Class Action Task Force

BACKGROUND

- Overlapping, multijurisdictional class actions (class actions commenced in more than one jurisdiction ostensibly covering extra-jurisdictional claimants) impede access to justice. They create confusion for individuals who may be presumptively included in more than one class action and subject to conflicting court judgments. They also create uncertainty as to the size and composition of class membership in a class action, increasing litigation costs, jeopardizing the viability of existing class actions, and magnifying the risk to law firms litigating the cases. They dissipate court resources as courts in different jurisdictions might hear and issue decisions on the same set of facts involving the same claimants. The public, the judiciary and the litigation bar alike are frustrated by the system.

- Attempts to address the problem include the creation of model provincial class action legislation by the Uniform Law Conference of Canada and the CBA's national class action database. However, problems caused by overlapping, multijurisdictional class actions seemed to increase as multijurisdictional class actions became the norm for class proceedings in Canada.

- The CBA took steps to solve the problem by establishing a National Class Action Task Force in February 2010. Task Force members included lawyers from both the plaintiff and defence bar, including corporate counsel and lawyers from firms involved in class action litigation. The Task Force envisioned a two-pronged initiative. First, it would develop a judicial protocol to consolidate proceedings as an interim solution. It would then seek a permanent, legislative solution.

- The Task Force first met in April 2010, to discuss potential solutions for multijurisdictional class actions. A legislative reform proposal involving possible involvement of the Federal Court could have an impact on a judicial protocol. It decided to tackle this proposal and the protocol simultaneously. The Task Force approved a draft protocol for consultation. Consultation with CBA members and other class action counsel occurred in June and July 2011, assisted by a short discussion paper.

- The Task Force obtained an opinion from Professor Patrick Monahan on the constitutional difficulties of legislative reform involving the Federal Court. The Task Force confirmed its decision to give priority to finding less constitutionally contentious ways to address the problem that would not require legislative amendment in all provincial jurisdictions.

- CBA Council approved a Canadian Judicial Protocol for the Management of Multi-Jurisdictional Class Actions. The protocol focused on notification and settlement procedures. CBA Council also endorsed protocols developed by the American Bar Association (ABA) on US Cross-Border Class Actions and Coordinating Notices. The judicial protocol was endorsed by the Canadian Judicial Council in September 2011 and was adopted by courts in several jurisdictions.

- An early draft of the protocol addressed multijurisdictional case management. In response to concerns about potential constitutional issues, the Task Force decided to study this issue separately. Professor Monahan reviewed the proposed case management provisions and concluded they were constitutionally sound. The Canadian Judicial Council and members of the judiciary (see, for example, *Kohler v. Apotex Inc.*, 2015 ABQB 610) encouraged the Task Force to continue this work.

- The Task Force concluded that it could not proceed with revisions to the Protocol and would move to Phase 2 of its mandate, advocacy for legislative change. It met in October 2012 to discuss jurisprudence, legislative reform required in each jurisdiction, and the necessary conditions for proceeding with its legislative reform mandate.

- The Protocol was ordered to apply to a multijurisdictional class actions in *St-Marseille c. Procter & Gamble Inc.,* 2012 QCCS 1527, *Pro-Sys Consultants Ltd. v. Infineon Technologies AG,* 2012 BCSC 1136; and *Heney v. Reebok,* 2012 ONSC 4449. It was used in settlement approval hearings in *Osmun v.*

Cadbury Adams Canada Inc., 2012 ONSC 3837, *Main v. Cadbury Schweppes plc*, 2012 BCSC 1062 and *Mackie v. Toshiba*, 2013 ONSC 5665.

- In 1999, parties in BC, ON and QC class action proceedings for those infected with hepatitis C by the Canadian blood supply reached a pan-Canadian settlement that assigned a supervisory role to the BC, ON and QC superior courts. Motions relating to the settlement were filed in each jurisdiction and proposed that they be heard by the three judges sitting together in one location. All three motions judges concluded they could sit in another province to hear the motions. BC and ON appealed. (*Endean v. Canadian Red Cross*, 2013 BCSC 1074; *Parsons v. Canadian Red Cross Society*, 2013 ONSC 3053). The BCCA (*Endean v. BC*, 2014 BCCA 61) found that a BC judge has jurisdiction to participate in joint settlement hearings for multijurisdictional class actions only if physically in a BC courtroom and participating by videoconference, teleconference or other communications medium. The Ontario CA found that a court has jurisdiction to sit outside Ontario; a majority held that the open court principle required a video link to a court room in Ontario (*Parsons v. Ontario*, 2015 ONCA 158).
- In October 2016, the SCC held in *Endean* and *Parsons* that judges have discretion to hold hearings outside their territory in conjunction with other judges managing related class actions, provided the court does not use its coercive powers to convene the hearing and it is not contrary to the law of the place where it will be held. In ON and BC, class proceedings legislation gave judges discretionary power. In jurisdictions without comparable laws, absent some clear limitation, inherent jurisdiction of superior courts would be the source of power.

CURRENT STATUS

- In 2015, at the request of the Canadian Judicial Council, the Class Actions Task Force was reconstituted. The Task Force reached consensus on a multi-jurisdictional case management protocol and concluded consultations on the protocol in November 2017. The protocol was adopted by resolution at the February 2018 annual meeting. This concluded the work of the Task Force.
- Absent a coordinated national class action regime in Canada the new protocol would result in greater coordination between counsel and judges across provinces and territories, and help reduce some inefficiencies, increased costs and inconsistencies in multiple overlapping class proceedings.
- In April 2018, the Canadian Judicial Council urged trial courts that administer class actions to adopt the CBA Multi-Jurisdictional Case Management Protocol. The Ontario Court of Justice, Alberta Court of Queen's Bench and BC Supreme Court, for example, have taken this step.
- In November 2020, the Task Force met to review the Protocol and gather information on the need for changes. In the absence of specific, urgent concerns, the Task Force decided to reconvene in 2021 to consider updating the Protocol by legislative amendment or a resolution at the 2022 AGM, The Task Force would monitor upcoming cases for concrete examples of areas that need improvement. It agreed that the Protocol is well suited for its purpose and is functioning well across the country.
- In May 2022, the group was surveyed to determine whether the Task Force should stay in place, the 2018 Judicial Protocol should be updated and if so, how, and sharing experience with the Protocol since the November 2020 meeting. The feedback was ambivalent on the ongoing need for the Task Force. The only possible addition to the Protocol suggested was to add motions. Finally, the feedback offered limited details on the Protocol's use.
- In November 2022, the OBA Class Action Bench-Bar Liaison Committee proposed a filing process for multi-jurisdictional hearings the CBA Task Force. The Task Force answered that, without having a concern per se, the proposal was not feasible without amendments to each court's rules of civil procedure or practice directions. The Protocol was drafted so as not override any rules or directions.

NEXT STEPS

- CBA Advocacy staff will monitor adoption of the protocol by courts across Canada.