CLASS ACTIONS IN REVERSE: *Salna v Voltage Pictures*

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July 2022

Respondent class actions, also known as a "reverse class actions" or a "defendant class actions", are a rarity in Canada. Unlike a conventional class action, in which a representative plaintiff voluntarily sues a defendant on behalf of a class of similarly situated persons, in a respondent class action the individual plaintiff sues a group of defendants who have been engaged in the same wrongful conduct, and names one respondent to serve as the representative for the defendant class.

The unlucky respondent is faced with not only the burden of defending a lawsuit, but also with the daunting – and most likely unwanted – responsibility of representing potentially hundreds or thousands of strangers.

In *Salna v. Voltage Pictures, LLC*, 2021 FCA 176, Voltage Pictures picked Mr. Salna as a proposed representative defendant on behalf of a group of individuals who allegedly violated Voltage's copyright by making its films available for download online. This is the type of nightmare scenario that the creators of the "never illegally download" PSA tried to warn internet users about back in 2007.

The certification of a respondent class action was disallowed by the motions court, but on appeal the Federal Court of Appeal partially overturned the motion judge's refusal to certify a respondent class action. It found that there was a tenable cause of action, an identifiable class and common issues. However the Federal Court of Appeal remitted the remaining questions of whether a class action was the preferable procedure and whether Mr. Salna was an appropriate representative defendant to the Federal Court for reconsideration.

While this decision stopped short of certifying the respondent class action, it reaffirms the conceptual viability of such a procedure.

Even so, as explained below, respondent class actions fit awkwardly into the legislative intent and jurisprudence behind Canadian class proceedings. They also raise significant issues with respect to fairness and litigation autonomy, which should make judges think twice before deciding to certify a proposed respondent class action.

Respondent class actions in context

The earliest class proceedings, dating back to the Courts of Equity in Medieval England, frequently took the form of respondent class actions in which vicars sued their parishes over the collection of tithes or landlords sued classes of tenants over the performance of manorial duties.[1]

The contemporary Canadian class action, on the other hand, was designed to create a procedure for seeking a remedy for "mass wrongs" done to large numbers of people, the paradigmatic example being the 1979 Mississauga train derailment in which 250,000 people were displaced for six days following a toxic chemical spill.[2] In the decades since the class action procedure has been adopted across Canada, it has been envisaged as a tool to level the playing field between vulnerable, under-resourced individual plaintiffs and corporate or institutional defendants. According to the Supreme Court in one of the leading decisions on class actions,

> The class action plays an important role in today's world. The rise of mass production, the diversification of corporate ownership, the advent of the mega-corporation, and the recognition of environmental wrongs have all contributed to its growth. A faulty product may be sold to numerous consumers. Corporate mismanagement may bring loss to a large number of shareholders. Discriminatory policies may affect entire categories of employees. Environmental pollution may have consequences for citizens all over the country. Conflicts like these pit a large group of complainants against the alleged wrongdoer … The class action offers a means of efficiently resolving such disputes in a manner that is fair to all parties.[3]

To date, the vast majority of class actions commenced and certified in Canada fit into this template.

Respondent class actions do not fit quite as neatly. In fact, as seen in *Salna*, they can be wielded by powerful actors to wrangle compensation from far less powerful individuals. While class proceedings statutes in select jurisdictions do contemplate respondent class actions,[4] the Ontario Law Reform Commission's 1982 *Report on Class Actions* – one of the foundational texts that catalyzed the emergence of class actions in the common law provinces – only devoted 3 out of its 880 pages to respondent class actions. All this is to say that, up until now, the respondent class action has played a very marginal role in Canadian class actions overall.

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[1] See Stephen C Yeazell, "Group Litigation and Social Context: Toward a History of the Class Action" (1977) 77:6 Colum L Rev 866.

[2] Ontario Law Reform Commission, *Report on Class Actions*, vol 1 (Toronto: Ministry of the Attorney General, 1982) at 90-91.

[3] *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at para 26, [2001] 2 SCR 534.

[4] See Rule 334.14(2) of the *Federal Courts Rules*, SOR/98-106; section 4 of the Ontario *Class Proceedings Act, 1992*, SO 1992, and section 5(2) of the Nova Scotia *Class Proceedings Act*, SNS 2007, c 28.

Nevertheless, as Justice Nadon stated in *Salna*, respondent class actions theoretically advance judicial economy because they could "reduce the financial implications of mounting a defence for each class member through the sharing of counsel, expert witnesses, and fees" and alleviate the pressure on class members to settle. However, in practice, this theory is unlikely to play out in most cases.

