

# INDUSTRY CLASS ACTIONS: A NEW CLASS ACTION INDUSTRY?

## 1. INTRODUCTION

The Courts in Ontario and British Columbia have articulated conflicting answers to the question of whether or not one plaintiff can sue an entire industry. In Ontario, the Courts insist on a plaintiff with a cause of action against each of the named defendants. In British Columbia, the Court of Appeal recently affirmed the opposite view, that a plaintiff can sue companies with whom he has had no dealings.

The BC approach raises the possibility of a single plaintiff commencing class proceedings against an entire industry of defendants. In this paper we consider whether this approach is reasonable. Perhaps more importantly, more recent case law allows us to ask whether it is ultimately workable, and hence, whether “industry class actions” will actually give rise to a new class action industry.

## 2. ONTARIO: One for each

In Ontario, in order for an action to proceed as a class proceeding against multiple defendants, there must a plaintiff with a personal cause of action for each of the defendants.

The need for a Plaintiff to have a cause of action against each defendant moving for summary dismissal, even in a proposed class action, was first recognized in *Ragoonanan v. Imperial Tobacco Canada Ltd.*<sup>1</sup> The claim in *Ragoonanan* was brought by the estates of three people who died in a fire alleged to have been caused by a cigarette manufactured by the defendant Imperial Tobacco Canada Ltd. However, the plaintiffs also sued two other cigarette manufacturers, Rothmans, Benson & Hedges Inc. and JTI-MacDonald Inc., claiming fire-related deaths could have been avoided had the three defendants manufactured “fire-safe cigarettes.” Rothmans and JTI-MacDonald moved to strike the Statement of Claim pursuant to Rule 21.01(1)(b)<sup>2</sup> on the ground that the claim did not disclose a cause of action as against them. Mr. Justice Cumming summarized the position of Rothmans and JTI-MacDonald as follows:

[Rothmans and JTI-MacDonald] raise an issue of first instance to class proceedings in Ontario. Is it sufficient to meet rule 21.01(1)(b) requirements that a representative plaintiff has a reasonable cause of action against one defendant although there is no representative plaintiff

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<sup>1</sup> *Ragoonanan Estate v. Imperial Tobacco Canada Ltd* [2000] O.J. No. 4597 (S.C.J.).

<sup>2</sup> “A party may move before a judge, . . .

(b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence, and the judge may make an order or grant judgment accordingly.”

with a cause of action against the other defendants? They submit that it is plain and obvious that the plaintiffs' claims, rooted in negligence and products liability, cannot succeed as against them. They assert that, in a class proceeding under the CPA, for any given defendant there must be at least one representative plaintiff who has 'a reasonable cause of action' disclosed in the pleading against that defendant.

[Rothmans and JTI-MacDonald] submit that it is insufficient for a representative plaintiff to have a cause of action on the face of the pleading against one defendant but not other defendants, even though at least some members of the putative class would have a cause of action on the face of the pleading against those other two defendants.<sup>3</sup>

Relying on the Supreme Court of Canada's decision in *Canada (Minister of Finance) v. Finlay*,<sup>4</sup> Mr. Justice Cumming reasoned that a plaintiff must have a relationship which can be the subject of cause of action against a particular defendant for an individual action to proceed against that defendant.<sup>5</sup> Accordingly, the Court ultimately concluded that the application to strike should be granted stating:

The CPA is merely a procedural statute. It cannot create substantive rights. The CPA does not lessen the requirement of rule 21.01(1)(b). The rules of court apply to class proceedings: s. 35 CPA.

It is axiomatic that the representative plaintiff must have a cause of action against a defendant in the action. A 'plaintiff' is, by definition, someone who brings an action against a defendant because of an asserted cause of action against the defendant. The pleading must disclose a 'reasonable cause of action' in law. Otherwise, there is no good reason to utilize the machinery of the courts and the proceeding should be brought to an end.

The criterion of s. 5(1)(a) of the CPA and the requirement of rule 21.01(1)(b) are commonly viewed as being identical in application. Query whether there is a difference? Section 5(1) of the CPA comes into play at the time of the motion for certification. That provision looks to the 'cause of action' (s. 5(1)(a)) in the context of the 'claims of the class members' (s. 5(1)(c)) and a representative plaintiff who will necessarily be a member of the class.

Looked at in the context of the motion for certification, there is arguably not a prerequisite required by s. 5(1)(a) to have a representative plaintiff with a cause of action against each defendant. For the purposes of certification, it may be enough if the pleading provides that class members have a cause of action against the defendants and there is at least one

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<sup>3</sup> *Ragoonanan*, supra, at paras 15 and 16.

<sup>4</sup> [1986] 2 S.C.R. 607, at pp. 332-33.

<sup>5</sup> *Ragoonanan*, supra, at paras. 23 and 24.

representative plaintiff. *Campbell* and *Harrington* both dealt with a motion for certification. They did not deal with a pre-certification motion under B.C. rule 19(24) [*Supreme Court Rules*, B.C. Reg. 221/90], being the equivalent to rule 21.01(1)(b) in Ontario.

