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INDIGENOUS CLASS PROCEEDINGS IN CANADA. AN EXAMINATION OF THE CONVERGENCE OF INDIGENOUS RIGHTS AND CLASS ACTIONS IN THE CANADIAN COMMON LAW SYSTEM

Abstract

The foundations of contemporary Indigenous relations in Canada have been laid by class action lawyers who foresaw the potential for correcting, acknowledging and addressing historical wrongs. Decades of persistence by Indigenous leaders and collateral work by lawyers compelled the Canadian government, the Canadian public and its major religious and charitable institutions to face their pasts. Class and mass action lawsuits are indispensable to lawyers seeking to advance claims that recognize the systemic oppression of Indigenous people beyond individual harms. Respected class action lawyer Steven L. Cooper, KC, outlines more than 250 years of this legal history that has defined the unique status of Indigenous Canadians, from recognizing royal proclamations as they relate to land claims to settlements that have seen hundreds of thousands of Indigenous people compensated for harms inflicted in residential schools and hospitals.

KEYWORDS

Indigenous rights, class actions, Canada, Truth and Reconciliation Commission, residential schools, discrimination, compensation

SŁOWA KLUCZOWE

prawa tubylcze, pozwy grupowe, Kanada, Komisja Prawdy i Pojednania, szkoły z internatem, dyskryminacja, odszkodowanie

1. INTRODUCTION[1]

Canada[2] has long been recognized as a stable bastion of liberal democracy with a far less turbulent past than that of many other former colonial outposts of European power. As a country, both domestically and internationally, it is perceived as a kinder, gentler version of other American postcolonial states.

There is more than a grain of truth to that image of Canada; it has been taught in schools and fostered by succeeding generations of leaders and politicians. However, as is the case for myth – particularly that of national origin – the reality is somewhat harsher. It took decades of persistence by Indigenous leaders and collateral work by lawyers to cut through the mythology and compel the Canadian government, the Canadian public and its major religious and charitable institutions to face their pasts.

The leap into the current era was founded by a series of class actions and class action lawyers who foresaw the potential for correcting, or at least acknowledging and addressing, historical wrongs. These problems were of a more systemic nature than could be addressed by individual plaintiffs, Indigenous bands or organizations.

Class actions were initially commenced under an obscure rule found in the Rules of Court in each common law jurisdiction in Canada (the Province of Quebec, being of French origin, has retained the civil law system, although there are modifications reflecting the fact that it is surrounded by common-law jurisdictions in the rest of the country). Each jurisdiction allowed for a representative action where – to paraphrase – there was a common issue amongst multiple potential plaintiffs. The representative action needed to be recognized by a court of competent jurisdiction in order to proceed. Such actions can bind a group of individuals who are not retained by the lawyer advancing the case and as such care is exercised to ensure the action is well considered.

[1] This paper derives from a remote presentation given by the writer in Warsaw in September 2020. It is not a paper of academic value but rather represents a very general introduction and overview.

[2] The name originates from one of the very first misunderstandings between the Indigenous population of North America and European colonialists. It is surmised that the name derives from the local Indigenous word for ‘village’ given when asked ‘what do you call this place?’ by newly arrived sailors.

This paper intends to address the intersection between Indigenous law and class actions. The origin of the former, of course, predates the explorations of Columbus in 1492 while the latter is a much more recent legislative and judicial creation. The contents are intended to be more descriptive than academic and a mere introduction to the topic.

2. ORIGINS

Over the last thirty years all the provinces of Canada (but none of the three territories) have adopted legislation under the heading Class Proceedings Act, more commonly referred to as class actions. The legislation in each common law jurisdiction is similar, although there are important differences that go beyond the purview of this paper.

