

Abuses described in recent U.S. study unlikely here

By Patricia D. S. Jackson

Seven years after the introduction of the *Class Proceedings Act* in Ontario, class actions are now a well-established feature of the legal landscape.

A vigorous entrepreneurial plaintiffs' bar has emerged. Active class proceedings are ongoing in most major business sectors. There is a developing body of jurisprudence — particularly with respect to issues of certification and settlement.

At the same time, the American class proceedings regime, which formed the foundation for the development of the Ontario model, has recently been the subject of a systematic study by the Rand Institute for Civil Justice. That study, *Class Action Dilemmas: Pursuing Public Goals for Private Gain*, raises serious questions about whether the American class action regime effectively achieves access and recourse for class members in appropriate cases. It concludes that in many cases class lawyers are over-rewarded for the pursuit and settlement of class proceedings that achieve little, if anything, of value.

The report questions the effectiveness of judicial scrutiny, noting that it has been hampered by a judicial culture that values calendar-clearing over appropriate results and by its reliance on judges who may have been chosen by counsel because of a known predisposition to plaintiffs' cases, who may not be familiar with their obligations and powers in class proceedings, or who do not have access to a broadly available base of information on the results of other class proceedings.

In large measure, the report reinforces the impression held by some that a class action regime, rather than functioning as a means for the private enforcement of mass wrongs, risks becoming a vehicle for a legalized shakedown of companies (so-called "strike suits") irrespective of any alleged wrongdoing, for the benefit of class counsel.

While the validity of this impression is debatable, there is no doubt that the Rand report provides support for it. We ought to consider, therefore, whether the Ontario experience to date suggests that we are developing a jurisprudence of class proceedings that will be free of the problems described in the Rand report.

While it is still early in the history of Ontario class proceedings, much of what has occurred to date provides a basis for optimism that the excesses sometimes experienced south of the border are unlikely to occur here.

The Ontario judiciary has clearly seen the *Class Proceedings Act* as intending to facilitate the bringing of class proceedings.



Patricia Jackson

(Indeed, the Act goes so far as to provide a lower threshold for certification than in the United States. Unlike the American rule, which requires that the common issues "predominate" over the individual issues as a condition of certification, the Ontario Act requires only that the court consider the class proceeding to be a preferable method for resolution of the common issues that exist.)

While the result may be that it is easier to bring a class proceeding in Ontario, it does not follow that the abuses described in the Rand report are more likely to occur here. Recent decisions have made it clear that our courts are alert and vigilant to prevent abuses. Moreover, well-established aspects of the Ontario legal tradition provide other bulwarks against frivolous proceedings.

'Recent decisions have made it clear that our courts are alert and vigilant to prevent abuses'

For example, in Ontario, unlike the United States, plaintiffs are deterred from commencing frivolous proceedings by the prospect of an award of costs in favour of the prevailing party. Ontario's Act does not eliminate the prospect of an award of costs in respect of an unsuccessful proceeding. However, it directs the court to consider with respect to costs the question of whether the case was a test case, raised a novel point or involved a matter of public interest.

Further protection for plaintiffs is contained in the class proceedings fund legislation that provides that any adverse costs decision against a funded plaintiff is borne by the fund. But the prospect remains that cost awards will be made in appropriate cases — as does the discipline against bringing unmeritorious actions.

There are other differences. In the United States a significant

incentive to the bringing of a strike suit and to a defendant's decision to settle it is the perceived risk that a jury animated more by the availability of a corporate deep pocket than legal principle will find in favour of the plaintiff class and tack on an astronomical punitive damage award.

To date we have virtually no experience with trials of class proceedings in Ontario. The use of juries, which is rare to begin with, is not likely to become more frequent. The courts have yet to address the question of whether the principles governing the availability of juries or punitive damages are any different for class proceedings than for other litigation. There is as yet no reason to think that the factors that constrain the use of juries and the availability of punitive damages will differ in a class proceeding.

The inappropriate challenges and advantages identified in the Rand report (see above) are compounded by the general absence of readily available reports of U.S. class proceedings. In Ontario, by contrast, the conduct of class proceedings is restricted to a small number of knowledgeable and specialized judges in each of the regions, and their decisions are widely and readily available.

It is not even possible to "forum shop" among the regions. In the case of a conflict as to the region in which a particular proceeding will be brought, principles generally analogous to those governing *forum conveniens* issues will apply: *Vitapharm Canada Ltd. v. F. Hoffman-La Roche Ltd.* (2000), 48 O.R. (3d) 21).