The essence of a class proceeding is that it is an action with a representative plaintiff on behalf of a group of persons (a class) who have a cause of action in respect of which there are common issues of fact or law. It is axiomatic that the representative plaintiff must have a cause of action against a defendant in the action. A ‘plaintiff’ is, by definition, someone who brings an action against a defendant because of an asserted cause of action against the defendant. The pleading must disclose a ‘reasonable cause of action’ in law. Otherwise, there is no good reason to utilize the machinery of the courts and the proceeding should be brought to an end. . . .

In my view, and I so find, it is not sufficient in a class proceeding, for the purpose of meeting the requirement of rule 21.01(1)(b), if the pleading simply discloses a ‘reasonable cause of action’ by the representative plaintiff against only one defendant and then puts forward a similar claim by a speculative group of putative class members against the other defendants.

. . . The putative class members cannot be considered parties until certification is granted by the court. In addition, in the case at hand there cannot be any certainty that there are any persons with a cause of action against RBH and JTI-M. There cannot be a cause of action against a defendant without a plaintiff who has that cause of action. In my view, for every named defendant there must be a party plaintiff with a cause of action against that defendant to meet the Rule 21 threshold.

. . . Until there is a plaintiff who has such a cause of action, it is entirely speculative as to whether there is anyone with such a claim. A defendant should not be made subject to a speculative claim which presumes that one or more unknown persons possibly has a cause of action. It would be wrong to put a defendant to the expense of the litigation process if there is no reasonable cause of action against that defendant on the face of the pleading [emphasis added].<sup>6</sup>

In coming to this decision, Mr. Justice Cumming considered and distinguished *Campbell v. Flexwatt*<sup>7</sup> and *Harrington v. Dow Corning*<sup>8</sup> two cases from British Columbia that appeared to relax the one plaintiff for each defendant requirement (and that are discussed below), stating as follows:

<sup>6</sup> *Ragoonanan, supra*, at paras. 48, 50-52, 54-56.

<sup>7</sup> [1997] B.C.J. No. 2477 (C.A.).

<sup>8</sup> [2000] B.C.J. No. 2237 (C.A.).

The issue as to whether the representative plaintiff did not have a cause of action against each manufacturer was not raised as an issue in the context of the ‘cause of action’ prerequisite for certification [in *Harrington*]. It was implicit in the reasoning of the motions judge, as well as that of Huddart J.A. for the majority of the Court of Appeal, that *for the purposes of certification* it was sufficient for there to be class members who would have a cause of action against a given named defendant. There were common issues to be determined for all class members and all defendants. There was not a representative plaintiff with a cause of action against some of the defendants, but this was not seen as an issue *in order to certify the proceeding as a class proceeding*. . . .

It appears that the defendants in *Campbell* did not object to the substantive adequacy of the claim against them, but rather, only to the adequacy of the representation of the class. The court held (at p. 295) that, after the determination of the threshold question as to whether ‘the RCHPs were fit for the purpose for which they were intended’, any need to create subclasses or appoint further representative plaintiffs could be addressed.

Thus, the issue at hand was not directly before the court in either *Campbell* or *Harrington*. However, it seems implicit to the findings in those cases that the ‘cause of action’ criterion for certification is met when the representative plaintiff has a cause of action against at least one named defendant, there are putative class members with a cause of action against the other defendants and an allegedly defective generic product is in issue that raises common issues of fact or law.

A purposive analysis of the CPA must be kept in mind. Section 5 of the CPA sets forth the requirements for a certifiable class proceeding. The touchstone is a commonality of issues with respect to ‘the claims . . . of the class members’ (s. 5(1)(c)). The pleadings must disclose ‘a cause of action’ (s. 5(1)(a)). This requirement can arguably be interpreted as relating to the ‘claims . . . of the class members’ (s. 5(1)(c)). There must be at least one representative plaintiff (s. 5(1)(b)).

The representative plaintiff must, *inter alia*, ‘fairly and adequately represent the interests of the class’ (s. 5(1) (e)), but there is no requirement that the representative plaintiff have a cause of action against all defendants.<sup>9</sup>

The Ontario Court of Appeal affirmed what is now generally referred to as the “*Ragoonanan Principle*” in *Hughes v. Sunbeam Corp. (Canada) Ltd.*<sup>10</sup> In *Hughes*, the

<sup>9</sup> *Ragoonanan, supra*, paras. 39, 42-45.

