

Title: Recent Trends in How Plaintiffs' Counsel Select Cases: Canada and the US

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Assignment Subject: How do plaintiffs' counsel select cases? Should we encourage Canadian counsel to copy US actions?

Introduction

Class action lawsuits represent one of the most important, complex and dynamic areas of legal practice. Importantly, class actions raise a number of questions with respect to not only policy and constitutional issues, but also as a means of pursuing mass justice with implications for plaintiffs and defendants alike. In general, plaintiffs' counsel selects cases based on merit and the ability of plaintiffs' to pay associated litigation fees. From the perspective of counsel, even where costs, funds and fee arrangements do not act as a direct incentive for substantive claims, counsel in Canada typically select cases on the basis of merit and those which are likely to be successful. The underlying rationale for class actions harness the grievances of individuals acting within their collective interest, who may not have the resources to pursue damage or claims individually. Accordingly, the thesis will be argued that recent emergence of Third Party Litigation Funding (TPLF) in the context of Canadian litigation, left unregulated, could result in a runaway market of funders with little transparency, accountability or protection for the plaintiffs or litigators who receive the funds. As a result, it will be argued that the commercialization of litigation contains a number of ethical, philosophical, judicial and public policy concerns, respective of that fact that funders' interest in litigation is unlikely to yield an increase in access to justice for litigants with human rights, civil rights or other public law based claims.

This essay will explore how plaintiff's counsel select cases to pursue in light of class action law suits. In doing so, this essay will explore how the landscape of class action litigation has changed in recent years, narrowing in on several key cases that have permitted recent debates.

How Plaintiffs' Counsel Select Cases: Canada

Class proceeding are unique from the traditional litigation proceeding in the way in which a class retains counsel. Within civil cases, the when a claim emerges a client suspects an issues and subsequently retains the advice of counsel, who in turn determines whether or not the issue is actionable. However, in a class proceeding lawyers commence a meritorious claim often without having an initial client bring the issue to their attention.¹ This is often done in light of media attention and/or scrutiny on a particular issue. Hence, identifying actionable claims in a class proceeding takes a slightly entrepreneurial turn, in the sense that plaintiffs' counsel often seek out cases to bring to court. In order to initiate this process, some class action lawyers also resort to public

¹Lisa C. Munro, "Who can be a representative plaintiff under Ontario's Class Proceedings Act, 1992?" Leners LLP (1 December 2014), online: Leners LLP <www.leners.ca/content/documents/who_can_be.pdf>.

advertising concerning the investigation of a potential claim with a specific case in mind, and ask for the public's assistance in coming forward with new information and/or claims.

This has led some to designate class action counsel as a form of “entrepreneurial lawyering” because of willingness of some counsel to actively seek out meritorious cases.²

²Kaitlyn MacDonell, “Ethics of Class Counsel: Is there a need for restriction on investigating class claims? (1 December 2014), online: <http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147487887>

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