

CLASS ACTIONS AND MULTI-PARTY LITIGATION

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In this book review, Shaun E. Finn of BCF LLP comments on a recent Canadian primer, The Class Actions Handbook (Toronto, LexisNexis, 2022), a practical multijurisdictional guide published by noted practitioner Michael A. Eizenga.

An Ode to Justice: Michael Eizenga Publishes *The Class Actions Handbook*

ABOUT THE AUTHOR



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ABOUT THE COMMITTEE

The Class Actions and Multi-Party Litigation Committee serves all members with an interest in class action trends and issues raised across the country in class action cases. Members publish newsletters on developments in class action law and present on topics of interest at committee meetings. The Committee has sponsored or co-sponsored a number of major CLE programs recently, such as one on the sub-prime mortgage and financial crisis class actions currently being filed across the country.

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I. An Essential Reference Tool

In the very first sentence of his latest work, *The Class Actions Handbook* (Toronto: LexisNexis, 2022, the “*Handbook*”), a LexisNexis publication, seasoned class action practitioner and author Michael A. Eizenga, L.S.M., explains that “[a] class action is a procedural tool that allows one or more persons to bring an action on behalf of, or for the benefit of, numerous persons who have suffered a common wrong. It is intended to provide an efficient mechanism to achieve redress for widespread harm or injury.”¹ From the uniqueness of this procedural tool flow eight clear, thoughtful, and remarkably crisp chapters of analysis. Neither a legal treatise nor a superficial marketing initiative, the *Handbook*, as its name suggests, is a useful 169-page primer that manages the feat of concentrating the statutory law of all relevant Canadian jurisdictions and over 30 years of case law into a single, accessible volume. In addition to providing useful background information, it introduces the reader to various crucial procedural stages and legal considerations. Although designed to be practical rather than academic in nature, the *Handbook*, like the class action itself, remains focused on one central theme: access to justice.

II. The Dynamic World of Canadian Class Actions

As the *Handbook* observes, “[c]lass action lawyers know that their practice area is a dynamic one.”² This is true from legislative, jurisprudential, and policy standpoints. Beginning with Québec’s adoption of a class action regime in 1978, every Canadian province has now enacted a class action statute. Prince Edward Island was the latest and last province to do so when Bill no. 36 received royal assent on November 17, 2021.³ Moreover, legislative reforms continue to be proposed and implemented. In Ontario, the *Class Proceedings Act, 1992*⁴ was recently amended pursuant to the *Smarter and Stronger Justice Act, 2020*,⁵ notably with respect to preferability. Québec is also contemplating possible changes to its codified class action regime and launched a public consultation process last year.⁶

In addition to these important developments is the fact that class actions have adapted themselves to virtually all spheres of economic and social activity. According to a report published by the Law Commission of Ontario, “there have been approximately 1,500 class actions initiated in Ontario [alone] between 1993 and February 2018.”⁷

¹ Michael Eizenga, *The Class Actions Handbook* (Toronto: LexisNexis, 2022) at 1.

² *Ibid* at ix (Preface).

³ Jessica Lam, Alysha Li and Jacob Webster, “P.E.I. Adopts Ontario Class Action Model in New Legislation,” <https://www.mondaq.com/canada/trials-appeals-compensation/1176778/pei-adopts-ontario-class-action-model-in-new-legislation>

⁴ S.O. 1992, c 6 [Ontario CPA].

⁵ S.O. 2020, c. 11.

⁶ Ministère de la Justice du Québec, *Consultation Publique: Perspectives de réforme de l’action collective au Québec* (Québec City: April 2021).

⁷ Law Commission of Ontario, *Class Actions: Objectives, Experiences and Reforms: Final Report* (Toronto: July 2019) at 14.

III. Making Sense of it All

As the *Handbook* explains, “[i]n the 30 years since the first Canadian common law class action legislation was enacted, thousands of class action decisions and judgments have been rendered.”⁸ Even more important, “there is also now a contained set of legal propositions, built out of the courts’ progressive interpretations of the class proceedings statutes, that are regularly applied across these substantive areas of litigation [i.e. product liability, environmental accidents, institutional abuse claims, privacy breaches, conspiracy and price fixing claims, consumer and investor protection issues, and mass accidents].”⁹ The purpose of the *Handbook* is to make sense of it all by pulling together “many (hopefully most) of those basic propositions in a concise and accessible format.”¹⁰ In this regard, the book has clearly achieved its objective. Devoid of legalese, it manages to address principle and substance with an enviable economy of language.

But the *Handbook* also avoids falling into the trap of generalization and oversimplification. Although based on a shared heritage, Canadian class action statutes – and the patchwork of case law to which they have given rise – are not identical. As the *Handbook* rightly points out, “[c]lass action lawyers should be particularly familiar with the

legislation in the jurisdiction they are dealing with. In addition, the various provinces’ rules of court apply to class proceedings and they tend to vary more than the class proceedings statutes themselves.”¹¹

IV. Notable Themes

While it would be impossible to capture the content and range of the *Handbook* in a review such as this, some subjects are of particular note: i) access to justice; ii) class action legislation; iii) summary judgment; and iv) carriage and multijurisdictional issues.