<sup>10</sup> [2002] O.J. 3457 (C.A). See also: *Boulanger v. Johnson & Johnson Corp.*, [2002] O.J. No. 1075 (S.C.J.), at paras. 21-22; *Pearson v. Inco Limited*, [2002] O.J. No. 2764 (S.C.J.) at para. 84;

representative plaintiff brought a class action against four smoke alarm manufacturers, even though he only purchased an alarm from one of them. The defendants whose products had not been bought by the plaintiff brought a motion pursuant to Rule 21.01(1)(b) just as their counterparts had done in *Ragoonanan*. The motions judge dismissed the claims against these defendants, holding that the plaintiff had no reasonable cause of action against a company that did not manufacture the product he purchased.<sup>11</sup>

The Ontario Court of Appeal in *Hughes* affirmed both the decision of the Chambers Judge in that case and the result in *Ragoonanan*, stating:

Section 35 of the *Class Proceedings Act* provides that ‘the rules of court apply to class proceedings’. Thus, even before certification, a defendant may bring a motion under rule 21.01(1)(b) to strike a representative plaintiff’s claim on the ground that it discloses no reasonable cause of action. See *Stone v. Wellington County Board of Education* (1999), 29 C.P.C. (4th) 320 (Ont. C.A.). And, if the representative plaintiff does not have a cause of action against a named defendant, the claim against that defendant will be struck out. Put differently, as Nordheimer J. said in *Boulanger v. Johnson & Johnson*, [2002] O.J. No. 1075 (Ont. S.C.J.): ‘for each defendant who is named in a class action there must be a representative plaintiff who has a valid cause of action against that defendant.’<sup>12</sup>

### 3. **BRITISH COLUMBIA: One for all**

In British Columbia it is not *necessary* that each representative to have a cause of action against every defendant (but as you will see, it may still be *advisable*).

In *Harrington v. Dow Corning Corp.*,<sup>13</sup> the plaintiff brought a claim against several manufactures of breast implants. In certifying the action, Mr. Justice MacKenzie was of the view the plaintiff would fairly and adequately represent the interests of the class, even though several of the manufacturer defendants complained she did not allege personal experience with their products, and therefore, could not represent claims against them. When responding to this concern, His Lordship noted that the primary cause of action was in negligent manufacture which involved the manufacturers severally. However, Mr. Justice MacKenzie also recognized that, if the proceeding proved unwieldy, it may be appropriate to divide the class into subclasses by manufacturer, with separate representatives for each subclass.<sup>14</sup> The certification decision was affirmed on appeal,<sup>15</sup>

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*Gariepy v. Shell Oil Co.* [2002] O.J. No. 2766 (S.C.J.) at para. 33; *McNaughton Automotive Ltd. v. Co-Operators General Insurance Co.*, [2003] O.J. No. 2914 (S.C.J.) at para.47; and, *Attis v. Canada*, [2003] O.J. No. 344 (S.C.J.) at paras. 38-41.

<sup>11</sup> [2000] O.J. No. 4595 (S.C.J.) at para. 41.

<sup>12</sup> *Hughes* (C.A.), *supra*, at para. 15.

<sup>13</sup> [1996] B.C.J. No. 734 (S.C.).

<sup>14</sup> *Ibid*, at para. 51.

<sup>15</sup> [2000] B.C.J. No. 2237 (C.A.).

and while it does not appear the issue of a single representative plaintiff was argued, in his dissenting opinion Mr. Justice Finch expressed concern that the certified common issues could not be addressed “without referring to specific products in relation to specific plaintiffs”.<sup>16</sup>

In *Furlan v. Shell Oil Co. and others*,<sup>17</sup> the issue was whether or not there needed to be a representative plaintiff alleging a direct claim against a defendant in order to establish *jurisdiction simpliciter*. The defendants were all US manufacturers of a plastic that had been used to manufacture pipes for home plumbing. While the plaintiffs were alleging failure of the pipes due to a defect in the plastic, their evidence did not disclose that any of them had pipe manufactured from the defendant E.I. Du Pont. On the jurisdiction motion, Du Pont raised this fact to distinguish its position from that of the other defendants; however, Mr. Justice MacKenzie did not accept that it made any difference for the purposes of a jurisdiction motion:

Du Pont contends that at least before certification the references in the amended statement of claim to ‘the Plaintiffs and the Class’ are not proper pleading and the respondents on this application must link causation of Du Pont resin to individual plaintiffs and not intended class members generally. In my opinion, that is too narrow a view of the pleadings in proceedings intended to be pursued under the Class Proceedings Act. On this application, causation should be considered in the context of the proposed class generally and not the individually named plaintiffs. On that view, the position of Du Pont does not differ significantly from that of the other two appellants.<sup>18</sup>

In *Campbell v. Flexwatt*,<sup>19</sup> the B.C. Court of Appeal addressed the single representative plaintiff concept more clearly, determining that it was not necessary that a representative plaintiff have a cause of action against each defendant in order to certify a proceeding as a class action. *Campbell* was a product liability lawsuit arising from the use of radiant ceiling heating panels manufactured by some of the defendants. These panels had been the subject of a disconnect order by the Province of B.C.’s Chief Electrical Inspector following reports of fire and property damage. The primary claims advanced concerned the design and manufacture of the panels and the action of the Province in disconnecting the units. Claims were also advanced against various municipalities for allowing the panels to be installed. The Court approved the use of representative plaintiffs residing in only two municipalities notwithstanding the proposed class action raised issues against a number of others.

