

Class Action Settlements: 10th Anniversary Perspectives on the Canadian Experience*

In the first ten years of our experience with class actions (see Appendix A for a statistical summary), a reasonable number of actions have been commenced in B.C. and Ontario pursuant to the respective class proceedings legislation. However, less than 50% of the actions commenced have actually progressed to the certification stage and less than 20% have achieved settlement on a class basis.

“Class settlement” plays a significant role in explaining the commencement of actions, the advancement (or not) of actions, the percentage of certifications, and, of course, the relatively small number of class action trials. In this paper, we will explore these relationships. Since many Canadian class actions are parallel to U.S. class actions, we will also discuss the impact of the dichotomy between the U.S. and Canadian legal landscapes on class action settlements in Canada. As well, we will identify some of the important recent developments in the U.S. in relation to class action settlements.

1. Many actions filed “pursuant to *The Class Proceedings Act*” are never pursued as class actions.

There are at least three explanations relevant to the discussion of class action settlements:

- a. The class action is protective only
- b. The individual plaintiff settles without advancing the class action
- c. The defendant “end runs” the class action

*This paper was prepared by Jim MacMaster with assistance from Ward Branch and Chris Rhone, which assistance is gratefully appreciated. For a comprehensive list of class action settlements in Canada and a complete discussion of all the applicable legal principles see: Ward K Branch, *Class Actions in Canada* (Aurora: Canada Law Book, 1996, (looseleaf, updated 2004), chapter 16.

We will review each in turn.

a. The class action is protective only

Many Canadian class actions are filed solely for the purpose of protecting the rights of the class (and the turf of the class counsel) pending the anticipated settlement of parallel litigation in the United States. This phenomenon is both good and bad.

The timing and coordination of parallel litigation in the United States and Canada is a topic for another day and panel. However, in relation to the topic of class action settlements, there are some observations to be made.

- Many Canadian class counsel are willing to file, but not advance, a “protective class action” unless a “settlement class” is approved in the United States.
- However, many lawyers and nearly all class members, upon hearing about the commencement of a Canadian class action assume the class action will be advanced diligently.
- The existence of a U.S. “settlement class” is no guarantee that a similar settlement will be made available to Canadian class members.
- The time delay waiting for a U.S. “settlement class” to materialize may be very prejudicial to the Canadian class if there is no parallel settlement in Canada and the original lawyers commencing the action then abandon the class action.

While there is a certain common sense to the proposition that, whenever possible, Canadian lawyers and class representatives should let their U.S. counterparts do the “heavy lifting” in proving out the merits of a claim and in negotiating the settlement, it is a strategy fraught with difficulty and uncertainty for the Canadian participants.

In all cases, Canadian lawyers and class representatives should carefully evaluate whether the better strategy is to be proactive in diligently advancing the case in Canada, notwithstanding what is occurring in the U.S.

As well, Canadian consumers and lawyers should be prepared to ask the hard questions of Canadian plaintiffs and counsel who commence actions which purport to be class actions in order to determine if the action is simply “protective”. There are situations where the class action may be filed but its future is genuinely uncertain because of concerns for the size of the class, the suitability of a class proceeding, the merits, or the solvency of the defendant. In these situations, others who might be contemplating a similar class action, should not hesitate to demand confirmation of the efforts being made to address these concerns and disclosure of the level of commitment to advance the action as a class action.

If an action was filed for protective reasons only, then serious consideration should be given to filing competing class actions. Firstly, a purely protective approach (which is almost entirely reactive) may not be in the best interests of the Canadian class members. Secondly, if the counsel who are “first in time” have no intention of advancing the litigation in the absence of a U.S. settlement class, that is a very good reason for disturbing their position. The practice of filing writs as turf protection should be discouraged and actively opposed.

Since a number of actions commenced pursuant to the class proceedings legislation may just be “protective actions”, should the court be more active in supervising all actions which purport to be class actions?