In *Marcinkiewicz*, the court adopted five guiding principles for determining whether a respondent class action is appropriate:

> (1) does the proposed class of defendants have any common interest?
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> (2) where there is a possibility of different defences, a class action binding prospective defendants is inappropriate.
>
> (3) would the representative defendant be likely defend the action vigorously? This is most frequently expressed as a requirement that the court ascertain whether the representative defendant could be said to "fairly and honestly try the right."
>
> (4) will the defendant class action benefit of the convenient administration of justice?
>
> (5) An objection by a named defendant to acting in a representative capacity is to be given only token weight if the court is satisfied that the defendant will vigorously defend.[5]

To date, certification of respondent class actions have been sought:

- by an Indigenous Band to assert title to disputed lands against a proposed class of government and corporate actors holding title to the lands (*Chippewas*);
- by a proposed class of pilots from one airline against another proposed class of pilots from another airline, following a merger of the two airlines, to contest seniority (*Berry*);
- unsuccessfully, by a proposed class of employees against a proposed class of defendants, including their employer and companies acquired by their employer, for failing to make contributions to their trust funds (*Sutherland*); and
- unsuccessfully, by a proposed class of automobile purchasers against a proposed class of automobile and automobile parts manufacturers, for selling vehicles containing a "defeat device" to circumvent government emissions tests (*Marcinkiewicz*).

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[5] *Marcinkiewicz v. General Motors of Canada Co.*, 2022 ONSC 2180 at para 186.

Depending on the outcome of *Salna*, respondent class actions may find traction in intellectual property law as well as other areas such as mass-breaches of standard-form contracts.

Challenges to respondent class actions

A major challenge to respondent class actions is the fact that the representative respondent is chosen by the plaintiff to represent the class, often against the representative's will. Acting as the face and brains behind the litigation on behalf of thousands of strangers is a massive expense, a huge responsibility and a thankless job for an individual defendant – especially one who never consented to taking on this role.

While the lack of a willing representative may have otherwise been fatal to certification in a typical (plaintiff) class action, the court in *Chippewas* ruled that this does not apply to respondent class actions so long as the representative will vigorously defend the common interests of the class.[6] A plaintiff may argue, for example, that the defendant will be responsible for defending the claim whether it proceeds as an individual action or as a class action, and thus they have a built-in incentive to defend. Such was the case for the proposed representative landowners in *Chippewas*. The same does not necessarily apply in a consumer context.

In *Salna*, Justice Nadon rejected the motion judge's decision to deny certification on the basis that Mr. Salna lacked the financial incentive to defend the class action on behalf of the class because this would effectively foreclose *any* representative from being deemed suitable for *any* respondent class action when the monetary consequences of the action are low. He suggested that this logic was inconsistent with the *raison d'être* of class actions. This issue was remitted to the motions court, along with the question of preferable procedure. Patently, it is grossly unfair to impose the massive financial burden of defending a class action on one or a few individual defendants when their individual liability is *de minimis*. It is likely that the motions court will find that a respondent class action is not the preferable procedure in this context.

Outside of the consumer context, a respondent class action may make more sense, even with a reluctant representative. For example, the court may order that a workable litigation plan be produced by a reluctant representative, pursuant to the court's plenary power to make any order necessary to ensure the fair and expeditious determination of a class proceeding.[7]

But what if all (or most) of the class members opted out? Or if the representative defendant – and any subsequent representative defendant appointed to replace them – simply paid the amount claimed against them? The option to exclude oneself makes it possible for the class size to dwindle down to zero, leaving the parties in the same position in which they began. Justice

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[6] *Chippewas of Sarnia Band v. Canada (Attorney General)* (1996), 29 OR (3d) 549 (Ont. Ct. Gen. Div.).
[7] *Berry v. Pulley* (2001), 197 DLR (4th) 317 at paras 54-55 (Ont. Sup. Ct. J.).

Nadon warned in *Salna* that it cannot simply be assumed that every class member would opt out if given the chance, but there is a decent chance that this would happen.

Justice Nadon recognized that in that case, decertification is an option, but this remedy is subject to judicial discretion. Further, going through a contested certification motion only to have the action decertified later is a waste of the court's and the litigants' resources: the very problem respondent class actions purport to address.

Restricting the right to opt out cannot be the answer. It is long established that class members ought to be free to exercise their right to participate in or abstain from a class action on an informed, voluntary basis, free from undue influence.[8] It would be fundamentally unfair to bind people to outcomes in proceedings led by other litigants when they might have been able to make a better claim or mount a better defence in an individual action.

Moreover, a corollary to the right to opt out is an effective notice plan so that class members are informed of their rights and can meaningfully exercise their right to opt out in advance of the deadline. In an imperfectly administered notice program, a member of the respondent class can conceivably be found liable to pay damages at the conclusion of the litigation due to a poorly conducted defence in which they never had any opportunity to instruct counsel or to decline to participate. The sheer impossibility of administering notice perfectly to hundreds or thousands of potential class members means that unfair outcomes of this nature are par for the course with large-scale respondent class actions. Without direct notice, there is a strong likelihood that defendant class members would challenge being bound by an adverse result, since they were denied their natural justice right to defend a claim asserted against themselves.

While the same danger of not being able to opt out of the action due to lack of notice can also arise in conventional class actions, the injustice in being forced to pay damages without being given an opportunity to defend oneself is not analogous to the injustice of being involuntarily bound to the outcome of a claim as a class member on the plaintiff side where the absent class member would not have taken action on their own in any event.

Unless the courts are willing to reckon with potentially severe incursions on litigation autonomy and the co-option of the *CPA* by powerful actors, they should approach respondent class actions with caution.

[8] *1250264 Ontario Inc. v. Pet Valu Canada Inc.*, 2013 ONCA 279 at para 41.