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Book Review

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Abstract

The enactment of class proceedings legislation revolutionized civil procedure in Ontario by providing citizens with a mechanism that both increased access to justice and served as a powerful deterrent against wrongdoing. Suzanne Chiodo's book, The Class Actions Controversy: The Origins and Development of the Ontario Class Proceedings Act, provides an in-depth exploration of the history of the legislation and the social and political forces that influenced it.

Book Review

The Class Actions Controversy: The Origins and Development of the Ontario Class Proceedings Act by Suzanne Chiodo[1]

MICHAEL KENNEDY[2]

THE ENACTMENT OF CLASS PROCEEDINGS LEGISLATION revolutionized civil procedure in Ontario by providing citizens with a mechanism that both increased access to justice and served as a powerful deterrent against wrongdoing. Suzanne Chiodo's book, *The Class Actions Controversy: The Origins and Development of the Ontario* Class Proceedings Act, provides an in-depth exploration of the history of the legislation and the social and political forces that influenced it. Although Ontario's *Class Proceedings Act* (*CPA*)[3] came into force in 1993, Chiodo's research reveals that the push for a class action regime in Canada started almost 30 years prior. Her book takes us through each development along the way in an intriguing style that captivates the reader.

Structured as a chronological retrospective of events and pertinent societal issues, the book begins by looking at other jurisdictions that have introduced a class action regime and then tracks the progression of a similar mechanism in Ontario. Chiodo explores how a push for environmental and consumer rights, significant amendments to the *Combines Investigation Act*,[4] and the introduction

1. (Irwin Law, 2018).
2. JD (2021), Osgoode Hall Law School, Toronto, Canada.
3. SO 1992, c 6 [*CPA*].
4. RSC 1952, c 314.

of class action legislation in Quebec all intensified the class actions debate in Canada and demonstrated that a similar regime was possible elsewhere. The heightened attention that class actions were receiving then led to a report from the Ontario Law Review Commission (OLRC) and, subsequently, a report from the Attorney General (AG)'s Advisory Committee. These reports would ultimately prove to be catalysts to the creation of the *CPA*.

Chiodo argues that the *CPA* may not have come into effect were it not for the appointment of Attorney General Ian Scott, who was described in an interview as "driven, ambitious, and a master tactician."[5] Scott's protegé, a young lawyer named Michael Cochrane, likely played an equally significant role in the creation of the *CPA*. This is clear from Chiodo's in-depth research into the AG's Committee and the masterful role Cochrane played in pulling together and appeasing a wide variety of divergent interests. As Chiodo notes, "Scott and Cochrane demonstrated an uncanny ability to persuade and, where persuasion failed, to get people where they wanted them through swift manoeuvring, political *savoir faire*, and sleights of hand at the negotiating table."[6]

The chronological approach that Chiodo takes in presenting her argument is instructive. Each event that she details provides valuable context and explains how the groundwork was laid for the next event to occur. For example, one of the pivotal elements in the creation of a class actions regime was the fight for consumer and environmental rights.[7] Chiodo explains that, although legislation was introduced that provided consumers with additional protections, granting consumers greater rights was meaningless without a mechanism to enforce those rights.[8] And while an individual consumer could technically sue a manufacturer over a defective product, few consumers would actually pursue such a claim because of the time and expense involved—especially when the best case scenario would likely result in a relatively modest award. Therefore, demand grew for a mechanism that would enable dozens—or even hundreds—of claimants to pursue a single claim together.[9]

Perhaps Chiodo's most notable contribution to existing scholarship is her discussion of the purpose of the legislation. The dominant view of class

5. Interview of Advisory Committee member by Suzanne Chiodo (13 April 2016), originally conducted as research for Chiodo's Master of Laws thesis.
6. Chiodo, *supra* note 1 at 91.
7. *Ibid* at 88.
8. *Ibid* at 48.
9. *Ibid* at 49.

proceedings is that the governing legislation was enacted to serve the public interest.[10] Chiodo notes:

> Public interest theory posits that legislation is enacted to correct market failures (in that small claims are not litigated because they are not individually economically viable),[11] to protect vulnerable groups, or to ensure resources are distributed fairly (aggregating individual claims to prevent the unjust enrichment of the corporation at the cost of the consumer).[12]

However, her research demonstrates that the *CPA* was not, in fact, created as a purely public interest-focused piece of legislation—quite the opposite. While the *CPA* may have initially been devised with public interest as the primary concern, a variety of private interests penetrated the consultation process somewhere along the way. Furthermore, Chiodo alleges that these interest groups actually co-opted or "captured"[13] the legislative process, as their endorsement was a pre-requisite to any legislation being approved.[14]