Presently, in B.C. at least, when an action is filed pursuant to the *Class Proceedings Act*, the court pays no attention to it at all until one of the parties requests a case management judge for the purpose of moving the matter forward either with the motion for certification or other interlocutory or final motions. In individual actions, if an action lies dormant for months or years, presumably the client knows and understands why that is occurring. However, when a class action is filed, if it receives any publicity (which most

do whether intended or not), then many unrepresented potential class members will learn of its existence. Do these potential class members take any comfort from the news of this class action? Do they rely on class counsel and the class representatives to advance the class action? Should the mere existence of an action which signals an intention to represent the interests of unrepresented people obligate the court to supervise the action in a proactive manner? With the court's approval, the action might still be held in abeyance, but at least someone will be watching out for the interests of the unrepresented class members.

The Ontario rule which requires the approval of the court before any action which purports to be a class action may be dismissed, is only a partial answer. The court is not in a position where it can compel the counsel to continue with the class action against counsel's wishes. However, where there was significant publicity attached to the initial filing of the action, there may be situations where it will be appropriate for the court to require the counsel to publish a notice of the discontinuance in an effort to alert the unrepresented class to the fact that the purported class action is not continuing. The approval requirement is not a complete answer because the court only becomes involved on termination when the parties actually seek a dismissal of the action. There is no protection for the unrepresented class at any earlier stage where the action simply remains in abeyance with the implicit consent of the plaintiff, plaintiff counsel and the defendant.

b. The individual plaintiff settles without advancing the class action

Settling the individual claim of the plaintiff may occur as a result of a defendant's initiative or it may simply be the right thing for the plaintiff to do once it becomes clear that the action is not suited for class treatment (the class is not large enough to justify the commitment, the class is not cohesive, the individual damages are large enough to justify individual actions, etc). Or, plaintiff counsel may determine that the strength of the merits is simply not sufficient to warrant the commitment to prosecute the action on a class basis.

As a defence tactic, assessing whether the plaintiff might be willing to settle the claim on an individual basis prior to a certification hearing should always be considered at an early stage. Obviously, if a settlement can be achieved on this basis, the defendant avoids more than just the usually substantial costs of defending a certification hearing. The defendant also avoids the risk of certification including the negative publicity associated with a notice program and the financial pressure produced by the aggregation effect of a class proceeding.

Offering to settle a claim on an individual basis also tends to divide the interest of class counsel and the plaintiff, in that the individual offer may be attractive to the plaintiff, but could never hope to satisfy class counsel's work in the matter. Sometimes, the offer will be coupled with a proposal to "make class counsel whole" by at least paying for time and disbursements incurred to date. However, once the plaintiff commits to settling the claim on an individual basis, class counsel may find themselves dealing with the recovery of fees and disbursements on that basis as well.

The class action legislation in the various provinces takes two distinct approaches to the role of the court in this situation. In B.C., Saskatchewan, Manitoba, and Newfoundland it is possible for a plaintiff to accept and implement a settlement on an individual basis without court approval. This is because the action does not become a class proceeding until certified as such; before that, it is treated like any other action. In Ontario and Quebec, it is necessary to seek court approval.

As an aside, in the United States, as of December 1, 2003, ambiguity on this point was addressed by amending the Federal Court Rule of Civil Procedure, Rule 23(1)(e) to make clear that court approval is required for a settlement or voluntary dismissal only if the class action is certified (Appendix C). It is quite interesting that in the context of a trend within the U.S. for increasing judicial oversight of class action settlements, the decision was taken to eliminate judicial review of settlements or dismissals prior to certification.

Court approval of the dismissal of a putative class action provides judicial oversight to ensure that class counsel and class representatives do not engage in, or succumb to,

abusive arrangements. The primary example of the exercise of the judicial discretion in this context remains *Epstein v. First Marathon Inc.* (2000), 41 C.P.C. (4th) 159 (Ont. S.C.J.) where the Ontario court refused to approve of the dismissal of a class action prior to certification where the class members received nothing but the class counsel was to be paid a \$190,000 legal fee. In the circumstances, the court characterized the action as a “strike suit” brought for its settlement value, not its merits. The court allowed the class action to be dismissed without costs and on the condition class counsel received no fee payment.

