



## **WHITE PAPER: CLASS ACTION PROCEEDINGS**

### **HIROC recommends...**

HIROC believes that provincial governments in Canada should make tort reform, as it relates to healthcare, an ongoing item on the political agenda. As part of the current agenda, governments should undertake review and study of legislation related to the certification and process of Class Action Proceedings. In light of significant escalation in the severity and frequency of class action suits, we call on governments to strengthen certification criteria and establish compensation caps and threshold tests for awards in suits where Government or publicly funded bodies are the defendants.

### **A. Defining the issue...**

The right of Canadians to seek redress before the Courts is sacrosanct. Historically this has meant individual action. More recently, however, it has meant action by a group of individuals who have come together to seek redress as a class.

While legislation allowing class action proceedings has been part of the legal landscape in Québec since 1978, common-law Provinces have enacted such legislation only over the past 17 years. Beginning with enactment of the *Class Proceedings Act* in Ontario in 1992, all Provinces except PEI have enacted comprehensive legislation allowing for class action proceedings. A precedent-setting decision in 2001 by the Supreme Court of Canada enabled class actions to be advanced under a local rule of Court; in PEI and other jurisdictions. In addition, Federal Court of Canada rules permit class action proceedings under Part V.1.

The purpose of the legislation related to class action proceedings is straightforward, to:

- Increase access to justice for Canadians whose actions might not otherwise be asserted. For example, those involving claims with merit, but where a plaintiff cannot afford to pursue legal remedies on his/her own.
- Modify the behaviour of defendants: i.e. wrongdoers who otherwise might be able to avoid or ignore public obligations.
- Manage scarce judicial resources through use of an efficient method for handling complex cases involving a large number of litigants.

Has class action proceedings legislation fulfilled this purpose? For the most part, it has. The sheer diversity of class actions that have been brought before the Courts over the past 17 years attests to this; claims involving defective products, misrepresentations, wrongful dismissal, and franchise agreement disputes. More importantly, many plaintiffs involved in these claims would not have been able to go it alone, bearing the full cost of legal counsel and staying the course over the extended length of time it generally takes for a complex case to move from filing to resolution.

The legislation has also served good purpose for governments. While it increases their exposure to litigation, governments have not been unfairly treated. In fact, case review indicates that governments generally have had to deal primarily with class actions that have substantive merit and are in the interest of procedural justice, while turning back those without merit or that lack commonality. In addition, governments have been able to take advantage of class action legislation as a plaintiff, acting in the public interest, i.e. an example of this can be seen in various Provincial government lawsuits involving recovery of smoking related healthcare costs from the tobacco industry.

At this point, the number of class action proceedings making their way through the judicial process continues to build, as consumers become increasingly aware of this option and lawyers increasingly advise clients to use it for redress. The numbers do not yet appear to be at a level to indicate that having allowed class action proceedings in Canada will create a tidal wave of class action lawsuits similar to that evident in the United States (US). In the U.S., the number and variety of class actions and the size of settlements is nothing short of astounding.

Notwithstanding the favourable comparison with the U.S. situation, the development of class action proceedings in Canada now requires government attention and action to address important areas of concern.

The foremost area of concern requiring government attention is related to the escalating severity and frequency of class action suits. This has resulted in a corresponding escalation in monetary awards and settlements, higher claims costs and increasing insurance premiums. No sector has been affected more acutely by this than the healthcare sector.

Beyond this major concern, it is worth noting four additional growing ones that call for government attention:

- The legal costs of defending class action lawsuits can be exceptionally high and often contribute to settlement amounts that are also exceptionally high.
- While monetary benefits for lawyers are invariably lucrative, financial returns to plaintiff consumers are commonly lower than anticipated.
- The number of class action proceedings involving Government is greater than was anticipated at the time that class action legislation came into effect.
- A reputation is growing that Ontario and Québec are the easiest jurisdictions in North America in which to have a class action proceeding certified by the Courts.

In order to ensure future manageability within the legal system and the healthcare sector with respect to dealing with class action proceedings, Governments must act now to address these growing concerns.

## B. Defining class actions and making a case for change...

While one of the key characteristics that define a class action proceeding is a group of individuals that have banded together to seek redress for a common injustice, one person alone, can commence a proposed class proceeding. A series of steps is followed (based on legislative requirements, to certify the proceeding), which includes designation of two or more persons as a “class”.

Generally there are five main statutory requirements to gain Court approval for proceeding to formal class action status:

1. The claim must be recognized by law and disclose a reasonable cause of action,
2. There must be an identifiable class of more than one person,
3. The proposed representative plaintiff must be appropriate, present a reasonable litigation plan and possess no conflicts with other class members,
4. The claims of the class members must raise common issues in fact or law,
5. It must be clear to the Court that a class action is the preferable procedure to resolve the common issues fairly and efficiently.