The Court held that it was not necessary for there to be at least one representative plaintiff with a cause of action against each municipality. To the contrary, the Court said one representative plaintiff can act against multiple defendants so long as he or she would

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<sup>16</sup> *Ibid*, at para. 130.

<sup>17</sup> [2000] B.C.J. No. 1334 (C.A.).

<sup>18</sup> *Ibid*, at para. 22.

<sup>19</sup> [1997] B.C.J. No. 2477 (C.A.).

adequately represent the class for the purposes of the certified common issues. However, the Court did acknowledge that it might be necessary to certify subclasses with their own representative plaintiffs at a later date.

Most recently, the B.C. Court of Appeal confirmed the dichotomy between Ontario and B.C. with regard to “industry class actions” in *MacKinnon v. Money Mart et al.*<sup>20</sup> The plaintiff in *MacKinnon* brought his action on his own behalf and on behalf of all persons in B.C. who had received payday loans from one or more of 27 named defendants. The claim alleged that fees charged to class members constituted interest and resulted in the collection of interest at a criminal rate.

A group of the defendants from whom the plaintiff had not received a loan brought an application under Rule 19(24) of the *B.C. Supreme Court Rules*<sup>21</sup> to have the claims against them struck. Those defendants argued that the plaintiff had no personal cause of action against them. The plaintiff relied on the B.C. Court of Appeal’s decision in *Campbell v. Flexwatt*. The chambers judge agreed, dismissing the Rule 19(24) application on the basis that she was bound by the decision in *Campbell*.<sup>22</sup>

Interestingly, at around the same time as the chambers decision in *MacKinnon v. Money Mart* reasons were released in *MacKinnon v. VanCity*<sup>23</sup> (a proposed class action by the same plaintiff alleging improper overdraft charge by credit unions) which seemed to call into question the B.C. approach to industry class actions. In the *VanCity* action, the plaintiff employed a different strategy for expanding the number of target defendants. He commenced the claim against the credit union he had dealt with but later sought to add seven other credit unions as defendants. Again, the plaintiff had no dealings with these proposed defendants, and in response to the plaintiff’s application to add them as defendants, the seven credit unions argued they were not proper parties given the absence of any contract. On January 20, 2004, Madam Justice Ballance issued Reasons for Judgment refusing to join the parties with whom the plaintiff had no contractual relationship. In doing so, Her Ladyship rejected the plaintiff’s argument that, if a representative plaintiff does not need to have an individual cause of action against a defendant in order to have the claim certified as class action, he does not need to have a cause of action against the same defendant in order to join it in an action already underway:

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<sup>20</sup> [2004] B.C.J. No. 1960 (C.A.).

<sup>21</sup> “At any stage of a proceeding the court may order to be struck out or amended the whole or any part of an endorsement, pleading, petition or other document on the ground that

- (a) it discloses no reasonable claim or defence as the case may be,
- (b) it is unnecessary, scandalous, frivolous or vexatious,
- (c) it may prejudice, embarrass or delay the fair trial or hearing or the proceeding, or
- (d) it is otherwise an abuse of the process of the court,

and the court may grant judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.”

<sup>22</sup> [2004] B.C.J. No. 176 (S.C.).

<sup>23</sup> [2004] B.C.J. No. 155 (S.C.).

Mr. MacKinnon does not claim to have paid any overdraft charges to any of the Proposed Defendants. His position is that the above principle in *Campbell* ought to be expanded to permit joinder of the Proposed Defendants even though he does not have an individual cause of action against any of them. Mr. MacKinnon's contention is that if a representative plaintiff in a class proceeding need not have an individual cause of action against a defendant in order to have a proceeding certified, then it logically follows that a plaintiff need not have a cause of action against each particular defendant in order to join such defendant to an action and pursue it to certification. . . .

The subject matter of this action is the alleged overcharges made by VanCity to its members pursuant to specific contracts between VanCity and members of the VanCity Class. The relief sought is the repayment to the VanCity Class of those specific overdraft charges and for related damages. The defences raised by VanCity to those allegations in part stem from the specific terms of the VanCity contract and the manner in which VanCity administered the collection of overdraft charges pursuant to the terms of that contract. The allegations which Mr. MacKinnon now seeks to raise in this action as against the Proposed Defendants are claims which are available to a completely different set of individuals (i.e. the members of each of the Proposed Defendants) and arise pursuant to completely different contracts entered into between each of the Proposed Defendants and their respective members. Mr. MacKinnon has led no evidence about the contractual terms of the Proposed Defendants. The issue raised against each of the Proposed Defendants relates to alleged overcharges arising from their own particular contracts with their own respective members and not overcharges arising from the contract which exists between VanCity and the VanCity Class. A determination of the claims advanced against VanCity will not be determinative of the claims advanced against the Proposed Defendants. To my mind, there is nothing to suggest that the claims are related except for the fact that they arise under the same section of the Criminal Code. . . .