Court approval also affords an opportunity for the court to consider the interests of the unrepresented class. Arguably, since the rights of absent class members are not directly affected by the settlement of individual cases, the standard of review should be less strict than that which applies in the context of a class wide settlement post certification which binds all class members. However, both defendant’s and plaintiff’s counsel would be well advised to ensure that, at a minimum, the settlement of the individual plaintiff’s claim is in good faith, without any prejudice to potential class members. Alternatively, the question might be asked whether the settlement prior to certification is “fair and reasonable”.

In circumstances where the individual plaintiff is acting in good faith, the court should not seek to interfere with an individual settlement that reflects concerns in relation to the merits or the suitability of an action as a class proceeding.

See *Logan v. Canada (Minister of Health)*, [2003] O.J. No. 418 (S.C.J.), for a discussion of several factors to be considered in a context where a plaintiff applied to withdraw and substitute another plaintiff in the class action. The first plaintiff wanted to proceed with the action on an individual basis. The court allowed the application but said such motions must not be taken lightly and the following factors should be considered (at para. 7):

. . . whether the class proceeding has been commenced for an improper purpose, whether there is a viable replacement so that putative class members will not be prejudiced, the question of prejudice to the defendant, whether the proposed replacement is prepared to accept the exposure to

costs consequences and other pertinent facts will all bear on the ultimate decision as to whether to grant the motion for withdrawal, especially in circumstances where the representative plaintiff's stated intention is to carry on with an individual action. This is worrisome where there is a concern that the purpose for withdrawal is so that the plaintiff can settle his or her own individual claim. . . .

In *Ho-A-Shoo v. Canada (Attorney General)*, [2001] O.J. No. 2330 (S.C.J.) the court approved a pre-certification settlement on the basis that it was “fair and reasonable”.

It is possible that settlement on an individual basis will encompass more than just the named plaintiff in the class action. There is at least one example in Ontario where a potential class action was dismissed prior to certification pursuant to an agreement to settle not only the claim of the individual plaintiff but also the claims of several other potential class members who were known to class counsel and the defendant at the time of the settlement: see *Blanchard v. Medtronic Inc.* (Ont. S.C.J. Court File No. 27513/97).

c. The defendant “end runs” the class action

Defendants are always able to do the right thing for their customers. Accordingly, there will be situations where defendants implement their own claims process prior to class certification, which need not involve class counsel. This “settlement” is not subject to judicial scrutiny. To our knowledge, this situation has not yet been considered by a court in a context where, subsequently, the parties seek approval to dismiss the class action. However, at least once in British Columbia, a defendant voluntarily implemented a claims process for the class following the commencement of a class action: *Windbiel v. BC Tel* (Vancouver Registry, B.C.S.C. Action No. C985218). Since, since there is no requirement for court approval in B.C., the parties simply filed a consent dismissal order to bring the action to an end.

The defendant’s claims process may or may not require claimants to execute releases excluding them from participating in the class. While a defendant’s independent claims process does not necessarily foreclose class litigation, the existence of such a program is a factor weighing against certification, because at a certification hearing, the court must

decide whether a class proceeding is a “preferable procedure” for resolving the common issues. As such, a defendant has a tactical incentive to propose such a program, beyond the basic desire to do the right thing for class members.

While defendants are not prevented from making such an approach directly to proposed class members, there is Ontario authority supporting an application by the plaintiffs for an order requiring that defendants inform potential class members of the existence of the class proceeding as part of the voluntary claims process.¹

2. A significant number of class actions settle between the filing of the writ and the certification hearing.

The more common form of settlement is a class wide settlement occurring at the same time as certification. The so-called “settlement class” becomes the justification for certification, with class and defence counsel joining in a motion to certify the class and approve the settlement. There are obvious advantages to both sides with a settlement certification.

