

CLASS ACTIONS: BABY STEPS TOWARDS NATIONAL COORDINATION

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Colin P. Stevenson -

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CBA created the National Class Action database in 2007 in an attempt to deal with issues arising from multijurisdictional class actions. Initially this was a two year pilot project by the Civil Litigation Section based on a recommendation by the Uniform Law Conference of Canada's working group on multi-jurisdictional class actions. It has now been extended indefinitely.

The concept was that counsel initiating a class action anywhere in the country[1] would register their pleadings on a CBA regulated national database. The database would allow counsel involved in class actions, and the public, to more easily determine whether the issues to be litigated were already before a court, whether in another province or the same one. Counsel could then determine how best to coordinate potentially overlapping actions. The database would, in theory, also allow members of the public to determine more readily in which jurisdiction their interests were being looked after and reduce confusion about where an individual could file for compensation, whether in a settlement or otherwise. The database can be found at www.cba.org/classaction.

Although the database contemplates plaintiffs will file pleadings and the certification motion, there has not been universal acceptance of this requirement, notwithstanding practice directions requiring these steps to be taken[2] in BC, Alberta, Ontario, Québec, Saskatchewan, Yukon, Newfoundland and the Federal Court. This lack of compliance has yet to be addressed by the Task Force.

CLASS ACTION TASK FORCE

CBA established a National Task Force on Class Actions in 2010 as a further step towards solving the problems associated with overlapping multi-jurisdictional class actions.[3] This type of problem is found in many class actions and is illustrated by the Maple Leaf Foods' listeriosis crisis in 2008. When the listeriosis outbreak occurred, some 22 people died and thousands of others were incapacitated. Multiple national class actions were commenced across the country, as well as several province-wide class actions in addition to certain individual actions.

No protocol existed to coordinate these actions. The matter was resolved only by virtue of cooperation among multiple counsel and exhortations from judges across the country.

A more formal framework for coordination was clearly required. Cooperation between counsel is not always guaranteed, as illustrated in the Vioxx saga[4]

In April 2010 the CBA Task Force even considered innovative solutions such as the possible involvement of the Federal Court. An opinion from Professor Patrick Monahan illustrated that the constitutional difficulties of legislative reform involving the Federal Court made this route too onerous. Priority was given to finding less difficult ways to address the multi-jurisdictional problem, without legislative amendments in every province.

Ultimately the task force produced a draft judicial protocol in late June 2011. This went before CBA Council and was partially approved on August 14, 2011. These documents can be found at www.cba.org/cba/resolutions.

It is expected that Council's resolution as to "best practices" in management of multi-jurisdictional class actions will be adopted by Canadian courts across the country in the near future. CBA Council also endorsed the "ABA protocol on court to court communications in Canada-US cross border class actions" and "notice protocol: coordinating notice to the class in multi-jurisdictional proceedings".

AUGUST 14, 2011 PROTOCOL

The protocol reaffirms the obligation for the plaintiffs to post pleadings on CBA's class action database.

More importantly, the protocol provides for the creation of a notification list for all counsel involved in class actions concerning the same or similar subject matter and the approval and administration of multi-jurisdictional settlements.

In particular, the protocol contemplates judicial communications, on a consensual basis, including via video link.

What was not included? The single most important modification to the original proposal was the rejection of a single case management judge to oversee scheduling in overlapping multi-jurisdictional actions or settlement approvals. The concerns were essentially twofold. First, that judges could not properly delegate jurisdiction to a judge in another province. Secondly, that the process lacked appropriate appeal protections. Some class action judges in attendance, however, were quoted as being opposed to the removal of this provision and expressed frustration with the lack of progress.[5]

CONCLUSION

The protocol, as adopted, is only a tentative step in the right direction. For now it appears that the problems associated with multi-jurisdictional class actions will still require consideration on a

case by case basis. A coordinating judge in one province, or the US concept of a judicial panel coordinating overlapping actions, will not be seen in Canada for years to come, if at all.

[1] All provinces other than PEI have class action legislation.

[2] The Nova Scotia rules require registration with the database.

[3] Further information on the task force can be found at www.classactionstaskforce.ca.

[4] See, for example, *Magnacca (Tiboni) v. Merck Frost Canada Ltd.*, [2009] O.J. No. 281; 95 O.R. (3d) 269 (Ont. S.C.).

[5] www.lawtimesnews.com/201108228616/commentary/editorial-bar-drops-ball-on-national-class-actions.