When most people think of class actions, images of nattily dressed lawyers on both sides of the aisle arguing technical, financial or product information are conjured up. Often the class actions are of little interest to even those in the putative class. The principal goal of many of the class actions is to punish companies and high-level executives who, it is alleged, are engaged in nefarious or negligent activities. The public reads about price fixing schemes, faulty products or overcharging.[3] Such claims usually result in little in the way of damages or compensation to those directly affected. In many ways, the public image of a class action is a matter which benefits few other than the lawyers involved. Lost on the public and even many in the profession is the social benefit that results from the mere prospect of being a defendant in a class action. This form of sociolegal behaviour modification is one of the oft stated goals of such litigation.

Class actions involving the Indigenous population in Canada usually involve, or at least initially involved, smaller law firms who were doing other work for the Indigenous client base. Many of us, the writer included, teamed up with a developing group of purely class action lawyers in order to combine front-line Indigenous sensitive expertise with the boutique specialized field of class actions. The latter were often primarily involved in financial or product liability cases.

Unlike financial or product liability class actions, which usually engage well-understood, carefully judicially considered concepts of liability, damages and process, Indigenous rights cases developed out of a judicial void. Before 1980, most cases decided by our highest court tended to reflect colonial thinking: 'Is an Eskimo an Indian?' Yes, said the court.[4] By the mid-1980s, a series of cases

[3] One such recent example of the latter is a case involving a mobile phone company in the Northwest Territories that was charging its customers $1 per month for 911 emergency service calls. The problem is no such service existed in that jurisdiction.

[4] *Reference Re Eskimos*, 1939 CanLII 22.

made their way to the Supreme Court of Canada that fundamentally changed the relationship between the First Peoples and colonial powers. Coincidentally, class actions were coming into their own as a legal hammer. It was a courtship (if you excuse the pun) of two judicial revolutions that opened the door to widespread judicial consideration of a litany of unresolved Indigenous issues. Only twenty years before, a potential plaintiff had been prohibited from leaving the reserve or hiring a lawyer. Oh, how times had changed.

3. THE ROYAL PROCLAMATION OF 1763

Before the historic decisions by the Supreme Court of Canada in *R. v Guerin*[5] and *R. v Sparrow*[6], the idea that Indigenous people had a separate constitutional existence with attendant rights was inconceivable to the judiciary, let alone mainstream Canada. Long forgotten was the Royal Proclamation of 1763 issued by then sovereign King George III recognizing the special relationship between His Majesty and the First Peoples of North America. At the time, pre-revolutionary British North America included the eastern side of what is now the United States. While the revolution which commenced in 1776 disconnected that relationship, it remained and indeed remains intact in what is left of British North America.

For roughly the last 150 years, co-existing with the Royal Proclamation were a series of treaties initially covering relatively small areas of eastern Canada that ultimately resulted in what are now referred to as the Numbered Treaties (1 through 11). These treaties[7] purported to resolve issues between the colonial power and the Indigenous peoples across western and northern Canada. When congregated, these treaties represent most of what the world now knows as Canada.

When the sale of land intended to be developed into a golf course was arranged through the federal government from an Indigenous band to a private investor, the local First Nations band started its own revolution. The band was fed false information and given promises that no one ever intended to keep as the basis for surrendering their land to the federal government to be then turned over or sold to an elite private golf course then in development. The band challenged the transfer all the way to the Supreme Court of Canada.[8] The Royal Proclamation was trot-

[5] *R. v Guerin*, 1982 CanLII 2971 (FCA).

[6] *R. v Sparrow*, 1990 CanLII 104 (SCC), [1990] 1 SCR 1075.

[7] Numbered Treaties 1 to 11 are a series of historic post-Confederation Treaties that were made in rapid succession over a short period of time from 1871 to 1921 between First Nations and the Crown (Canada). The treaties were used as political tools to secure alliances and to ensure that both parties could achieve the goals they had set out for their peoples, both at the time of treaty-making and into the future.

[8] *Guerin v The Queen*, 1984 CanLII 25 (SCC), [1984] 2 SCR 335.

ted out for the first time in over 200 years with both sides arguing its impact on the transfer. Lawyers for Canada insisted that the transfer was done according to the proper surrender process which had been developed subsequent to the Royal Proclamation while lawyers for the band retorted that the surrender had been founded on fraud.