Mr. MacKinnon urges this court to extend the principle established in *Campbell* well beyond its intended scope and in a manner that would effectively provide a litigation vehicle for others, presently unconnected to the proceeding, to prosecute a claim against the Proposed Defendants.<sup>24</sup>

On appeal of the *MacKinnon v. Money Mart* decision, the defendant's group sought to distinguish *Campbell*, arguing that in that case the Court had been asked to consider whether a cause of action existed in the context of s. 4(1)(a) of the B.C. *Class Proceedings Act*<sup>25</sup> rather than under a Rule 19(24) application. Alternatively, the

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<sup>24</sup> Ibid, at paras. 11, 17 and 19.

<sup>25</sup> R.S.B.C. 1996, c. 50.

defendants took the position *Campbell* should not be followed because it was wrongly decided. Finally, the defendants relied on the reasoning in the *VanCity* case.

Writing on behalf of unanimous five-numbered bench, Madam Justice Saunders, rejected all of those arguments. Early in the Court's Reasons, Her Ladyship signaled that she might be willing to relax the usual cause of action rules for class proceedings when she noted that, "an action commenced under the Class Proceedings Act is, even before the certification application, more than just "any old action": it is an action with ambition."<sup>26</sup>

In answer to the defendants' contention that the applicable tests could be distinguished, Madame Justice Saunders reasoned that the s. 4(1)(a) test is not materially different from that used in Rule 19(24), and therefore, there was no reason that "the form of the application bringing this issue to court can or should lead to different results".<sup>27</sup> (Note that this finding undermines the chief ground on which the court in *Ragoonanan* had distinguished the *Campbell* decision).

As regards the second ground for appeal, Madam Justice Saunders noted that s. 2(4)<sup>28</sup> of the B.C. *Class Proceedings Act* makes it possible for a person who is not a member of the class to act as the a representative plaintiff. Drawing from that analogy, the court concluded that, "while the Act requires a cause of action against each named defendant, that cause of action must be held by class members, not necessarily the representative plaintiff".<sup>29</sup> Her Ladyship's reasoning in this regard is found in paragraphs 49 and 50 of the Appellate Court's decision:

. . . the flexibility in the Act supports the result of *Campbell v. Flexwatt*. While s. 2(1) displays an intention that, in ordinary cases, the representative plaintiff or plaintiffs themselves should have a cause of action, s. 2(4) shows that such condition is not inherent to a class action. A representative plaintiff referred to in s. 2(4) is not a member of the class and would not be linked to the defendants by a cause of action. Rather the link would be between the defendants and the class, with the representative plaintiff simply the spokesperson of the class.

Although s. 2(4) only allows a non-member of a class to be the representative plaintiff where it is necessary 'to avoid a substantial injustice to the class,' the fact that the Act allows such a situation at all indicates, in my view, that the cause of action nexus is not solely between defendants and the representative plaintiff, but also between defendants and the plaintiff class as a whole. This shifts the focus in the cause of action analysis from the representative plaintiff onto the class, and is

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<sup>26</sup> [2004] B.C.J. No. 1960 (C.A.), at para. 33.

<sup>27</sup> *Ibid*, at para. 40.

<sup>28</sup> "The court may certify a person who is not a member of the class as the representative plaintiff for the class proceeding only if it is necessary to do so in order to avoid a substantial injustice to the class."

<sup>29</sup> *MacKinnon v. Money Mart* (C.A.), *supra*, at para. 51.

consistent with litigation process that seeks to resolve common issues, rather than to resolve entire claims.<sup>30</sup>

The Court of Appeal gave very short shrift to Madame Justice Balance's decision in the *Van City* case, distinguishing it on the basis of the applicable test in much the same way the defendants had suggested *Campbell v. Flexwatt* should be distinguished:

These reasons do not address, and should not be read as dealing with *MacKinnon v. Vancouver City Savings Credit Union*. There, Ballance J. was concerned with the application of Rule 15(5) and the lack of interrelationship of the claims, a question which bears on the exercise of discretion to add a party, particularly where, as here, the action is based in contract.<sup>31</sup>

Finally, the Court distinguished the Ontario line of authorities on the basis that there is no equivalent to s. 2(4) in the Ontario *Class Proceeding Act*.

The affected defendants appealed the Court of Appeal's decision to the Supreme Court of Canada. However, that was abandoned as moot following the rejection of certification which is discussed further below.

#### **4. QUEBEC: One for All, then One for Each**

Originally, the Courts in Quebec seemed to have adopted a similar approach to that in British Columbia, allowing single plaintiff industry claims to be advanced, although the issue was never squarely considered in certification context.<sup>32</sup>

Most recently, however, they have aligned themselves with their Ontario counterparts. In *Bouchard v. Agropur Co.*<sup>33</sup>, the court refused to certify an action against several defendants from the dairy industry on the basis that the plaintiff did not drink their milk, and therefore, did not have a cause of action against them.

