched by an individual plaintiff is not made tenable dressed up as a class proceeding. Still, it is disingenuous to maintain that there is nothing beyond the procedural in class action litigation. It is worth remembering that Ian Scott, the attorney general of Ontario who oversaw the drafting of the first class proceedings statute in English-speaking Canada, attributed a regulatory function to class proceedings. As described in his memoirs years later, Scott viewed class actions as a "cost-effective way to promote private enforcement and thereby to take some of the pressure off enforcement by the budget-strained government."[9]

At the same time, class actions are also unquestionably entrepreneurial in nature, and for some class counsel represent massive profit-generating devices. By and large, Canadian judges have accepted that our class action regime can function only if there are risk-tolerant lawyers willing to take on a complex piece of litigation on a contingency fee basis. Nevertheless, Ontario's former chief justice has reminded us that class actions do not exist *for the purpose* of generating profits for lawyers.[10] The $8 million-a-year class action lawyer is not necessarily a policy victory.[11] More litigation and seven-figure incomes for class action lawyers tell us very little about the state of access to justice in Canada. That the class action regime is being utilized and claims that would not be viable individually are now being litigated is neither normatively good nor bad. There is no doubt that class actions enable litigation that would otherwise not be brought. The much more difficult question is whether such litigation is socially useful. That is, does class action litigation (sometimes, often, or ever) adequately compensate people who have been harmed or otherwise wronged? In addition to such compensation, or in its place, does this litigation incentivize corporations and other defendants to reform illegal practices, fix faulty products, or act with due care?

There is a vigorous debate taking place in the European Union that has largely escaped Canadian attention. There, policymakers and academics argue about the capacity for privately initiated enforcement mechanisms to achieve public policy goals. Should the enforcement of antitrust,

environmental, consumer, and other laws be privatized, wholly or in part, with class action lawyers (and at least notionally their clients) acting as private attorneys general? Some argue that litigation is an inefficient, expensive method of enforcing laws, especially consumer protection legislation. It is said that a regulatory or administrative scheme is far better suited to providing redress and encouraging compliance. Others point out that government compensation schemes and regulatory bodies are too often understaffed and under-resourced, or are captured by industry interests, and therefore provide less than robust enforcement of consumer, environmental, and other laws. While each camp proffers empirical data to support its position, it is perhaps the philosophical divide between them that makes rapprochement most unlikely.

In Canada, our courts have engaged the public/private debate in the context of class actions only sporadically. Not long ago, the Ontario Court of Appeal and the Supreme Court of Canada rejected an argument that a year-long Ontario Securities Commission investigation and enforcement proceeding, pursuant to which aggrieved shareholders were compensated for roughly 20 percent of their losses, provided adequate access to justice.[12] Although the regulatory proceeding had provided a measure of compensation and performed a deterrence function, both courts found that it was not preferable to a class action because it was principally protective and preventative, not compensatory, in nature, and because it lacked transparency and participatory rights for affected investors. According to this line of thinking, there is no public/private divide: regulatory bodies like the Securities Commission are designed to work in conjunction with civil litigation to ensure that public companies and mutual fund managers act in the investing public's interest.[13] Private enforcement mechanisms, therefore, are just as important as those of public enforcement entities in regulating the behaviour of, for example, capital market participants.

Nevertheless, there is an uneasy coexistence between private action and public goals. Despite its entrepreneurial nature, a class action is not a purely private action because it is underwritten by the state. Legislatures have created a specialized regime for the efficient representation of more clients than a lawyer could ever serve individually. By obviating the need to negotiate individual retainers with class members, and by providing for a court-enforced first charge on any settlement or judgment proceeds,

the class action regime reduces transaction costs, eliminates most collection efforts, and thereby facilitates entrepreneurial lawyering. In addition, the state pays judges and provides courtrooms as part of this enterprise. In these ways, the state – or, more accurately, the public purse – underwrites class action lawyers' business. This is not legal aid on a collective litigation scale; the system is designed specifically to operate on a profit-generating basis.

It could be argued that the quid pro quo for this state-sponsored entrepreneurial activity is that the class action fulfills its public aims. What are these public goals? At its most fundamental level, the goal of any litigation is to provide a peaceful resolution of a dispute. After an injury or loss, litigation is a mechanism for assessing fault and delivering compensation. Beyond conflict resolution, litigation also operates to shape the behaviour of governments and market participants. Some attribute an even higher function to litigation: to effect social change.

All of these assumptions, of course, have long been the topic of vigorous, even existential debate. How well law or litigation serves compensatory, regulatory, or democratic ends is the central preoccupation of whole bodies of jurisprudence, including law and society literature, yet few have asked how well class actions fulfill such goals in Canada.[14]

Organization of This Book

In this book, I aim to take stock of class actions in Canada. In light of the persistent controversy surrounding class actions in the United States and an increasingly heated debate about the wisdom of adopting collective action legislation in various Asian, European, and Latin American jurisdictions, a rigorous assessment of the outcomes being produced by class actions in Canada is timely. I focus my analysis by reference to access to justice, one of the three pillars of class actions. Although the effectiveness of the class action in achieving its two other stated objectives – judicial economy and behaviour modification – is worthy of analysis,[15] access to justice is a particularly important normative framework within which to evaluate class actions, in no small part because of the enduring importance of the access to justice debate within our system of civil justice. Although ubiquitous, the term requires closer examination. What do judges and

lawyers mean when they talk about "access to justice"? What specific institutional and normative goals are class actions thought to achieve? And to what extent does the reality of the Canadian class action experience measure up to its ambition?