There are clear benefits in going before the Court in a class action proceeding for consumers—or governments acting on behalf of consumers—with common issues, including:

- It is likely that more competent counsel can be engaged and often on the basis of a contingency fee to be determined based on the aggregate settlement awarded at the end of the judicial process,
- The participation of class members is minimal, as there is little for them to do during the proceeding (unless they decide to opt out)
- The representative plaintiff or the class members incur no costs during the determination of common issues,
- Limitation periods are extended for all class members,
- The result can be an aggregate award made by the Court to all class members,
- The Court can use statistical evidence to determine the aggregate award,
- Once the common-issues trial is complete, the Court is directed to simplify the proof to resolve any remaining individual issues.

Given this long list of benefits, it is not surprising that the number of class action proceedings has continued to build steadily over the past 17 years.

For example, during a 10 years since the *Class Action Proceedings Act* came into effect in British Columbia—1995 to 2005—approximately 230 proposed class actions were filed. Of these, some 135 cases were assigned to Judges for case management. The plaintiffs abandoned some of these; while some proceeded in other jurisdictions (e.g. Ontario Courts are able to certify National classes).

Ultimately 84 of the original 230 cases reached the certification stage, with certification granted to 33 cases. Most were either certified for settlement or settled in whole or in part. Only five of the certified cases proceeded to trial, and the Courts ruled in the defendants' favor in four of those.

The variety and scope of class action proceedings are also expanding. For example, healthcare class actions commonly relate to product recalls, medication side effects, inadvertent disclosure of personal health information, exposure to improperly disinfected equipment or negligence by healthcare workers.

From the point of view of scope and scale, the evolution of class action proceedings over the past 17 years indicates this is a good time for governments to examine current legislation for efficiency and effectiveness. Continued escalation in the number of suits and in the dollar value of awards, could lead to a tipping point with respect to increased claims costs, particularly within the healthcare sector.

The case for examination is further strengthened by emerging inconsistencies in legislative interpretation. Nowhere is this more evident than in the area of the certification—both in the process and in the criteria for getting a class action certified to proceed to Court.

As noted, one of the key points in the certification process involves the determination that issues raised by the plaintiff are common to all the members of the group that will form the class. In some jurisdictions for example, it is usually sufficient to establish that all members are owed a duty and standard of care to achieve commonality, while this is often insufficient in other Courts. Subjectivity with respect to interpretation is also evident where another one of the criteria is concerned—preferable procedure. In some jurisdictions, Courts consider both the concept of a “fair, efficient and manageable” method of advancing the claim and the concept that the class action process is the preferable means for resolving the claim. Other jurisdictions focus more on quantification; i.e., whether resolution via class action is more likely to result in a fair settlement for the individual parties over individual pursuit of the claim.

Clarifying the certification process and standardizing criteria would ensure that class actions would proceed more efficiently and exclusively in cases involving many persons with the same complaint, each of whom responded similarly to the aggrieving situation and each typically representing a claim that would not itself justify an independent action.

Within the healthcare context, it is particularly important for governments to ensure an effective certification process, given that healthcare class actions generally are complex, novel, often generate negative media attention and cross claims and entail high legal costs. Healthcare presents a further set of special circumstances. For example, it is relatively easier for a healthcare claim to be certified as a class action where the commonality is a breach in the standard of care or the defendant's alleged negligence.

### **C. Role of HIROC and other insurers in patient safety**

While institutional and malpractice insurers have a role to play in healthcare, insurance reciprocals in particular have a unique role. For example, Healthcare Insurance Reciprocal of Canada—HIROC—is among the largest healthcare liability insurer in Canada.

Reciprocals provide subscribers with premium stability and loss reduction programs, based primarily on a pooling of insurance coverage and risk sharing across a large subscriber base, as well as through negotiation of fair settlements.

Promoting patient safety is at the core of HIROC's mandate. We are working with our partner organizations to contribute to risk reduction, in general, and specifically to reduce the frequency of adverse medical events. We have recognized the importance of partnering with governmental and organizational stakeholders to establish a culture of patient safety in the healthcare system.

Inherent in a culture of patient safety is the concept of fairness in the identification and disclosure of adverse healthcare incidents and compensation, where appropriate, of aggrieved parties.