A number of large corporations in North America recognize that, from time to time, genuine problems do occur with their products or services for which the corporations may be liable to the ultimate consumers. In this situation, corporations may conclude that they are able to achieve better management of the problem through the use of the class action procedure. Two of the most important advantages are court approval and the binding effect of the settlement on all class members who do not opt out. Court approval provides both a filter and a buffer which should serve to reduce the criticism of the settlement program and enhance the credibility of the corporation. The *res judicata* resolution provides greater certainty. The class action procedures provide mechanisms for notifying the class members, processing the claims, and resolving the problem within a period of time approved by the court.

¹ *Lewis v. Shell Canada Ltd.* (2000), 48 O.R. (3d) 612 (S.C.J.).

Other things being equal, a defendant's cost of settling should increase after certification is granted because one risk factor—the risk of certification—has been negated. As well, to the limited extent that the courts in Canada consider the merits in weighing the certification decision, some defendants will interpret the granting of certification as a negative sign for the future prospects of the litigation. As well, to the extent that the granting of a certification order makes the contingent liability more certain and enlarges the financial exposure to a corporation or its insurers, losing the certification battle may increase corporate disclosure obligations, impact share prices, and increase reserves. Accordingly, where a defendant knows that it has a genuine problem with a product or a service or, for other reasons, may have difficulty weathering the certification storm, it will be well advised to fully canvass the possibilities of settlement before certification, since the plaintiff may also be prepared to discount the claim to take into account the possibility of not obtaining certification.

Of course, the plaintiff and class counsel will be ecstatic to obtain a court approved settlement for the class without having to contest certification or establish the merits of the case. This is the dream which fuels the filing of “protective actions”. Of course, there are now a number of examples in Canada where corporate defendants enter into class settlements in the United States but do not offer a similar, or any, settlement to the Canadian consumer. The parallel action in Canada is defended vigorously and, generally, at least through certification. There are some examples where the defence even continues through to trial. The rationale from the defendant's perspective is quite simple: since the legal environment in Canada is different (and, in particular, much more comfortable from a defendant's perspective) the defendant can justify a much more aggressive defence posture in Canada. The absence of equivalent leverage in Canada can rapidly turn the “American dream” of a “settlement class” into a Canadian nightmare.

The major advantage to the class of settlement prior to certification is that the class can have its cake and eat it too. That is, if a class member does not like the class settlement then the class member may opt out. While the opt outs may have less leverage either on an individual basis or within the context of smaller classes, their ability to pursue their

rights as they see fit is protected. This is a very significant safety valve from the class perspective. As well, the ability of unhappy class members to opt out of the settlement should provide considerable comfort to the court.

In some situations, the ability to opt out of the class settlement may facilitate resolution. For example, if a class has only a small number of large claims but a large number of small claims, a settlement might be achieved on the basis that it will only address the large number of small claims with the others being encouraged to opt out.

Of course, in this context, the courts should always be alert for the so-called “sweetheart” deals where defendants and plaintiff’s lawyers allegedly settle meritorious claims for much less than they are worth. Although “sweetheart” deals have been a concern in the United States, the Canadian experience has not yet produced any case where these concerns were identified. Indeed, the ability to regulate class counsel’s fee in situations where the effort may have been minimal and the value delivered may be small, combined with the generally restrained Canadian approach to awarding legal fees may be sufficient to ensure that “sweetheart” deals are never a serious problem in Canada.

3. Settling after certification of the class action

The statistics show that a number of class actions have been settled after certification was ordered and before trial.

To a large extent, the enhanced leverage for the class and the increased pressure on the defendant explains the settlement. If certification can be defeated, then almost by definition (since the individual claims do not justify legal action), the defendant achieves the ultimate in managing its potential exposure. Therefore, frequently, even where the merits of the defence case are not good, the defence strategy is to oppose certification vigorously. As long as the defendant has a 10% chance of defeating certification, the cost-benefit analysis probably will justify the effort. If the certification battle is lost, then given the likely reality that there is a very real problem with the product or service, no one should be surprised to learn that the class action is subsequently settled.