To the surprise of almost everyone, and with only passing reference to the Royal Proclamation, the Court found that the rights to the land were not premised on any treaty[9] or proclamation but rather on a unique interest in land as long-time first occupiers. A *sui generis* right and interest predated the journeys of Columbus and his confrères and that of the numerous colonially authorized traders and farmers. The band was awarded $10 million in damages. More important than the money was the recognition for the first time in colonial law that the Indigenous population of North America need not find the rights in its own land in any colonial pronouncement or statute.

4. DEVELOPMENT AND EXPANSION

A number of results from this and subsequent related decisions of the Supreme Court of Canada and the lower courts have helped fill in the constitutional map. For the first time, Indigenous peoples were recognized as distinct in their connections to the land. People once considered lesser citizens, who only several decades before had not been permitted to leave land reserved for them by the colonial government nor even to hire a lawyer without the approval of the Indian agent, could now pursue long-delayed interests.[10]

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[9] '"[T]reaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation;' Article 2(1)(a) of the 1969 Vienna Convention on the Law of Treaties.

[10] The Rules of Supreme Court of the Northwest Territories, NWT Reg (Nu) 010-96, Judicature Act, Official Consolidation of the Rules of the Supreme Court of the Northwest Territories, C.R.Nu., R-010-96, Part 24: Consolidation of Actions, Order respecting actions, examinations for discovery:

318. (1) Where there are two or more actions or proceedings that have a common question of law or fact or arise out of the same transaction or series of transactions or where, for any other reason, it is desirable to make an order under this rule, the Court may order

(a) the actions or proceedings be consolidated or be tried at the same time or one immediately after another;

or

(b) any of the actions or proceedings to be stayed until after the determination of any other of them.

At the time that the early Indigenous constitutional cases were considered by the courts, class actions were still in their infancy and each case stood on its own representing a limited number of plaintiffs. There was no easy method by which lawyers could purport to represent a large group of individuals who were impacted by decisions of a government that acted well beyond its lawful authority. Lawyers and potential plaintiffs had not yet found each other. Many potential plaintiffs were still in or had barely survived the residential school system which (as described below) was designed to ensure social compliance with colonial imperatives.

The marriage of Indigenous rights and class actions developed slowly into a torrent beginning in the late 1980s. As lawyers became more confident in their ability to make their cases against the federal government and large, often powerful, institutions such as the Catholic Church, more rights were pursued, more damages were negotiated and more historical wrongs were written into the history books.

Beginning in the early 1990s isolated groups of lawyers were being contacted by individuals and, occasionally, organizations representing Indigenous people about a system that had been in place for over 100 years. Individual cases were making their way through the judicial system, finally reaching the Supreme Court of Canada in 2005.[11] This system, known as the residential school system, had been a Canadian adaptation of a similar program already operating in the United States, called the industrial school system. While the methodologies and management were somewhat different, the goal for each system was the same: the utter destruction of the Indigenous people as a cohesive non-European collective. While often called assimilation, it was, by any description, a form of social genocide. The intent, despite many critics' suggestions otherwise, was not to kill the Indian *per se* but rather to 'kill the Indian in the child', as one of the early promoters once described the program. By killing the Indian in the child, many in government felt that the Indigenous population could be and should be assimilated into, not made part of, the European majority. The intent was to Europeanize and Christianize entire Indigenous populations wherever they may be found. Their partners in all of this were the churches, the largest being the Roman Catholic Church in Canada at the time.

5. RESIDENTIAL SCHOOL CASES

The Roman Catholic Church, and to a lesser extent the Anglican Church, had made great strides in evangelizing the Indigenous population. Smaller churches,

[11] *Blackwater v Plint*, 2005 SCC 58 (CanLII), [2005] 3 SCR 3.

such as the Presbyterian Church, the United Church and even several small outposts of the Moravian Church, under the guise of 'civilizing the savages' lauded their European bases. Using the medium of education without the intent of truly educating the children of the First Nations, Inuit and Métis of Canada, the churches were responsible for indoctrinating the children, and through them their families, into their particular brand of Christianity. Had that been the only impact, it would have been bad enough. Had the other impacts been unintended consequences, it would have been worse. The reality was that the entire system resulted in the most horrific of abuses. The result was not integration but near social disintegration.

