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Class Actions in Canada: The Promise and Reality of Access to Justice, by Jasminka Kalajdzic

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Book Review

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Abstract

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Class Actions in Canada: The Promise and Reality of Access to Justice by Jasminka Kalajdzic[1]

Jina Aryaan[2]

Class action litigation is often regarded as a successful instrument for advancing access to justice, which continues to be a significant cause for concern within the justice system.[3] The three pillar objectives of class action litigation are to ensure judicial economy, behaviour modification, and access to justice.[4] Professor Jasminka Kalajdzic's book, *Class Actions in Canada: The Promise and Reality of Access to Justice*,[5] explores the debatable interpretation and meaning of the third pillar and whether the reality of class action litigation reflects this promise.[6]

Kalajdzic begins by rejecting the limited understanding of access to justice as only access to courts, and by asserting the existence of barriers to justice beyond financial barriers. She conceptualizes access to justice as the achievement of substantive, transparent, and just outcomes.[7] She sets out to determine both how class actions are measured to meet their goal of access to justice and to what extent this objective is being fulfilled in the Canadian context. In doing so, she clearly articulates the need for a contextualized understanding of the manner in which class actions operate and are executed to ensure improved access to justice. As she notes, there remain existing shortcomings that do not receive adequate attention from the legal community.[8]

There is a gap in the literature due to a lack of reliable and comprehensive data analysing class actions based on their substantive outcomes.[9] Despite this challenge, Kalajdzic's extensive experience and expertise in the field—as a former civil litigator in private practice, published scholar, and member of both the Law Foundation of Ontario's Class Proceedings Committee and the Law Commission of Ontario's Class Actions Advisory Group[10]—enabled her to conduct her own empirical research and make some remarkable findings in her analysis of class action proceedings.

Present legal scholarship in this area is predominantly focused on the degree to which class actions achieve procedural access to justice; there is therefore a gap in the value-driven discussions of what "justice" ought to mean and how it ought to be achieved in the context of class actions. Kalajdzic effectively bridges this gap through her varied use of original quantitative survey data as well as qualitative case studies and interviews.[11] She also relies on doctrinal data, including jurisprudence and scholarly academic commentary on the efficacy of class actions in advancing access to justice beyond mere access to courts.[12]

Kalajdzic's quantitative data is derived from two surveys; she distributed the first in 2009 and its follow-up in 2014. She collected data from twenty-nine plaintiff-side class action law firms

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[1] (UBC Press, 2018).
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[3] See Kalajdzic, *supra* note 1 at 3.
[4] *Ibid* at 8. See also *Western Canadian Shopping Centres Inc v Dutton*, 2001 SCC 46 at paras 27-29.
[5] *Supra* note 1.
[6] *Ibid* at 5.
[7] *Ibid* at 11.
[8] *Ibid.*
[9] *Ibid.*
[10] University of Windsor, "Jasminka Kalajdzic, Associate Professor: Biography" (last visited 2 October 2021), online: <www.uwindsor.ca/law/kalajj>.
[11] *Supra* note 1 at 14.
[12] *Ibid*.

across Canada. The collected data related to the lawyers' case selection criteria, the impact of the Class Proceedings Fund, and settlement take-up rates.[13] The graph and pie chart illustrations of this data, presented in her book, allow for an easy understanding of the survey findings, which further allows for clear comparative analysis between the 2009 and 2014 results.[14] More importantly, the survey results reveal a significant new finding: Environmental and employment discrimination claims are among the rarest cases being litigated in class actions.[15] In fact, the majority of class action proceedings involve private law causes of action. Class actions are quite frequently generated by "entrepreneurial" litigation—a term used by Kalajdzic to refer to class action activity that results from a firm's internal research and investigation—or upon request from another firm for class action collaboration.[16] While the latter method of initiation has markedly increased, client-initiated claims have taken a slight decline between 2009 and 2014.[17] For lawyers, once an action is found to have legit merit, class membership size and quantum of damages are the predominant considerations used in case selection.[18]