If settlement of the class action occurs after certification but before any notice to the class has gone out, it will be possible for the parties to preserve the benefits identified above in relation to opt outs. That is, since the first official notice the class receives of the class action will include the fact of the settlement, any class members who are not satisfied with the settlement can opt out. Settlement after certification but prior to notice being sent out is fairly common particularly where the defence strategy relies primarily on defeating certification. Many defendants will want to avoid incurring two sets of notice costs, first in relation to certification and then in relation to the settlement. As well, to the extent that notice equals adverse publicity, it is better to minimize it.

When settlement occurs after certification and notice, it very likely also will be occurring after the completion of the opt-out process. A class member's status as opted-in or opted-out can be problematic once the settlement is on the table.

In some cases, class members who have opted out of the action may want to re-enter the class action once there is a settlement. In the U.S., courts have allowed class members to do so where the defendant does not object. A defendant may be prepared to allow these class members back into the action to maximize the binding effect of the class settlement. To date in Canada this situation has not been addressed.

In other cases, class members who did not opt-out initially may want to opt-out of the settlement phase because they are not satisfied with the class settlement. As well, the class representatives, the class counsel, and even the courts may be very concerned that a particular settlement is sub-optimal or does not serve the interests of a significant number of people in the class. For example, class action settlements may suffer from the averaging processes used to develop the settlement. Usually, there are a large number of smaller claims and a small number of larger claims. While there may be significant differentiation between all of the cases on an individual basis, when they are averaged the differences are obscured and the net result may be quite low. As well, in a settlement context, the application of discounts across the class for litigation risk factors relating to liability, causation, and damages may create problems for class members with stronger claims.

Under our present legislation, there is no express recognition of a second opt-out right. However, there have been a few cases where the courts in Ontario have refused to approve of the settlement unless the defendant consented to a second opt-out right being incorporated in the settlement. Often defendants will consent because they recognize that most class members will accept the settlement, they are willing to defend the claims of the second opt-outs on an individual basis, and they recognize that the second opt-out right will help satisfy the test that the settlement is fair, reasonable, and in the best interests of the class as a whole.

Of course, if there are too many second opt-outs, then either the class representative plaintiff or the defendant may want to reserve the right in the settlement agreement to terminate the agreement. A sample from a current B.C. class action settlement of a second opt-out with the right to modify the settlement amount and the right to terminate the settlement agreement is attached as Appendix B.

It is important to note that in the United States, as of December 1, 2003, Rule 23(e)(3) now gives the court discretion to require that members of an already certified 23(b)(3) class be given a second opportunity to opt-out after review of the proposed settlement. If the settlement agreement does not offer the class members the second opt-out opportunity, the court may refuse to approve it. As well, requests for exclusion are confined to individual class members, so as to preclude any efforts to enhance leverage by encouraging sub-classes to opt-out. A copy of the modified rule on settlement is attached as Appendix C.

There are a number of concerns identified in relation to the second opt-out². These include a concern that the value of settlements will be driven down because defendants now have to anticipate that there may be more opt-outs. However, one might argue equally that the desire to avoid second opt-outs should drive the value of settlements up. Another concern is that a second opt-out may not be appropriate in certain financial cases

² see discussion in paper presented by Spangler, Shannon "Recent Revisions to Rule 23, Fed. R. Civ. P." on February 8, 2005 in Defence Research Institute program *Commercial Class Actions: Responding to Threats*

where the damages are set and do not change over time whereas in the personal injury context the plaintiff's damages may change over time and for the worse. The suggestion is the second opt-out is appropriate in the latter case but not the former.

The level of satisfaction with Canadian class action settlements post-certification, the extent to which Canadian settlements incorporate second opt-outs by consent, and the U.S. experience with the judicial discretion to allow second opt-outs all will require careful monitoring as we continue to evaluate our class action experience in Canada.