Most of these children were forcibly removed from their homes and communities. In some cases where the schools and residences were located in Indigenous communities that meant children were kept away from their families, their culture and their societies notwithstanding that they were in the midst thereof. Not every child was moved away physically, but all were completely disconnected from their families.

Through a combination of religious and overt expressions of power and dominance, and by the abject failure to ensure proper supervision or even the basic qualification of the people who maintained absolute control over the children, easily 20% of the attendees at the residential schools were sexually abused. Virtually all were abused in some other fashion, whether it was physical, psychological or otherwise. Some children were subjected to medical experiments reminiscent of World War II. Others were disciplined in ways that parents, even of the day, would not have recognized as anything other than abuse. Many of the children were malnourished. Through it all, the children were admonished to speak nothing of the abuse and deprivation.

Volumes have been written on the history and impact of the residential school system and it is beyond the purview of this paper to go into more detail other than to note that it was not only the generation of attendees affected, the impact was intergenerational.

Since then, over 100,000 former residential school students have applied for and received compensation ranging from $10,000 to $500,000, depending on their individual circumstances. More important than the money, most would say, was the establishment of the Truth and Reconciliation Commission, which after years of deliberations and testimony prepared a report that contains society modifying recommendations. Amongst the most prominent and important of those recommendations was that the federal government resolve ongoing and pending litigation involving Indigenous matters.[12] This report did make a difference and although the federal government continues to resist many of the class actions, most – if not all – are settled eventually.

[12] Truth and Reconciliation Commission of Canada: Calls to Action, 2015, Nos 26 and 29.

Those of us class action lawyers who had been pursuing class claims since the 1990s and who had coalesced into what was called the Baxter National Consortium, recognized the power of the class action. At the time when the residential school settlement was signed off by more than 40 lawyers in 2005, there were more than 15,000 claims against the government. In the end, more than 100,000 under the settlement were processed. But for the class actions resulting in this settlement, most claims would have died with the former students.

Subsequent actions all took the form of class actions, including my own in the Province of Newfoundland and Labrador Residential School claim. That claim was eventually settled in favour of over 1,000 survivors of that residential school system. A separate 'Day School' claim resolved most recently involved a further estimated 80,000 survivors.[13]

The class action process continues to be used in related claims, including two claims against the national police force, the Royal Canadian Mounted Police, a nationwide claim against the federal government involving the Indian hospitals system, and class actions in various provinces dealing with forced sterilization of Indigenous women.

6. MASS ACTIONS

An adjunct to the class action is the mass action approach. A mass action is a modification of conventional litigation in that it involves multiple plaintiffs (in my cases as many as 300 plaintiffs involving one or two defendants). We have commenced such actions involving medical experimentation, in which skin grafts were forcibly and without consent removed and grafted to involuntary Inuit subjects. The manifestation of this abuse involved the extraction of small pieces of skin from one person and the grafting of the sample onto another individual and vice versa.

Other examples of mass actions in which I have been involved include relocation cases. The first such claim and settlement was with a group called the High Arctic Exiles. These were Inuit families from northern Quebec who were moved to very remote northern Islands for no other purpose than to establish Canadian sovereignty in an ongoing dispute with Norway and Denmark over ownership of the High Arctic.[14]

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[13] 'Day School' survivors were distinguished from 'Residential School' survivors by the fact that they went home after school as opposed to living in a school residence.