The quantitative data is supplemented by a close examination of two carefully selected class action cases: *Canada (Attorney General) v Hislop* ("*Hislop*") [19] and *Lawrence v Atlas Cold Storage Holdings Inc* ("*Atlas*").[20] For both, Kalajdzic conducted interviews with the class counsel and the judges who presided over the cases.[21] Both cases offer valuable insight into Kalajdzic's contextualized understanding of how more class actions *should be* used as an access to justice mechanism for overcoming social barriers in the pursuit of substantive equality. This is reflected in both *Hislop*, which involved surviving same-sex spouses confronting discriminatory legislation that frustrated their eligibility for a survivorship pension,[22] and *Atlas*, which involved the pursuit of *just* settlement outcomes and fair counsel compensation.[23] These two case analyses do not, on their own, provide a clear theory for the unsettled understanding of access to justice. Accordingly, Kalajdzic's doctrinal analysis points readers to the polarity between the judiciary's view of access to justice—as strictly procedural, premised on economic barriers, access to legal representation, and *process*—and the academic scholarship's view of access to justice—as substantive and just *outcomes*, focused on the deeper and more progressive goals of access that remain at the periphery for judges.[24]

Ultimately, the perspectives provided by these diverse sources underscore the foundation of Kalajdzic's overarching argument for a "thick," complex, and multi-layered notion of access to justice.[25] For Kalajdzic, access to justice through class actions ought to involve access to a number of elements: a process that would otherwise be unattainable in the face of psychological, social, and economic obstacles; a procedure that must be fair and transparent; a right to full participation for plaintiffs; and a result that must be "substantively fair," such that class members benefit from

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[13] *Ibid* at 15.
[14] *Ibid* at 17, 19-20.
[15] *Ibid* at 17, 26.
[16] *Ibid* at 18-19.
[17] *Ibid* at 19.
[18] *Ibid* at 20.
[19] 2007 SCC 10.
[20] [2006] 34 CPC (6th) 41 (Ont Sup Ct).
[21] *Supra* note 1 at 28-29.
[22] *Ibid* at 36-37.
[23] *Ibid* at 45-48.
[24] *Ibid* at 68-70.
[25] *Ibid* at 9.

the result to a maximal extent.[26] Using this notion, Kalajdzic comprehensively assesses the efficacy of class actions in achieving access to justice by examining the criteria of case selection for class actions, settlements, contingency fees, and adverse costs. The result is that the reader is drawn to the stark reality of class action litigation as it operates on the ground. In particular, Kalajdzic notes the social implications of the role of judges in their case certification decisions and the role of counsel's selection of a "meritorious" case for a class action trial. Counsel's selection process involves consideration of the quantum of damages, the size of the class, the risks assumed with contingency fees, and the counsel's potential representation fee.[27] Kalajdzic's evaluation of these important components, while accepting of their positive attributes, equally reveals the existing deficits of a litigation mechanism too readily accepted as an effective framework for ensuring access to justice.

Kalajdzic effectively identifies the many ways in which lawyers and judges tend to serve as gatekeepers to the proper realization of her "thick" interpretation of access to justice. With respect to class counsel case selection, for instance, her research unveils the fact that less lucrative claims, though meritorious—cases of significant public interest value and particular importance to historically marginalized groups of our society—are simply not factored into the calculus undertaken by most class action firms and counsel.[28] Additionally, Kalajdzic uncovers the disturbing reality of cost shifting and third-party funding, which affect the types of cases deemed worthy of pursuing by class action lawyers.[29] These findings further support her belief that the class action goal of access to justice is notionally met, but only on a "narrow interpretation" of the phrase.[30]

While these findings are less than ideal, Kalajdzic proposes specific research and reform recommendations that pave the way for improvements informed by her "thick" notion of access to justice. This section is one of the highlights of the book, as Kalajdzic shifts the focus back onto the people affected by the litigation process and trial outcomes—the class members who are too often made invisible in the litigation process. She offers plausible reform suggestions that seek to mitigate the lack of procedural participation for class members, and to incentivize class counsel to undertake civil rights-based claims of significant and broader societal importance.[31] Although her suggestions appear plausible, it is not clear *how* these changes ought to be implemented. This is one area of the book that could have benefited from further elaboration of a detailed approach to effect real change.