Chiodo incorporates "capture theory" in her claim that the AG's Advisory Committee was essentially hijacked by private interest groups.[15] Law and economics scholars describe "capture theory" as occurring when regulatory agencies get "stymied in meeting their public interest goals because they have been subverted by pressure and influence to protect the interests of those who were the subjects of the regulation."[16] According to scholars, regulatory agency work is particularly susceptible to undue influence when a variety of factors are present: when the work being conducted is beyond the public gaze; when the committee requires information that only the regulated industries can provide; when the committee is dependent on expertise from officials in those industries; and when the subject industries can exercise veto power or have some other ability to hamper the agency's work.[17] Chiodo notes that this perfect storm of factors was present with the AG's Committee.[18]

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10. Law Commission of Ontario, *Class Actions: Objectives, Experiences and Reforms* (LCO, 2019, Final Report) at 82, online (pdf): <www.lco-cdo.org/wp-content/uploads/2019/07/LCO-Class-Actions-Report-FINAL-July-17-2019.pdf>.
11. Anthony Ogus, *Regulation: Legal Form and Economic Theory* (Hart, 1944) at 55.
12. *Ibid* at 46-54; Chiodo, *supra* note 1 at 167-68.
13. *Ibid* at 168. Chiodo credits the idea of "capture theory" to Anthony Ogus. See *supra* note 10.
14. Chiodo, *supra* note 1 at 168.
15. *Ibid*.
16. *Ibid*.
17. Ogus, *supra* note 10 at 57-58.
18. Chiodo, *supra* note 1 at 168.

Chiodo points to three illustrative examples to support her claim. First, the AG's Committee conducted its work in private. Although the report itself was public, the deliberations occurred behind closed doors.[19] Second, the AG needed information from the private interest groups involved in order to understand how the class actions would impact corporate interests and also to learn the views of the private interest groups' constituents.[20] Finally, AG Committee members with distinct private interests had the ability to negate the committee's work, as a consensus among group members was required.[21] According to Chiodo, the involvement of private interests, and the power they held in deliberations, had a definite impact on the final *CPA*.[22] She writes, "The results changed the shape of the *CPA* and continue to be felt by class actions lawyers to this day."[23]

The year *The Class Actions Controversy* was published proved to be quite a popular year for class actions scholarship. Perhaps the most notable addition came from Canadian academic Jasminka Kalajdzic, an associate professor and Director of the Class Action Clinic at Windsor Law. Kalajdzic's book, *Class Actions in Canada: The Promise and Reality of Access to Justice*, is an insightful examination of the conventional belief that class actions advance access to justice goals.[24] Kalajdzic ultimately 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."[25] While Chiodo's book serves as a comprehensive look at the history and development of the legislation enabling class proceedings, Kalajdzic's contribution focuses on tackling the long-held belief that class proceedings abolish certain barriers to justice. Both books are valuable in their own right, and both should be considered required reading for class action lawyers.

As a professor, lawyer, and internationally acclaimed scholar in the area of class actions, few people are better positioned to write a book about class actions than Chiodo. The breadth and depth of Chiodo's research and her practical experience as a class actions lawyer allowed her to write what is undoubtedly the authority on the history of the *CPA*. Winner of the 2019 Peter Oliver Prize in Canadian Legal History and shortlisted for the Speaker's Book Award 2019,

19. *Ibid*.
20. *Ibid* at 169.
21. *Ibid*.
22. *Ibid* at 170.
23. *Ibid*.
24. (UBC Press, 2018).
25. *Ibid* at 10.

The Class Actions Controversy is a must-read for class actions lawyers, judges, and anyone with even a remote interest in class action law.

As the influx of scholarship in the area may suggest, there has never been a more interesting and important time in Canadian class actions history. Indeed, given recent legislative developments, an analysis of the history of the *CPA* could not have been timelier. On 1 October 2020, significant amendments to the *CPA* came into effect.[26] Many of these amendments had been successfully predicted by Chiodo in her book's final chapter, which is yet another testament to her expertise and extensive knowledge of the area.[27] Furthermore, as COVID-19 continues to paralyze the world, Canadian law firms are seeing what they have described as an "epidemic of class actions."[28] According to Joséane Chrétien, a Montréal-based lawyer with McMillan LLP, "The wave of COVID-19 class actions has just begun."[29] While Chiodo's book will likely find its largest audience in the legal community, anyone who has experienced an unfair business practice or suffered hardship as a result of COVID-19 could be well-served by reading it.

26. *CPA*, *supra* note 3.
27. Chiodo, *supra* note 1 at 189.
28. Joséane Chrétien, "Heading Towards an Epidemic of Class Actions" (3 April 2020), online: *McMillan* <mcmillan.ca/insights/heading-towards-an-epidemic-of-class-actions>.
29. *Ibid*.