Ethical Lawyering in the Clientless World of Class Actions in Canada

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Jasminka Kalajdzic, Self-Interest, Public Interest, and the Interests of the Absent Client: Legal Ethics and Class Action Praxis, 49 **Osgoode Hall L.J.** 1 (2011).

It is surprising what you can learn by watching the next generation coming of age. In this way, lawyers in the United States can gain much from following the experiences of the Canadian legal community as it climbs the steep learning curve needed to formulate the parameters and protocols for complex litigation.

Civil litigation and the structure of the legal profession in Canada do not pretend to challenge American exceptionalism. There are important differences between the two legal systems. But they have enough in common that academics and others in the U.S. can gain useful insight into class actions practice by hearing how Canadians are currently struggling to meet the kinds of challenges that have long been the subject of debate in the U.S. In this fine article, Jasminka Kalajdzic explores a new subject, at least for Canadian lawyers: the special ethical concerns that arise for counsel in class actions.

Kalajdzic identifies and examines three key ethical dilemmas unique to class actions: 1) entrepreneurial litigation, in which the lawyer's financial stake is out of all proportion to any individual class member's interest; 2) the adversarial void, in which the interests of class counsel and defense counsel in gaining approval for settlements are aligned, so the court is deprived of the fundamental forensic benefits of the adversary system; and 3) clientless representation, in which the fiduciary relationship of the lawyer to the client in providing advice and taking instructions is so notional that it cannot be relied upon to safeguard the interests of the class.

Kalajdzic then takes a closer look at the third problem: ethical lawyering in what is, for all practical purposes, clientless litigation. She notes that the Ontario Law Reform Commission recommended tailoring the Rules of Professional Conduct to make them responsive to the special concerns raised by class actions in 1982, a decade before class actions even were adopted in Ontario.

While this problem is not new in the U.S., Kalajdzic explains how it is compounded by Canadian courts' insistence on clinging to the notion of the representative plaintiff as a genuine client. She reviews two recent cases, Fantl v Transamerica and Richard v British Columbia, to show the implications of relying upon and reinforcing the supposedly "genuine" client relationship between class counsel and the representative plaintiff as a means of serving the interests of the class.

In *Fantl*, a representative plaintiff opposed a lawyer's attempt to take the proposed class action with him upon leaving the firm. The lawyer sought an order either requiring the representative plaintiff to accept him and his new firm, or replacing the representative plaintiff with another plaintiff. The Court (and the Court of Appeal) sided with the representative plaintiff, allowing him to sever the relationship with the lawyer who had prosecuted the matter for several years. Many features of class actions widely appreciated in the U.S. would question the assumption that the interests of the class were better served by giving primacy to the representation of the lead plaintiff over that of class counsel. Still, the Ontario courts preferred to rely upon traditional notions of named-party litigation in making this decision.

In *Richard*, shortly after class certification, a decision in a related case meant that the claim of the representative plaintiff in Richard was barred by statute of limitations. After protracted negotiations, class counsel received a final offer of settlement for the claims of those who were not time-barred. The representative plaintiff instructed counsel to reject

the offer, and counsel sought unsuccessfully to have the plaintiff class divided into sub-classes. Counsel then sought to have the class re-defined to eliminate the statute-barred claimants and to replace the representative plaintiff, who in turn filed a successful motion to remove counsel. Eventually, the matter was sorted out and the claimants whose recovery was not barred were able to proceed separately.

These decisions mark an important moment in the development of class actions practice in Canada, in which the legal community comes to grips with the new ethical issues arising from the potential for a conflict of interest between the representative plaintiff and the interests of the class as a whole. Kalajdzic explores the reasons the Canadian legal community is only now tackling these ethical issues and how these issues might best be addressed. Relying on a wealth of analysis from American jurisprudence and commentary, supplemented by interviews with seven of the most experienced Canadian class actions jurists, she considers options for better understanding and enforcing the ethical obligations of class counsel.

She makes a number of thoughtful and specific recommendations for reform to the Rules of Professional Conduct and for further consideration of emerging issues. She concludes that normative confusion persists in the absence of a clear sense of who the client is in class litigation and what duties are owed to the client. And she calls for a more fulsome discussion within the legal community so judges will not be left to build the body of ethical rules piecemeal at the expense of the interests of class counsel, the public, and absent class members.

This concise and informative article provides readers in the United States with real insight into Canadian class action practice at a critical juncture in its development – the discovery of the need for specialized ethical rules.

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