[14] It is not without significance that several northern, now Canadian, islands have very Norwegian names, two of them memorializing the support of two prominent Scandinavian brewers: Amund and Ellef Ringnes. Hans Island, between Greenland and Canada is 'invaded'

Grise Fiord and Resolute Bay, Nunavut, are the two most northerly communities in North America and were peopled by the federal government by forcing two groups of Inuit to move thousands of miles beyond their traditional territory. They were lured with hunting opportunities and a promise to return home at their request. Both statements were lies and the mass action resulted in the first relocation resolution in 1996. I became involved in subsequent relocation claims about ten years later. My clients, the Ahiarmiut,[15] were identified by 'Life' magazine in 1956 as one of the two most primitive tribes left on the planet. This was a ridiculous claim at the time, with contrived photographs provided by a 'Life' photographer who dropped in for a few days. The group was also documented by a well-known Canadian author, Farley Mowat, in his works *People of the Deer*[16] and *The Desperate People*[17].

Their trials and tribulations were well documented and analysed for decades. The Government was slow to acknowledge and even slower to settle their claim. The claim itself revolved around five forced relocations of the group numbering roughly 100 any particular time. The first relocation resulted in the starvation and death of some Ahiarmiut as part of a plan that was later identified to be an attempt to turn them into commercial fishermen. As part of this relocation, the group was placed on an island in the middle of a lake several hundred miles south of their traditional territory. They were left without support, supervision or supplies. After waiting months for the lake to freeze over, they managed to make their way back to their traditional territory only to be moved multiple times thereafter.

I commenced the action as a form of mass action whereby the group was represented as the Ahiarmiut Relocation Society. After ten years of mixed litigation and negotiation, the federal government agreed to pay a $5 million settlement to be distributed between the relocatees and their offspring.

Currently, I have four more relocation cases in the litigation pipeline. The Government of Canada paid no heed to the rights and interests of the various Indigenous groups in the northern half of Canada, moving them around like pawns in a chess game. Sometimes the Indigenous population was moved for the administrative convenience of the federal government, but more often than not for matters of national interest, particularly sovereignty and defence. Several relocation groups were moved to locations that were considered critical for the defence of Northern Canada from the enemy of the day.[18] They would provide knowledgeable 'feet on the ground' to identify enemy incursions. All well and

periodically by the Danish or Canadian Military to establish national ownership. A bottle of alcohol and a flag is left by each invader.

[15] 'The Far Away Dwellers', referring to their unique position inland along the tree line and away from salt water. They were referred to at the time as 'Human Flagpoles'.

[16] F. Mowat, *People of the Deer*, February 1952.

[17] F. Mowat, *The Desperate People*, June 1957.

[18] The Russians, Germans, Chinese, Norwegians, Americans or Danes.

good until one considers that nobody told them, and nobody thought their consent to perform was relevant. It was conscription to serve the national interest under the illusion of serving their interests.

The impact of the relocations remains to this day with many of the relocatees considered lesser citizens of the small communities into which they were injected. A yet unresolved issue is the fact that the Indigenous population was transient until the 1950s and 1960s when they were corralled into communities where there was no work and where it was much more difficult to supply the family with food and other needs. The most important survival technique of the Inuit over the years in the harsh environment was to be in transient small groups and not in permanent structures congregated in what were sometimes very poor hunting and fishing areas. Concentrating them in urbanized environments reduced accessible hunting areas. More people and less land meant that hunting became harder and even competitive. Slowly, the Inuit were forced to give up hunting and fishing as the primary means of survival in favour the colonial preference for the wage economy. The wage economy ensured that the relocated population had no choice but to stay where they were.

7. MASS ACTIONS VERSUS CLASS ACTIONS

The question of class actions versus mass actions and conventional litigation is one that is often present in the minds of litigators, whatever the nature of the claim. It is important to understand the differences and respective advantages and disadvantages of each form.

The presumption in our Rules of Court is that every claim will proceed as conventional litigation with one or a few plaintiffs and one or a few defendants. The Rules of Court are designed to reflect that presumption. Mass actions proceed as conventional litigation but with the added complexity of having to seek instructions from multiple plaintiffs which can sometimes be inconsistent and can even give rise to conflicts of interest. In mass actions, as in conventional litigation, each client has a right to be represented without conflict. In conventional litigation it is not usually a difficult matter to obtain clear instructions, give clear advice and avoid conflicts. The more plaintiffs that are added, the more complex communications, advice and instructions become. It is rare to have two plaintiffs, let alone 50 plaintiffs, with identical interests and issues. In some ways, despite the complexity of class actions, mass actions can be more difficult to manage because there is no modification of responsibilities or plaintiff relations as opposed to conventional litigation.