#### **5. IS THE BC APPROACH CORRECT? A DEBATE IN TWO PARTS**

##### **(a) Sure it is!**

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<sup>30</sup> Ibid, at paras. 49-50.

<sup>31</sup> Ibid, at para. 58.

<sup>32</sup> *Teixeira (f.a.s. Dépanneur A. et C. enr.) v. Tetra Vision Inc.*, [2001] J.Q. No. 1219 (C.A.); *Option consommateurs v. Assurances Générales des Caisses De jardins Inc.* (unreported, July 19, 2001, Que. S.C., Court File No. 500-06-000093-993); *Union des consommateurs v. Hyundai Motor America*, [2003] J.Q. no 7652 (S.C.); *Lavergne v. Union canadienne*, [2002] J.Q. no. 2918 (S.C.); leave to appeal dismissed [2002] J.Q. no 2830 (C.A.); *La Compagnie d'assurance Missisquoi Inc. v. Option consommateurs*, REJB 2002-32909 (C.A.). However, it should be noted that the latter three decisions were issued in the context of motions made prior to the certification hearing proper, leaving the question to be fully considered at that stage.

<sup>33</sup> [2004] J.Q. No. 13863 (S.C.).

The most important factor in favour of industry class actions is that they serve the primary legislative objectives of class proceedings legislation – judicial economy, access to justice and behaviour modification. Put most simply: if there are common underlying facts, then why not address them in one lawsuit?

Managing a broad group of similar claims within one action as opposed to a multitude of smaller claims obviously promotes judicial economy. Should those defendants band together in a single defendants' group or even with one set of counsel, case management and the defence case should be consolidated and simplified. Where the impugned conduct is truly common to the targeted industry, the specter of complex and unwieldy litigation arising from minor variations in practices across a broad industry group may never materialize. Note the litigation chaos that developed in the auto deductibles litigation in Ontario after, in deference to the *Ragoonanen principle*, separate actions were brought against each insurer. Although the cases were case managed together, that was not nearly enough to ensure smooth and efficient management of the many-headed beast.

The alternatives are either a single action with large and unwieldy representative plaintiff group or a series of parallel claims against individual industry members, both of which may not offer a remedy to everyone affected by the industry's common conduct. In the latter case, an otherwise viable class of claims may be lost to the passage of time or because the financial condition of a smaller member of the industry group cannot sustain a separate class proceeding. With a single large, industry class action, both sides should be in a better position to shoulder the cost of the proceeding, by spreading it across a broader group of either class members or defendants.

The B.C. approach should also promote access to justice by enabling more persons who have suffered the wrong at issue to receive the benefit of a class proceeding. Without the industry class actions, individual plaintiffs have to be found for each defendant even though the claims against all defendants are essentially the same. What advantage is gained by forcing class counsel to scour the countryside for straw men?

Finally, an industry class action should improve behaviour modification by ensuring that all members of the industry are made to account for any wrong in which they took part.

**(b) No way, Jose!**

The principal knock against industry class actions is they are premised on the abrogation of a fundamental rule of fairness. A defendant should not have to defend a lawsuit unless someone who has had dealings with it wants to sue it. From the defendants' perspective, the question for proposed class counsel is simply stated: Is it really too much to ask that you have a plaintiff before you sue me?

Except in cases involving down-stream consumers, industry class actions will commonly include a plea in contract. It is trite law that a plaintiff cannot bring an action in contract against a party with whom he has had no dealings. Privity is a threshold requirement of standing to sue on a contract.<sup>34</sup> There is also no question that a defendant may apply to dismiss an individual contract claim where the plaintiff lacks the requisite privity.<sup>35</sup>

If a plaintiff cannot maintain his action against a defendant in the ordinary case, does the fact that the claim is a proposed class action somehow negate the privity principle, and operate as a bar to a dismissal application? The answer is clearly “no”. Class proceedings statutes, whether in B.C. or Ontario (or any other Canadian jurisdiction), are simply procedural legislation. They do not create any new rights or causes of action. If a plaintiff does not have a claim against a defendant before the filing of the proposed class proceeding, the filing does not change that fact. As stated by Winkler J. in *Ontario New Home Warranty Program v. Chevron Chemical Co.*<sup>36</sup>:

. . . this Court has noted on multiple occasions that there is no jurisdiction conferred by the *Class Proceedings Act* to supplement or derogate from the substantive rights of the parties. It is a procedural statute and, as such, neither its inherent objects nor its explicit provisions can be given effect in a manner which affects the substantive rights of either plaintiff or defendants.<sup>37</sup>

While class proceedings legislation allows a plaintiff to advance his personal claim on behalf of other persons who are similarly situated, it does not allow him to advance *a claim he does not have* on behalf of others. Taken to its most rudimentary form, class proceeding legislation provides a process by which a class of other people can “tag on” to properly constituted litigation. However, where the plaintiff does not have a valid claim against a defendant to which others can be invited to “tag on”.