As the *Handbook* explains, “[t]he most important policy objective driving class actions is to provide access to justice. Many claims are not individually litigated, not because they lack merit, but rather because of economic, social and psychological barriers.”¹² Invoking the Supreme Court of Canada, it adds that “[t]he high cost of litigation means that claims of modest amounts rarely will be economically feasible to pursue on an individual basis. By aggregating the claims of potential individual plaintiffs and effectively spreading legal costs across hundreds or thousands of class members, economies of scale can be generated to reduce the economic barriers to litigation.”¹³ Class action legislation thus has a broader socio-economic dimension that transcends traditional civil litigation.

⁸ Michael Eizenga, *The Class Actions Handbook* (Toronto: LexisNexis, 2022) at ix (Preface).

⁹ Michael Eizenga, *The Class Actions Handbook* (Toronto: LexisNexis, 2022) at ix (Preface).

¹⁰ Michael Eizenga, *The Class Actions Handbook* (Toronto: LexisNexis, 2022) at ix (Preface).

¹¹ Michael Eizenga, *The Class Actions Handbook* (Toronto: LexisNexis, 2022) at ix (Preface).

¹² Michael Eizenga, *The Class Actions Handbook* (Toronto: LexisNexis, 2022) at 2.

¹³ Michael Eizenga, *The Class Actions Handbook* (Toronto: LexisNexis, 2022) at 2.

This sense that class actions are procedural – and yet, somehow, beyond the *merely* procedural – is acknowledged by the *Handbook*. On the one hand, it recognizes that “[c]lass action legislation establishes a body of procedural rules to facilitate the effective conduct and resolution of collective claims. Class action legislation creates no new causes of action and is not intended to change substantive law.”¹⁴ On the other hand, “by allowing claims to be pursued that might otherwise remain dormant, ‘a class procedure has the potential to breathe new life into substantive rights.’”¹⁵

While access to justice is an important advantage of class actions, that certainly does not mean that every class action should be certified. The good administration of justice also requires a rational and proportionate utilization of judicial resources. One tool for achieving just, cost-effective outcomes in common law Canada (but not Québec) is the summary judgment motion, a motion brought by one party against another to have a case decided summarily, without the need of going to trial.

As outlined in the *Handbook*, in 2014 “the Supreme Court of Canada [in *Hryniak v. Mauldin*]¹⁶ heralded in a ‘culture shift’ to promote timely and affordable access to justice. In particular, this shift entails simplifying pre-trial procedures and moving

the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case.”¹⁷ More specifically, “[t]he Court stated that a full trial is not required if a summary judgment motion can achieve a fair and just adjudication, and provide a process that allows the judge to make the necessary findings of fact and apply the law to the facts and is a more proportionate, more expeditious, and less expensive means to achieve a just result than going to trial.”¹⁸

Returning to the theme of timely and affordable access to justice in its discussion of parallel class actions (a typically Canadian phenomenon given the absence of a U.S.-style Judicial Panel on Multidistrict Litigation), the *Handbook* declares that “[t]he avoidance of a multiplicity of proceedings is a foundational principle of civil procedure. Multiple proceedings about the same wrong may lead to inefficiency, the duplication of fact-finding, legal analysis and appeals, wasted forensic and judicial resources, and inconsistent outcomes.”¹⁹ Although a truly national solution has yet to be adopted, some helpful steps have been taken. As the *Handbook* explains, “[t]he Uniform Law Conference of Canada has recommended that courts should consider the issue of parallel multi-jurisdictional class proceedings at the

¹⁴ Michael Eizenga, *The Class Actions Handbook* (Toronto: LexisNexis, 2022) at 3.

¹⁵ Michael Eizenga, *The Class Actions Handbook* (Toronto: LexisNexis, 2022) at 4.

¹⁶ [2014] 1 SCR 87.

¹⁷ Michael Eizenga, *The Class Actions Handbook* (Toronto: LexisNexis, 2022) at 15.

¹⁸ Michael Eizenga, *The Class Actions Handbook* (Toronto: LexisNexis, 2022) at 15, 16.

¹⁹ Michael Eizenga, *The Class Actions Handbook* (Toronto: LexisNexis, 2022) at 77.

certification stage, under a more refined preferable procedure criterion.”²⁰

V. Why the *Handbook* Belongs on Your Bookshelf

The bookshelves of a Canadian class action practitioner will likely include annotated statutes, loose-leaf binders, textbooks, case books, and law reviews. They should now certainly include *The Class Actions Handbook* as well. Written in clear, concise prose, it also includes useful appendices containing sample class definitions and common issues and the 2020 amendments to the Ontario CPA. More than a guide for practitioners, the *Handbook* is an essential resource for all Canadian jurists, whether they be law students, legal scholars, or judges. Those with an interest in class actions have an excellent reason to add this useful and engaging book to their collection. Like the class action itself, the *Handbook* will, in its own way, help to ensure access to justice.

²⁰ Michael Eizenga, *The Class Actions Handbook* (Toronto: LexisNexis, 2022) at 85.

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