8. CLASS ACTIONS

Class actions are inherently far more complex and expensive than most other litigation matters and are only appropriate in certain circumstances and by the relevant class proceedings legislation. Upon commencement and filing, a class action is not active litigation in the ordinary sense. It is *proposed* and ultimately approved by a court through a process called 'certification'. Until certification, in most cases, a defendant is not even required to file a defence. The defendant has multiple kicks at the litigation cat in that it can attempt to foreclose upon certification by establishing that the claim does not meet the threshold to proceed.

In contrast to class actions, mass actions and conventional litigation need no certification or approval of a court to proceed. There are mechanisms by which a defendant can short-circuit the litigation including summary applications to limit the claim or eliminate it entirely at an early stage. In most instances, the judge recognizes the general right for one's day in court and will rarely make pre-trial decisions which adversely affect the plaintiff's right to proceed.

In a class action, the court is asked to determine whether there is *inter alia* sufficient commonality between the proposed class or classes of claimants and the issues attached thereto. Generally speaking, there are five requirements for an action to be certified as a class action:

- pleadings must disclose a reasonable cause of action. There is an ever-expanding compendium of possible actions, including those that the court considers novel. In fact, many class actions involving Indigenous class members include pleadings with untested, unclear or truly novel legal issues;
- there must be a class capable of clear definition. It is never the case that differences between class members are determinative. The class boundaries can be fuzzy but must exist;
- there must be issues of law or fact sufficiently common to all class members;
- the class action must be the preferable procedure to advance the litigation. The court will want to know that individual or mass litigation cannot or should not be the preferred method in any particular claim. This includes the nature of the claims (for example, aggregated minimal dollar value claims) as well as litigative and judicial economy; and
- the representative plaintiff must adequately represent the interests of the class. In many claims there is more than one representative plaintiff and/or more than one class or subclass of putative class members.

If the proposed action is certified, then litigation proceeds in the ordinary course, but in a somewhat modified form. The class members are not clients. Only the class itself is the client. The 'class' is a legal fiction in litigation much as

a ‘company’ is a legal fiction in corporate law – a mechanism, not an organism but treated in the same fashion. The class as a client is a chimera, part human, part fiction, but one entity. This is a difficult distinction for most clients and even many lawyers to understand. The client class is represented by the representative plaintiffs and even their involvement is somewhat cursory for a majority of the action.

The representative plaintiff agrees to follow the advice and direction of the class action lawyers and can be replaced in a variety of circumstances. This is a substantially different process than other forms of litigation in which there is a readily identifiable and unchanging client; this format actually works well as a representative plaintiff becomes the sounding board for many ideas and opinions and, particularly, potential settlement proposals. It ensures that the autonomy of the class action lawyers is restricted by the involvement of often very sophisticated representative plaintiffs. It also gives the court some comfort that there is input by others, rather than just the class action lawyers.

9. NON-COMPENSATORY BENEFITS OF CLASS AND MASS ACTIONS

9.1. APOLOGIES

The advantage of class actions includes the ability, particularly within the settlement process, to ensure that the claim is about more than money. In the Indian Residential Schools Settlement Agreement of 2005,[19] the Truth and Reconciliation Commission was the most important non-compensatory component of the settlement. The Truth and Reconciliation Commission, after years of deliberation, made 94 recommendations called Calls to Action. The impact still resonate today. Amongst the calls to action were 26 and 29, calling on provincial, territorial and federal governments to amend legislation to allow claims that were previously barred by limitations, and to work collaboratively and expeditiously with Indigenous people to resolve outstanding litigation.