Nevertheless, Kalajdzic's thought-provoking discussion requires the reader to reflect on who it is that is afforded *access*, as it is understood from both the restrictive perspective of the judiciary *and* Kalajdzic's more substantial perspective. By bringing class actions under scrutiny, she compels one to reflect on the social implications of the justice system's failure to meaningfully benefit disenfranchised groups and communities. The gap between the promise and the reality of class actions' ability to fulfill access to justice goals ultimately undermines public confidence in the legitimacy of the justice system; this will, in turn, further deny access rather than grant it.[32]

Perhaps the greatest strength of this book is its normative understanding of access to justice as it pertains to the role of class actions and the novel empirical evidence underlying this

[26] *Ibid* at 70.
[27] *Ibid* at 80-89.
[28] *Ibid* at 88.
[29] *Ibid* at 162-68.
[30] *Ibid* at 10.
[31] *Ibid* at 144-49.
[32] *Ibid* at 148.

discussion. Kalajdzic presents a compelling case for a less superficial and less technical understanding of access to justice and, in doing so, places a higher burden on lawyers and judges in class action litigation. Her research fills the formerly identified gaps in the literature and sheds light on outstanding gaps. For these newly identified gaps, more data is required to better measure and evaluate the efficacy of class actions in realizing their access to justice goals. Kaladjzic's comprehensive research challenges the predominant belief that class actions are a successful mechanism for increased access *and* justice. She also challenges the legal community to expand the scope of its social mission and attune it to the evolving understanding of access to justice—one that rests on intersecting and compounding social barriers, and not solely on economic barriers. Kalajdzic identifies the need for systemic change in the manner in which class actions are conducted, such that access is meaningfully offered to all, and justice goes beyond the right to a hearing.

Overall, Kalajdzic provides a balanced and insightful analysis of class action litigation in the Canadian legal landscape. She not only accepts the positive contributions of this form of litigation, but also debunks the "unsupportable" assertion that "class actions inevitably open the doors to justice."[33] She effectively explores the notion of what access to justice ought to mean, the failures of our current class action operational structure, and the reforms necessary to both reconcile the persisting gaps in this form of litigation and ensure that meaningful access to justice is achieved by our justice system. While her concluding findings may be disheartening for members of the legal community with long-held optimism about the social mission of class actions, Kalajdzic's overarching argument should be regarded in a positive light. Any mechanism for access to justice ought to be subjected to regular checks and balances. However, the legal community may too often be content with long-standing structures and mechanisms, even if such comfort is not necessarily in the best interest of the public affected by these rigid systems. Kalajdzic's book aims to make the community aware of areas that require structural attention and improvement to ensure that the goal of access to justice is met—and not merely in the superficial meaning of the idea.

Kalajdzic's argument is certainly a significant contribution to the existing literature on class actions. She effectively shifts the focus to the broader social utility considerations and access goals that often remain in the peripheral vision of the court system. By doing this, she sparks a new dialogue that pushes the bounds of the existing discussions of class actions and access to justice. Her findings will likely influence those involved in class action litigation, including judges and lawyers, to report and record the empirical evidence necessary for future class action efficacy assessments. As a result, this book would greatly benefit law students, lawyers, and judges either interested or involved in class action activity. That said, a wider range of legal community members may also benefit from Kalajdzic's engaging analysis; it will likely inspire others to examine the reform initiatives of their respective legal practices with a more critical eye towards achieving *meaningful* access to justice.

[33] *Ibid* at 169.