4. *Class Action Fairness Act of 2005*

After about 10 years of political maneuvering in the United States, the above referenced legislation was quickly passed by the House and Senate in early 2005 and was signed into law by President Bush on February 18, 2005 (see Appendix D for complete text).

Among the objectives of the *Class Action Fairness Act of 2005*, perhaps the most important is to permit the removal of a majority of large class actions to federal courts from state courts. The federal courts are consistently perceived to be fairer to corporate defendants.

However, the *Class Action Fairness Act of 2005* also impacts class settlements in several significant ways. This paper simply summarizes the key points for the purpose of highlighting possible future trends or approaches that may be considered in Canada.

- The creation of a “Consumer Class Action Bill of Rights” provides for judicial supervision of coupon settlements where no cash payment is made to class members.
 - The court may approve a coupon settlement only after a hearing and making a written finding that the settlement is fair, reasonable and adequate for class members.

- The court may require the distribution of a portion of the value of unclaimed coupons to charitable or governmental organizations.
- Most importantly, the portion of any fee to class counsel that is attributable to the award of coupons shall be based on the value to class members of the coupons that are redeemed, not including any coupons given to charitable or governmental organizations
- The courts cannot approve settlements that require class members to pay lawyer's fees resulting in a net loss to the class member, unless the court can make written findings that the non-monetary benefits of the settlement outweigh the monetary loss to the class member.
- The courts may not approve class settlements that pay greater sums to some class members solely on the basis that those class members reside in closer proximity to the court.
- Within 10 days of a class action settlement being filed with the court, the defendants must put state and federal officials on notice and no approval order can be made for 90 days thereafter. Failure to provide the appropriate notice automatically creates an opportunity for class members to opt out of the settlement. Interestingly, while the intent obviously is to create some government supervision of class settlements, the mandate is vague because there is no explicit legislative mechanism for government review of the settlement or for intervention. However, in September of 2004, the Federal Trade Commission conducted workshops on various topics relating to protecting consumer interests in class actions and appears to be willing to intervene where necessary.³
- Continuing monitoring and alteration of the rules is contemplated by a provision which requires that within 12 months after enactment (that is, now by February

³ see www.ftc.gov/bcp/workshops/classaction/agenda-htm for a link to a number of interesting papers presented at the workshop including several on class action settlements.

2006), the Judicial Conference of the United States is to prepare a report on class action settlements for both the Senate and House Committees on the Judiciary addressing recommendations on best practices the courts can use to ensure:

- Class action settlements are fair to the class members that the settlements are supposed to benefit
- Fees and expenses awarded to counsel appropriately reflect the extent to which counsel succeeded in obtaining full redress for the injuries alleged and the time, expense, and risk that counsel devoted to the litigation
- Class members are the primary beneficiaries of the settlements

APPENDIX A

Table 1 – Known Class Action Experience in B.C. and Ontario from enactment to September, 2004

	British Columbia	Ontario
Total class actions filed as of 2001*	At least 108	At least 280
Certification hearing completed	62	145
Certification granted	52	106
Certification opposed at hearing	36	86
Certification granted after opposition	25	47
Certification by consent	27	59
Consent certification for settlement purposes	18	34
Settlement achieved after certification	9	18
Trial on the merits	2	10
Action dismissed at trial	2	4
Action successful at trial	0	6

These action counts were obtained in 2001 in conjunction with the preparation of a class action experience in B.C. and Ontario. See Watson, Garry D. and Wright, Charles, “Class Actions in Ontario and British Columbia 1993-2001: An analysis of the First Eight Years of the Class Actions in Canada’s Common Law Provinces, First Annual Class Actions Symposium, Class Actions: Where Are We and Where Are We Going”(Toronto: Osgoode Hall Law School of York University, 2001).

Since then, the data on total class actions filed has not been maintained. In any event, it was never possible to know for sure whether every action that might be issued out of every Registry was captured.

The balance of the data in Table 1 is current to September 2004 and has a much higher degree of reliability.