

Book Review
Compte rendu

Class Actions in Canada: The Promise and Reality of Access to Justice

Jasminka Kalajdzic

Associate Professor, University of Windsor Faculty of Law
UBC Press, 2018

Reviewed by Camille Cameron*

Class actions have found their way into the fabric of Canada's civil justice system. Class action legislation has been in place in Ontario for 27 years and in British Columbia and Quebec for 25 and 40 years respectively. Trial and appellate courts have had many opportunities to deal with and develop the law of class actions. Notwithstanding their longevity, however, there is little qualitative and empirical research to test many of the justice claims that are made in favour of, and the criticisms that are levelled at, class actions. This is the unsettled terrain into which Professor Kalajdzic ventures. Her experience in private practice and in the academy, her membership of the Law Foundation of Ontario's Class Proceedings Committee and the Law Commission of Ontario's Class Actions Advisory Group, and her numerous publications and research collaborations on class actions topics, make her very well qualified for the task.

Kalajdzic takes on a formidable challenge in writing this book, formidable for reasons she acknowledges. First is her choice to examine class actions through an access to justice lens. This is a timely and much needed contribution to class action scholarship, but as Kalajdzic notes, notwithstanding the amount of attention access to justice has received and continues to receive in academic writing and law reform reports, it is still a fundamentally contested concept. Her goal is challenging for another reason as well. Class action litigation and discourse are infused with politics, and in particular the politics of power. Regardless of what legal scholars including Kalajdzic conclude about the access to justice contributions of class actions, they can and often do level the playing field between well-resourced litigants with deep pockets and litigants without the resources to commence a civil claim. As Kalajdzic notes, in class action discourse, one is often either on the side of the angels or of the devil. Any good research about class actions must try to navigate those polarities and be alert to them but avoid a one-sided approach. Kalajdzic does this successfully.

* Dean and Weldon Professor of Law at the Schulich School of Law (Dalhousie University).

Kalajdzic identifies, and with this book begins to do something about, the paucity of scholarly, empirical analyses of class actions. In addition to her use of an access to justice lens to shed light on whether and, if so, how Canadian class actions achieve or advance access to justice goals, she makes specific recommendations for future research to fill these gaps. She concludes that “it is only on a narrow interpretation of the [access to justice] concept that one can say that class actions are generally meeting their access to justice goals.”¹ That is in some respects a pessimistic view but her pessimism, if it is that, is tempered by some excellent suggestions for reform.

Any analysis of her work must begin with her “thick” concept of access to justice, one that goes beyond access to courts and incorporates other factors. Her rejection of an “access to courts” definition is consistent with the best writing and thinking about what access to justice is and should be. Her definition includes access to courts, but also access to a court procedure that is fair and transparent, one that offers meaningful participation to class members, and that delivers a substantively fair settlement that “benefits class members to the fullest extent possible.”²

In litigation in general, and class actions in particular, the price tag is probably the factor, more than any other, that creates access to justice barriers. Litigation is expensive, especially complex litigation, and class actions are by their very nature complex. Kalajdzic gives us an excellent analysis of how costs have the potential to thwart the access to justice promises of class actions. And this is probably the area where she offers some of her most robust recommendations for further research and reform. Her examination of the ways in which Canadian courts have dealt with the issue of costs shifting is comprehensive and perceptive, and it lays an excellent foundation for the recommendations she makes. She demonstrates how mixed and unpredictable the case law is in helping us to know when a court will find that an unsuccessful plaintiff in a class action ought to pay the successful defendant’s costs. Of particular note is the trend Kalajdzic identifies of more, rather than fewer, costs awards against unsuccessful plaintiffs, even where the case is a test case that raises a novel point of law and engages the public interest.³ Viewed through an access to justice lens, the consequences of this judicial shift are significant. It is a shift that might raise the stakes in class action litigation for any representative plaintiff and for the lawyers who are trying to decide whether to take on the considerable financial risk of a class action.

¹ Jasminka Kalajdzic, *Class Actions in Canada: The Promise and Reality of Access to Justice* (Vancouver: UBC Press, 2018) at 10.

² *Ibid* at 70.