Being required to defend a claim when there is no plaintiff with a cause of action against you can be particularly onerous in a class action. It is possible to imagine a company caught up in an industry class action spending considerable time and money opposing certification and defending the common issues, only to find that none of its customers is actually aggrieved or inclined to advance a claim. Ironically, this problem is probably greatest in B.C. where the no-costs scheme is likely to prevent the defendant company from recovering even a portion of its legal expenses.

There are a number of practical objections to the use of industry class actions, mostly arising from a perceived inability of a representative plaintiff who does not have a cause

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<sup>34</sup> *Iampen v. Royal Bank of Canada* [1987], A.J. No. 507 (Q.B.), at paras. 15-17; G.H.L. Fridman, *The Law of Contract in Canada*, 4th ed. (Toronto: Carswell, 1999) at 187.

<sup>35</sup> *Grasser Contracting Ltd. v. Butler Bros. Equipment Ltd.*, [1979] B.C.J. No. 1046 (S.C.); *Lajoie Lake Holdings Ltd. v. Hayward*, [1992] B.C.J. No. 2261 (S.C.– Master); *Chrysler Credit Canada Ltd. v. Shipperbottom*, [1993] O.J. No. 1707 (Gen. Div.), at para. 17.

<sup>36</sup> [1999] O.J. No. 2245 (S.C.J.).

<sup>37</sup> *Ibid*, at para.50 (emphasis added). See also *MacKinnon v. VanCity*, *supra*, at para. 11 and *Bendall v. McGhan Medical Corp.*, [1993], O.J. No. 1948 (Gen. Div.), leave to appeal denied, [1993] O.J. No. 4210 (Gen. Div.).

of action against every defendant to represent the interests of the entire class. Certainly this “token plaintiff” cannot give the evidence required to support certification against all of the defendants. One might also question whether he has any sufficient interest in pursuing the claims against those defendants who are not related to him in order to meet the test for appointment as the representative plaintiff,<sup>38</sup> or if appointed, to properly instruct counsel. This could be particularly problematic where one company makes an offer to settle the litigation. In this case, the representative plaintiff really has no personal stake in the terms of settlement with any company with whom he has had no dealings.

Lastly, whenever there are differences between legal regimes such as the one discussed in this paper, there is the prospect of forum shopping.<sup>39</sup> Will ambitious class counsel comb B.C. (or any other province that chooses to adopt the B.C. approach) to locate a representative plaintiff with whom they can take on a whole industry?<sup>40</sup>

## 6. **LESSONS FROM THE MACKINNON AFTERMATH: PERHAPS THE PROPER BALANCE HAS BEEN STRUCK?**

Recall that in *MacKinnon v. Money Mart* the Court of Appeal only said there was no “cause of action” bar to industry class actions. It did not certify the action. Following the Court of Appeal’s ruling regarding the existence of a cause of action, the case was remitted to the trial judge to consider the balance of the certification requirements. Indeed, the Court of Appeal went further, stating that industry class actions should be subject to a rigorous application of the balance of the certification test:

The appellants also express concern that an entire business sector may be embroiled in litigation at the instance of one person in circumstances where there is no real complaint against many of the defendants. On the other side of this, of course, is the concern discussed in *Lupsor Estate v. Middlesex Mutual Insurance Co.*, [2003] O.J. No. 1038 (S.C.J.) of needless multiple proceedings. The materialization of unfocussed, sector-wide litigation would be a concerning development. However, tools for corralling abuse exist within the Act, both in the certification process that tests the commonality of issues and imports the test of fairness and efficiency, and after certification if such should be ordered. This will be particularly important where, as here, the claim hinges on an allegation of criminal conduct.

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<sup>38</sup> Ontario *Class Proceedings Act*, s. 5(1)(e) and B.C. *Class Proceedings Act*, s. 4(1)(e).

<sup>39</sup> See *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897, and the comments regarding that case at paragraph 56 of the reasons of the Court of Appeal in *MacKinnon v. Money Mart*.

<sup>40</sup> One limitation on this possibility is that fact that B.C. still has an “opt in” regime for extraprovincial class members, making it less attractive.

I would expect the controls given to the trial court by the Act to be applied robustly, so as to protect against abuse while still advancing the three objectives I referred to at the beginning of these reasons for judgment.<sup>41</sup>

So what happened next?

In a decision handed down March 1, 2005, Madame Justice Brown rejected the plaintiff's application for certification of the industry wide class action, on the basis of a failure to prove common issues.<sup>42</sup> As set out above, the plaintiffs in the *Money Mart* case were alleging that fees charged in conjunction with loans made by the defendants were in fact interest charged and paid at a criminal rate. Based on the defendant's review of their differing business practices, Her Ladyship concluded that fact finding in relation to the loan transactions would not be common to the class. While fees charged by one defendant might constitute interest and might have been paid in excess of the criminal rate, those potential findings of fact and legal analysis could have little or no application to other borrowers and lenders named in the action. Therefore, Madame Justice Brown reasoned, the court would be required to look at each separate form of agreement and fee charged.