Apologies are often from senior members of government and/or institutions. In several instances, this included the Prime Minister of Canada. Apologies are an essential component in many Indigenous-based claims because of the historical nature of the injustices. Money alone does not represent reconciliation. Reconciliation is made up of both an acknowledgement of errors and compensation in both monetary and non-monetary forms. There can be no reconciliation in any

[19] The agreement in principle concluded in November 2005, the formal agreement signed on 8 May 2006.

instance in which an apology has not been rendered. Ordering an apology is not within the court's jurisdiction. Apologies arise only in settlement agreements.

9.2. PUBLIC ACKNOWLEDGMENT

The reason many of the abuses and institutional injustices in Canada have gone unknown and unreported is that on an individual litigation basis there is invariably a non-disclosure and confidentiality agreement, which is a usual part of the settlement agreement. There were certainly settlements in the most extreme cases involving residential school abuses before 2005. In each case the clients signed documents that obliged them to remain silent about the accusations made and the settlement achieved under the spectre of having to repay the settlement funds to the institution or government with whom they settled. This was an effective method to buy the client's silence and I have always described it as such to each client.

This leads to another important benefit of a class action in that there is no individual plaintiff to sign a non-disclosure agreement. The very nature of class actions is that they are conceived as a public process. Class action certification leads to a massive public notice process. It is such a sufficiently detailed and comprehensive step that companies specialize in doing nothing other than providing notice of class actions.

The notice feature of class actions has obvious benefits. First, those who felt that they were alone, were intimidated into not speaking about their individual circumstances or who are unaware of how to pursue their claims are far more likely to become aware of the process which can resolve their complaints. Secondly, the defendant can no longer hide the circumstances which resulted in the claim. This can be a time for an institutional reckoning which is, after all, one reason for the existence of class actions.

9.3. SOCIETAL CHANGE

School curriculums are being rewritten as a result of settlements which made public dark chapters of Canadian history. This is not the intent, but it is certainly the common effect of class actions involving historical injustices, particularly those affecting the Indigenous population. Students in grade schools and post-secondary institutions now take obligatory courses outlining a more realistic view of Canadian history. No longer are students in Canadian institutions taught only about the colonial history of Canada as was the situation prior to the Indian Residential Schools Settlement Agreement. Rather curriculums now teach about the civilizations that existed before 1492 and the conflict between the First Peoples of North America and the invaders who attended North America only in the

last 500 years or so. This correction is still nascent but as little as ten years ago it was virtually non-existent. Up to this point, history taught in North American schools started in 1492 with a sentence or two suggesting that there may have been people that existed on the continent before the brave explorers came across the Atlantic Ocean.

9.4. ACCESS TO JUSTICE

One of the unheralded benefits of the class action process over other forms of litigation is access to justice, particularly for people who have been socially ostracized, marginalized or who, for any number of reasons, do not see the justice system as their system.

Class actions give social, even cultural permission for people to come forward with claims that have often remained buried for decades.[20] Residential school and relocation class and mass actions granted social permission for Inuit to break the cultural taboo against speaking of hard times. Had the class action not been pursued, most of the abuse and resulting claims would never have been disclosed. When a claimant under the settlement compensation process came forward, it was not uncommon for them to go to extraordinary efforts to hide the facts from their family. On more than one file, my staff had to project themselves as health practitioners when contacting the client to ensure that even the fact the lawyers were involved was not known to the family or the community. Many claimants had their belongings moved to locations far from home to limit the chances of a privacy breach.

10. LITIGATION PROCESS

Procedurally, class actions have a predictable path. A proposed class action is filed in the appropriate court depending on a variety of factors. The only national court that exists in Canada is the Federal Court and it is restricted to actions involving only the federal government and its agencies, such as the Royal Canadian Mounted Police. National class actions can be commenced in any provincial jurisdiction because of the existence of individual provincial class proceedings

[20] In one personal recollection, a 95-year-old Inuk lady explained to me that the Inuit traditionally had a very hard life. One cultural adaptation to reflect that fact was not discussing past hardships. It is culturally ingrained in most Inuit – particularly those of the first generation to transition to current society – to bury and never disclose dark chapters in their lives.

acts.[21] The same cannot be said about class actions/class representative actions in the territories because they have not progressed past the representative action stage. Often, competing claims will be filed in multiple jurisdictions across the country, each purporting to represent a national class and therein lie many conflicts of law applications between various courts. There is an increasing tendency towards applications to preclude second-in-time applications for certification on the same or similar actions referred to as *Heyder*[22] applications. Ultimately, class action lawyers anticipate the legislation will be updated and changed across the southern jurisdictions in Canada to decrease firms' competing cross-jurisdictional claims.