To begin answering these questions, I explore both the dominant themes in the jurisprudence as they relate to access to justice concerns, and the practices of class counsel "on the ground." Chapters 1 and 2 describe the methodology used in my research and summarize two case studies and the results of a survey completed by twenty-one prominent members of the class action plaintiff bar. These chapters provide much-needed empirical context for the analysis of class actions found in the rest of the book. Chapter 3 probes the much-vaunted, and perhaps little-understood, concept of access to justice. It does this by reviewing access to justice literature to unearth the various conceptions of access to justice that may be significant to class proceedings, and proposes a "thick" concept of access to justice against which class action outcomes ought to be measured.

Successive chapters discuss four distinct components of a typical class action that engage specific access to justice concerns: case selection; settlement (including subsidiary issues of notice to the class and *cy-près* settlements); counsel fees; and costs.[16]

How proposed class actions are selected for prosecution is a little-explored question, but one that is fundamental to understanding who gets access to the class action device. Chapter 4 examines the criteria and methodologies used by class counsel to select prospective class actions, as reported in the survey results and qualitative interviews, and discusses the implications of these criteria for access to justice.

Chapter 5 examines the criteria used by courts to determine a fair outcome, and discusses the increasingly important issue of "take-up rates." The take-up rates reported by class counsel in the survey provide an important empirical foundation for this discussion. The chapter includes a survey of the kinds of notice programs approved by Ontario courts in recent cases and in the two case studies, and a discussion of whether, if access to justice is understood as access to legal information,[17] the current approach to notice fulfills the access to justice objective of the legislation. It also examines a particular kind of settlement that is prevalent in Canada:

awards that are distributed to charities rather than paid directly to compensate class members. Issues surrounding settlement, therefore, directly engage the question of the scope and nature of justice achieved.

Counsel fees, considered by some commentators as the "lightning rod in the controversy over damage class actions,"[18] are the focus of Chapter 6. The fees paid by class members for the legal services delivered by class counsel are important for understanding not only one aspect of the costs of justice in this context but also which incentives are created for counsel to pursue this form of litigation. Here, again, recent jurisprudence is critiqued, and scholarly literature on the topic in both Canada and the United States is explored for arguments and theories that illuminate the ways in which counsel fees are a critical feature of the access to justice goals of class proceedings.

Finally, Chapter 7 considers the issue of adverse costs awards, a reality peculiar to the Canadian context and a few other jurisdictions but foreign to American litigation, although at least one US state has considered adopting the same model.[19] The risks and repercussions of adverse costs awards are standard barriers to litigation generally; in class actions, however, the consequences of the two-way costs regime have been hotly debated since class action legislation was first contemplated. Moreover, the recent emergence of commercial third-party litigation funders in Canadian class actions is an important phenomenon that merits meaningful exploration.

In each chapter, both doctrinal and empirical approaches are employed to explore the extent to which each element contributes to or detracts from the access to justice imperative. Specifically, the results of the survey and qualitative research are used to provide a contextualized discussion of the class action jurisprudence.

The Conclusion pulls together these discussions of various aspects of class actions and assesses how class actions measure up in terms of the access to justice framework developed throughout the book. In the end, I conclude that it is only on a narrow interpretation of the concept that one can say that class actions are generally meeting their access to justice goals. To be sure, hundreds of class actions have been launched, several dozen have gone to trial, and hundreds have settled, all on behalf of parties who would not otherwise have had the ability to litigate their claims. If access

to justice is access to a legal process, then class actions are a success story. I suggest that we can do better, however. Surely, there is more to redressing mass harm than the possibility of justice buried in a procedural statute. If we accept that access to justice is more than this, there is reason to be far more cautious in our enthusiasm about the state of collective action in Canada.

A review of the leading cases confirms that, with only a few exceptions, access to justice has come to be viewed in its most limited sense as "access to courts." This approach is at odds with the bulk of the scholarly literature on the subject, which views barriers to justice as more complex than limited financial resources. The definition of access to justice adopted in this book contemplates more than access to a court procedure. The term also evokes fundamental concepts such as procedural fairness, a transparent process, and substantive justice, by way of either meaningful compensation to class members or the exposure and curbing of unlawful behaviour.

Evaluating class actions using this metric is difficult because of the lack of reliable, detailed, and system-wide data.[20] It may be impossible to know with any precision whether the outcomes of Canadian class actions are just. As explored in this book, however, the very process for determining whether, for example, settlements are fair, is flawed. Moreover, there is a lack of information as to how class actions are operating on the ground. Very little is known about the rates of recovery in the class action regime. Analyzing take-up rates – a topic explored in Chapters 1 and 5 – is but one way of gauging the extent to which class members are participating in settlements or distributions of damage awards. Few statistics are available regarding the results achieved in class proceedings. Similarly, little is known about the kinds of cases class counsel are rejecting. Survey results on the criteria employed by class counsel in selecting and rejecting cases may help illuminate to whom access is being given; such qualitative information is but the beginning of an appreciation of the continuing barriers to justice for low- to middle-income Canadians who are denied access to the courts.

Ultimately, I aim to provide a contextualized approach to the evaluation of class proceedings, one in which the statutory and jurisprudential dimensions of class actions are considered, in addition to how class actions are actually conducted, financed, and settled, all geared towards better understanding the scope for class actions to improve access to justice.

While class actions are and should continue to be an important part of the Canadian civil justice system, the assumption that all class actions further access to justice is misplaced. Complacency should be replaced with vigilance. There is a need to monitor class actions, in terms of their conduct, oversight, and outcomes, in order to ensure that the power of the class proceeding mechanism is harnessed to promote access to justice in the fullest sense. It is a project in which judges, lawyers, academics, and public interest organizations each have a role to play. All are encouraged to think more critically about the access to justice goals they seek to serve when engaged in class action litigation.

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