³ *Ibid* at 157.

But as Kalajdzic also points out so effectively, this is yet another area of class action law and practice where there is insufficient empirical research either to support or to refute many of the claims that are made. The manner in which she addresses costs shifting and related issues, especially indemnities and third-party funding, provides an excellent example of the contributions her book makes to class actions research. She uses her definition of access to justice to analyse and to debunk some conventional wisdom about class actions, and she then converts that debunking into some excellent proposals for further research and reform. It is often assumed, for example, that the risk of adverse costs might well have a chilling effect on the number of class actions that are commenced. Kalajdzic's research reveals, however, a steady increase in class action filings in Ontario, notwithstanding that Ontario is one of the Canadian provinces with a costs shifting rule. She demonstrates that the possibility of costs indemnities for representative plaintiffs and the availability of commercial litigation funding from third parties to cover the costs of those indemnities, make it difficult to establish an access to justice cause and effect between a two-way costs rule and number of class actions filed. Furthermore, Ontario has the Class Proceedings Fund, and Kalajdzic's research indicates that there has been an increase in the number of class action firms that are seeking assistance from this fund. Based on her case law analysis and lawyer interviews, Kalajdzic concludes that costs shifting has resulted in innovation, especially in the form of third-party funders, but that it cannot be said to have had a chilling effect on the number of class actions that are brought. Rather, the chilling effect is that costs shifting might deter class action lawyers from taking certain kinds of worthy cases.

This ties in well with her analysis of case selection by class action lawyers. Among other things, her interviews of class action lawyers reveal that "the public interest value of a claim ... is not a factor for most class counsel."⁴ Most of the lawyers who were interviewed identified legal merit and quantum of damages as the key factors in case selection. As Kalajdzic notes, this excludes many deserving cases, such as those involving issues of government entitlements, human rights, and claims on behalf of lower income and historically disadvantaged litigants. Her proposal for a judicial approach to approving counsel fees that places a premium on the public interest value of the claim is worthy of very serious consideration and further research. Viewed through her access to justice lens, creating a fee incentive that expands the categories of cases lawyers are willing to bring would be a welcome reform. It does run the risk of reducing the compensation available to deserving class members, and Kalajdzic identifies other measures to address this, including a reduction

⁴ *Ibid* at 88.

in fees where the litigation risk is shared between lawyers and third-party funders.⁵

Kalajdzic concludes that a comprehensive view of access to justice, one that goes beyond purely economic and procedural considerations to encompass considerations of equality and fairness, “[has] yet to enter the class action lexicon.”⁶ This is accurate to a point, especially if the lexicon in question is case law; Kalajdzic argues persuasively that judges have for the most part restricted themselves to an “access to the courts” concept of access to justice.⁷ There is also the lexicon of scholars, however, some of whom have attempted to use a broader view of access to justice. A few of the class action counsel interviewed by Kalajdzic also go beyond a narrow procedural and economic definition of access to justice. But perhaps these exceptions only prove Kalajdzic’s thesis, overshadowed as they are by the narrow scope of access to justice in the class action context as it has come to be defined by our courts.

In conclusion, Kalajdzic makes a significant contribution with this book. She gives us a balanced consideration of the justice contributions of class actions. She debunks some conventional wisdom and makes some excellent suggestions for reform and further research. I might add one further dimension to the concept of access to justice she uses and applies. I referred above to the politics of class actions, in particular their complex power dynamics. In “Power and Legal Artifice: The Federal Class Action,”⁸ Bryant Garth urges us to look closely at the impacts of class actions on class representatives and class members, some of whom may be disappointed by their class action experience, but others who might have found it to be an empowering experience. He suggests that in future research, we “need to consider not just what happens in lawyers’ offices and courts, and not just the results, but also the complex situations of the persons whose statuses are constructed and lives inevitably affected by the filing and conduct of litigation.”⁹

⁵ *Ibid* at 148–49.

⁶ *Ibid* at 70.

⁷ *Ibid*.

⁸ Bryant G Garth, “Power and Legal Artifice: The Federal Class Action” (1992) 26:2 *Law & Soc’y Rev* 237.

⁹ *Ibid* at 269.