When multiple overlapping claims are commenced, there will be carriage motions. Often derisively referred to as a 'beauty contest', judges are given the unenviable task (by their own description) of choosing between very similar law firms and claims. Again, there is a movement afoot to find a better way to resolve competing claims between law firms.

Upon certification and the resulting notice program to potential class members, the matter moves along the litigation path with initial examinations of key representatives and experts and, if necessary, a trial. Most such claims resolve early after certification as settlement is discussed. Any resulting settlement is made the subject of an approval hearing before the supervising judge. The judge can accept, reject or modify the settlement proposal, always with the interests of the class at heart. Once approved, the settlement proposal is the subject of a further notice program, often even more extensive than the first notice after certification. The importance of the notice at this stage cannot be overstated because class members are considered bound by the result if they fail to opt out.[23] This applies even to those class members who are not made aware of the settlement despite the notice program. The notice program itself is part of the approval that is sought from the supervising judge.

11. LOOKING FORWARD

Class actions are one of the options in the litigator's toolbox, particularly in the case of Indigenous rights issues which often involve large groups of individ-

[21] Class Proceedings Act, SA 2003, c C-16.5; Class Proceedings Act, 1992, SO 1992, c. 6; Class Proceedings Act, RSBC c. 50; Class Actions Act, 2001, SS 2002, 2001, c. 21, 2015, c. 4; Class Proceedings Act, CCSM, c C130; Class Proceedings Act, SNB 2006, c C-5.15; Class Actions Act, SNL 2001, c C-18.1; Class Proceedings Act, SNS 2007, c. 28.

[22] *Heyder v Canada (Attorney General)*, 2018 FC 432 (CanLII).

[23] A few Provinces have 'opt-in' provisions for extra-provincial class members, but most have adopted 'opt-out' as the standard.

uals many of whom may not even be aware of the potential for a claim. Class actions have resolved literally hundreds of thousands of cases in Canada that otherwise would never have been pursued or would have been pursued individually with limited and/or unknown results. Class actions are giving the Indigenous population the power of the collective without substantially giving up individual rights. It is often the case that non-viable claims once congregated are aggregated within the class action. Limitations arguments do not change in class actions but often the dominant role over parts of a constitutional claim, or sexual abuse claim for example, allow for the claims to proceed. Eighty percent of the claims in the residential schools settlement may be lost solely on the basis of the passage of time or considered not economically viable.

Finally, one can never underestimate the power of the public in ensuring that historical injustices are resolved. Politicians are keenly aware of the effect of appearing to aggressively defend against claims by historically subjugated populations. Politicians are often justifiably concerned about the impact of a decision from the court, particularly at the Supreme Court of Canada level, which can result in advances in the law creating claims that previously were not known to law. *Regina v Guerin* taught governments and large institutions to be wary for what they wish for. A fairly minor claim resulted in decades of claims involving tens of billions of settlement dollars. Had they simply paid out the damages early on to the band, maybe (just maybe) the subsequent claims would not have been commenced. An adverse finding can have an impact well beyond the individual case however large it may be, and it is often better economically, politically and otherwise to settle a claim that has some merit than to take a chance on a judicial finding. Settlements are not binding, but decisions of the court in the common law system are and become precedents.

Class actions are indispensable to lawyers representing Indigenous claimants. Without them, our national history would remain in the service of the colonizer. King George III would, no doubt, be surprised at how his proclamation was interpreted in the twentieth and twenty-first centuries. I am not sure he would be pleased.

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