

# Introduction — Class Actions : New Developments and Their Impact

---

The Honourable Mr. Justice Kenneth C. MACKENZIE\*

Welcome to the wonderful world of Class Actions — Part II. Part I was Professor Alexander's presentation yesterday morning — a comprehensive and thought provoking summary of the U.S. experience. This afternoon we will look at the Canadian scene.

Before introducing the panel members, I want to offer a few general comments from a judicial perspective, while Professor Resnik's comments this morning are still resonating. Class proceedings crack the mold of traditional adversarial litigation. For example, all settlements have to be approved by the court. Legal fees charged to the class also have to be approved. Except for infants' settlements and a few other isolated instances, judges have not been involved in assessing the merits of settlements. That has been left to the parties themselves and their counsel. It is simply none of the court's business. Neither are the legal fees charged to the client, at least if the client doesn't complain. The difficulty in class proceedings is that counsel acting for the class may represent a large group of claimants with whom she has little direct contact and the usual relationship in which fees are agreed is absent. Consequently, the legislatures in their wisdom have said the court should approve both the settlement and the fees. That is a new role for judges and many of us are not very comfortable with the intrusive nature of it. Nor is it clear how it is to be exercised. Are judges to make their own independent critique or are they to designate independent counsel to investigate and make critical submissions? Presumably on a settlement, both plaintiff's counsel and counsel for the defendant will be singing in tune in a chorus of acclaim, and no discordant voices are likely to be raised without some prompting.

I raise this not to condemn class proceedings. They are not some eccentric idea drafted by theorists insulated from the real world. They are a practical response to the growing volume of mass claims thrown up by an increasingly litigious and technologically sophisticated society. Asbestos, breast implants, tainted blood, tobacco are a few that come quickly to mind. And there is no sign yet that the tide is slackening. Indeed, ingenious counsel are advancing new applications all the time. Class proceedings are not going to be the only procedural device for dealing with such claims, as the American experience demonstrates, and we are starting to test the limits of class actions. For example, the U.S. Supreme Court has recently turned down a multi-billion dollar asbestos settlement on the ground that it provided "no structural assurance of fair and adequate

---

\* Supreme Court of British Columbia, Vancouver, British Columbia.

representation for the diverse groups and individuals affected".<sup>1</sup> The court was particularly concerned about the disparity between "currently injured and exposure only" plaintiffs, i.e. those who had been exposed to asbestos but have not yet manifested any symptoms and may not for many years. The tobacco litigation seems likely to exceed the bounds of existing rules and requires special legislation.

In short, class proceedings are an expedient in response to "market demand". Our law has always had to be adaptable to changing social conditions — that has been its greatest strength over centuries. In that sense, class actions are nothing new and if it forces us to modify traditional adversarial attitudes, so be it. The ultimate test is whether the new procedures resolve disputes in a manner that is fair and is seen to be fair. It is going to be a challenge for counsel and judges alike, but that is what makes it interesting. This is an exciting time to be involved in civil litigation and it is going to continue to be exciting for quite a while.

To talk about the excitement, we have two panelists who have extensive backgrounds in class proceedings. Yves Lauzon has been actively engaged in class actions in Quebec, which pioneered class proceedings in this country, and he has had to wrestle with the practical problems of representing a class of plaintiffs. Gary Watson has been closely following class actions in Ontario since its inception and has traced its antecedents in the United States.

---

1. *Amchem Products Inc. v. Windsor*, 138 L. Ed. (2d) 689 at 715, Ginsberg J.