Perhaps the most telling distinction between the experience reported in the Rand study and that of Ontario relates to the approach of the courts to the review of settlements. The Rand report complains of courts that approach the review of a proposed settlement with a paramount concern for calendar-clearing, a disinclination to scrutinize settlements, and a tendency to allow results that over-reward class counsel who achieve little in the way of value for the class.

In Ontario, the court has made it clear that the settlement of a class proceeding will be approved only if the result appropriately protects the interests of absent class members. The court has shown itself willing to allow substantial involvement from objectors with concerns about a proposed settlement and to raise and require answers to its own concerns about settlement value (*Dabbs v. Sun Life* (1998), 40 O.R. (3d) 429), to require as a condition of approval the amendment of a settlement that in the court's view does not adequately protect against the prospect that future

events will undermine the value of the settlement (*Parsons v. The Canadian Red Cross Society*, [1999] O.J. No. 3572), and to refuse approval of a settlement of an apparent strike suit brought on the eve of a fairness hearing concerning a proposed merger and settled on the basis that the only recovery would be of class counsel's fees (*Epstein v. First Marathon Inc.*, [2000] O.J. No. 452).

Because of the reality that in most cases the bringing of a class proceeding requires the plaintiff's counsel to undertake the risk that they will only be compensated if the action is successful or settled, the level of compensation available to class counsel is a significant factor in determining whether a class proceedings

regime provides an adequate but not excessive incentive to the bringing of a class action.

In this area the question of the extent to which the principles applicable in Ontario may differ from those in the United States may soon be reviewed at the appellate level. Many who have expressed concern about the American experience point to the availability of sometimes astronomical counsel fees — in the billions of dollars — as an indication that in that jurisdiction the incentives are excessive.

In the United States, class counsel's compensation is sometimes calculated on the basis of a "multiplier" of the amount of time spent on the matter, and

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CLASS ACTIONS LAW AND PRACTICE

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Disabled war vets win unpaid-interest class action

By John Jaffey
Toronto

The Ontario Superior Court has granted disabled war veterans summary judgment in their class action against the Government of Canada. The claim for unpaid interest on government pensions and allowances administered by the Department of Veterans' Affairs could amount to about \$1.5 billion.

London, Ontario sole practitioner Peter Sengbusch, who launched the class action on behalf of the disabled veterans, told *The Lawyers Weekly* that this outcome is a tremendous victory for doing the right thing.

"I've seen documentation stretching back decades," he said, "in which the government is told to do the wrong thing. And they got away with it. It's astounding to me that the government could keep the money for 30 years, then pay it back without interest. It's just not reasonable. Now, finally there's an institution in this country that's doing what's right by these veterans. It makes me feel good about our legal system."

Since the First World War, the government of Canada has recognized an obligation to provide pensions and allowances for veterans who suffered physical or mental disabilities as a result of service. The DVA administered the payment of funds under var-

ious statutes. If the DVA determined certain veterans were unable to handle their own financial affairs, an independent tribunal or third-party administrator was designated to manage the funds for the benefit of the veterans or their dependents. Presently there are about 1,000 of these administered accounts.

The DVA was not given authority to pay interest. Administered funds were paid into a special account in the consolidated revenue fund on which no interest is paid (though the Minister of Finance has a discretion, authorized by statute in 1951, to pay interest on special accounts).

In fact, during the 1960s and 1970s, interest was paid if a veteran or his family requested it. Moreover, in 1982, the Minister of Finance gave special approval to pay interest to the accounts of all the veterans at St. Anne de Bellevue Hospital in Quebec. (In 1985 it had 953 patients.)

From about the 1970s, bureaucrats were concerned about the non-payment of interest and the government's potential liability.

The plaintiff's six-volume motion record contains reports, memos and letters dealing with interest on veterans' funds. The 1985 Auditor General's Report, for example, found "inadequacies in the controls over veterans' trust accounts by the depart-

ment...and in the policy guidance to those responsible for administering these trust accounts for veterans."

His 1986 report was even more damning: "The department does not invest or pay interest on money held in any trust account. Where veterans have raised the matter of receiving interest, they have been told by department officials that such arrangements are not possible."

And, "The department and the commissioner recognize that a trust relationship exists with their administered account clients. However, neither has met the minimum obligations of the situation."