Tort legislation generally is geared toward identifying culpability and ensuring the person responsible is held accountable before the law. As justifiable as this is, in this respect, Tort legislation runs counter to initiatives in healthcare designed to reduce the incidence of healthcare errors that result in patient injury. With its emphasis on culpability, accountability and judicial solutions, Tort legislation does not support broad-based, systemic healthcare solutions designed to ensure patient safety through the creation of workplace environments where healthcare errors are less likely to occur.

Tort reform, as it is related to healthcare, is long overdue. While some efforts are being made in Canada to address tort reform, these are limited. Radical reform is not necessary.

A directed and concerted effort in incremental steps can result in significant strides towards improved patient safety and fairness in the aftermath of adverse events where compensation is justifiable.

Strengthening the criteria and standardizing the process related to certification of a class action, discussed earlier in this paper, will be an important step forward.

Another step would be for governments to address the issue of costs associated with medical malpractice. Specifically by:

- exercising legal authority to order structured settlements and establishing a threshold test for compensation related to mental anguish;
- establishing a ceiling cap for compensation awarded in class action judgments where Government or a publicly funded body is the defendant ; and,

According to the Canadian Medical Association (CMA) and the Canadian Medical Protective Association (CMPA), “structured settlements can provide certainty, flexibility, stability, guaranteed duration and security of compensation to injured patients that are not provided by more traditional lump sum payments.”

Structured settlements are currently allowable only if all parties agree. A Court-ordered settlement, in conjunction with a compensation package, should be an option in cases where the result would be enhanced financial benefit for all concerned.

As mentioned, governments and publicly funded organizations can be involved in class action proceedings as either a plaintiff or a defendant. Claims in which a publicly funded entity is involved as a defendant—common in cases related to healthcare—are generally for large sums of money.

While there is no doubt that justice must be served and class actions against publicly funded bodies should proceed duly through the Courts, special recognition of the role of Government and publicly funded bodies in society warrants special recognition when it comes to compensation awards in class actions. In cases not resulting in a structured settlement, a legislative change should be considered that would establish a ceiling cap on total compensation Courts can award in class action proceedings involving Government should be considered.

#### **D. SUMMARY & RECOMMENDATIONS...**

There is little doubt that class action proceedings have been a significant and beneficial addition to the Canadian legal system. The key measures are that class actions provide another procedural avenue for Canadians to seek redress before the Courts and generally result in fairness for the parties and an efficient use of the judicial system.

Results to date show that this alternate avenue for advancing claims as a class, rather than individually, has been used judiciously by Canadians and lawyers alike. The “tsunami” of frivolous class action litigation flooding the U.S. Court system has not washed across the border. Governments, too, have realized benefits from class action proceedings, as a plaintiff and as a defendant.

Nonetheless, HIROC believes that this is an opportune time to make improvements. Now with some 17 years of history in Canadian common law, encompassing a wide variety of types of cases and claimants and broad legal experience, examination of class action proceedings legislation for efficiency and effectiveness would be beneficial.

HIROC calls on governments to initiate such an examination, on a Province-by-Province basis or nationally, across all provincial common-law jurisdictions. The priority should be to examine the escalation in frequency, severity and compensation in class action law suits and the resulting impact on claims costs, particularly as these affect governments and publicly funded bodies.

At the same time, clarifying the certification process and standardizing criteria would ensure that class actions would proceed more efficiently and exclusively in cases involving many persons with the same complaint, each of whom responded similarly to the aggrieving situation and each typically representing a claim that would not itself justify an independent action.

Examination of related areas that may result in significant cost savings for Government and publicly funded organizations, particularly hospitals and healthcare facilities, also would be beneficial.

Exercising legal authority to order structured settlements and establishing a ceiling cap for compensation awarded in class action judgments involving Government or a publicly funded body as the plaintiff are other areas for examination.

**HIROC recommends...**

HIROC believes that Provincial Governments in Canada should make Tort Reform, as it relates to healthcare, an ongoing item on their political agenda. As part of the current agenda, Governments should undertake review and study of legislation related to the certification and process of Class Action Proceedings. In the light of significant escalation in the severity and frequency of class action suits, we call on governments to strengthen certification criteria and establish payment caps and threshold tests for awards in suits where Government or publicly funded bodies are the defendants.

## E. APPENDIX

The following table presents a cross-Canada review of legislation related to class action proceedings:

<b>Legislation re Class Action Proceedings in Canadian Provinces &amp; Territories</b>		
<b>Jurisdiction</b>	<b>Class Actions Allowed since...</b>	<b>Statutory citation</b>
BC	1995	
Alberta		
Saskatchewan		
Manitoba	2003	
Ontario	1992	
Québec	1978	
New Brunswick		
Nova Scotia		
PEI	2001	
Newfoundland & Labrador		
Nunavut		
Northwest Territories/Yukon		