This resulted in a flurry of paperwork. A letter from the DVA's deputy minister to the Department of Finance says: "The work we were doing did not seem to be getting far in eliminating the risk of litigation over failure to pay interest on accounts for which arguably we had the responsibility of a trustee."

In a document prepared in March 1998 for consideration by the Cabinet, two of the options listed to deal with the interest were: "Keep quiet. Settle case out of court if and when it arises," and "Eliminate old liability (*ex post facto*)."

Justice John Brockenshire considered five issues in clearly

reasoned detail. Relying both on caselaw and constitutional texts, he came to the following conclusions:

1. The disabled veterans that make up the plaintiff class have a property interest in their pensions and allowances as well as a property interest in their claims for investment returns or interest thereon (or damages in lieu thereof).

'It's astounding to me that the government could keep the money for 30 years, then pay it back without interest'

2. The Crown became a fiduciary to each of these veterans when it accepted the administration of their funds.

3. The Crown was obliged to prudently invest the funds that were not immediately used.

4. The Crown breached its obligations by taking in and using those funds as if they were the Crown's, by failing to invest them

and by failing to pay interest on them.

5. Section 5.1(4) of the *Department of Veterans' Affairs Act*, which would appear to bar this action, cannot do so because it offends ss. 1(a) and 2(e) of the *Canadian Bill of Rights* by infringing the right to the enjoyment of property, the right not to be deprived of property except by due process of law, and the right to a fair hearing in accordance with the principles of fundamental justice.

He concluded his reasons with a prophetic paragraph: "I would expect that this decision will be carefully reviewed by the government, and may well be the subject of appellate review."

"If it is not overturned by an appellate court, or rendered of no force and effect by special federal legislation specifically passed notwithstanding the *Bill of Rights*, the questions of damage claims, and further steps in the action will have to be addressed in a case conference."

(Reasons in *Authorson v. Canada (Attorney General)*, 2025-017, 31 pp., are available from FULL TEXT.)

Efficacy scorecard a must

DATA

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scaleability. To accommodate more business processes and registered users, the average data warehouse doubles in size 18 months after it goes live.

In a recent database study, Winter Corporation, a Waltham, Mass.-based database scaleability research and consulting firm, says that "keeping data up-to-date means ingesting huge volumes of new information every day of every week and, sometimes, every minute of every hour."

The ability of a data warehouse to quickly and efficiently store, process, analyze, search and display gigabytes or terabytes of information is a measure of its efficacy. "Fewer than 30 per cent of enterprises measure ROI for their data warehouses," says a META Group study entitled "Data Warehouse Scorecard: Cost of Ownership and Successes in Application

Data Warehouse Technology." It suggests four metrics — direct business expense reduction (this is reflected in the balance sheet and is usually the easiest to measure); indirect expense reduction (savings that derive mainly from improving or streamlining complex processes); direct business impact (increase in business opportunity) and indirect business impact.

The need for tools like the balanced scorecard will intensify as enterprises extend decision-making authority to an increasing number of employees — particularly those who have direct contact with the customer. Such tools ensure that everyone's eyes are on the right ball — and that all decisions are in line with the ultimate objectives of the company.

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Counsel compensation a key issue

MULTIPLIER

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sometimes on the basis of a percentage of the results achieved. The latter approach, in particular, can and has produced exorbitant results for class counsel.

The Ontario Act permits contingency fee agreements. It requires that any such agreement be approved by the court and authorizes the court to award a multiplier of the counsel's base fee to reflect the risk undertaken by class counsel. Although the Act does not expressly authorize a fee agreement expressed in terms of a percentage of the outcome, courts of first instance have approved contingent fee agreements containing other

than multiplier-based arrangements, including agreements setting fees based on a percentage of recovery (*Nantais v. Telectronics Proprietary (Canada) Ltd.* (1996), 28 O.R. (3d) 523; *Crown Bay Ltd. Partnership v. Zurich Indemnity Co. of Canada* (1998), 40 O.R. (3d) 83).

Whether and in what circumstances percentage arrangements are appropriate has yet to be addressed at the appellate level. However, we will shortly have the benefit of appellate review of the general principles that apply to the determination of class counsel fees in circumstances where very significant amounts (\$20 million to Ontario counsel) have been approved at first instance in the settlement of the

Hepatitis C litigation (*Parsons v. Canadian Red Cross Society*, [2000] O.J. No. 2374).

The experience to date suggests the court will be alert to the importance of establishing principles for the compensation of class counsel that do not produce wind-fall gains for them at the expense of the class, the defendants and the class proceedings regime generally.

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