In taking this view, Her Ladyship rejected the plaintiff's argument that commonality could be found in the similar legal analysis that would have to be brought to the consideration of the lender practices and forms of agreement:

This similarity of legal analysis is not the commonality contemplated by the Act. While each fee in each agreement will involve a somewhat similar legal analysis because each is alleged to breach s. 347 of the Criminal Code, the legal analysis is no more similar than that between two distinct cases involving breaches of s. 347: a mortgage purportedly in breach of s. 347 would enjoy as much similarity in fact and legal analysis with these loans as they do with each other.

Even if the similarity of the legal analysis were sufficient to make these issues common issues, this would not be the preferable procedure, as discussed below. Each defendant would be required to attend and participate in the review of agreements and business models which have little in common with theirs. Individual plaintiffs would be required to wait for determination of their claim while unrelated fees and agreements are considered.<sup>43</sup>

Expanding on her concerns regarding preferability, Madame Justice Brown stated that:

Here, in my view, the individual issues overwhelm the common issues. As Payroll Loans and Pay Credit (B.C.) say in their argument, any issues that

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<sup>41</sup> *MacKinnon v. Money Mart* (C.A.), *supra*, at paras. 54 and 55.

<sup>42</sup> [2005] B.C.J. No. 399 (S.C.).

<sup>43</sup> *Ibid*, paras. 30 and 31.

can be phrased commonly play a minimal role in the context of the entire claim which manifestly requires a review of the individual circumstances with respect to each individual loan agreement. The proposed common issues do not predominate over the individual issues when the common issues are viewed in the context of the claim as a whole. Assuming that a particular standard form loan agreement is found to constitute an agreement to receive interest at a criminal rate, the court must still look to individual circumstances:

1. In many cases the standard form loan agreements were varied orally, at the time of execution or later;
2. The court will have to determine on an individual basis the date of the advance of principal and the dates of repayment: small payments may have been advanced from time to time and the court will have to determine what, if any interest has been received on the amount advanced;
3. In some cases, payment will be made after collection procedures are initiated and the court will have to consider what portion of the payment is principle, what interest and what costs;
4. Defences will be raised to each of these claims: *res judicata* for some claims which have already been adjudicated by another court; voluntariness for payments of interest exceeding 60% (in other words, where the plaintiff could have avoided paying interest at more than 60%, yet pays in a manner that the interest exceeds 60%, is this voluntariness and does that constitute a defence to the Criminal Code provision?);
5. With respect to trade practice claims and punitive damages, the defendants will raise individual circumstances in defence to these claims: were the individuals fully informed, were they under pressure, etc.
6. The defendants will bring counterclaims against the plaintiffs for loans that have not been repaid: in many cases, borrowers borrow on more than one occasion and may repay in full on one occasion and not at all on another occasion. The defendants will advance counterclaims for those amounts unpaid.

For any individual claimant or defendant it may take a very significant period of time, as the court works through other issues, before their individual circumstances are dealt with. This is neither fair nor efficient. It is not an efficient use of judicial resources. It may be that these claims could be pursued effectively in 'less ambitious' class proceedings.<sup>44</sup>

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<sup>44</sup> *Ibid*, paras. 39 and 40.

Unfortunately for the authors and readers of this paper, the Court never dealt with the appropriateness of the representative plaintiff and his ability to adequately prosecute the claim on behalf of all members of the class.<sup>45</sup>

The caution that should apply to any effort to certify an industry class action was underscored by Madame Justice Brown in a decision six months later to certify an action asserting parallel claims against a single enterprise/business model: *Bodnar v. Cash Store Inc.*<sup>46</sup> In response to the assertion by those defendants that the rejection of certification in *MacKinnon v. Money Mart* was determinative of the certification application in *Bodnar*, Her Ladyship stated as follows:

The circumstances of *MacKinnon* are quite different from these. In *MacKinnon* there were more than twenty defendants, operating eighteen businesses, with many different business models. Each defendant charged fees, which may have little or nothing in common with the fees charged by another lender. An individual claimant may have borrowed from only one defendant lender. The court's conclusions with respect to one fee of one lender may have no application beyond a particular borrower and lender. In those circumstances, I concluded that the issues, as phrased, were not common issues.

By contrast, here, we are concerned with only one business model. The thrust of the plaintiffs' claim is that Cash Store and Rentcash have set up a business where the borrower pays brokerage fees, cash card fees and debit fees to obtain a loan. The plaintiffs assert that each of the fees is interest and is in breach of s. 347 of the Criminal Code. Each of the claimants will have borrowed following the same Cash Store standard terms and procedures; each will have paid the same (or most of the same) fees; each will have a claim that the fees which they paid for their loan were unlawful interest.

To summarize then, on the basis of the most B.C. case law, there is no doubt that you can *file* an industry class action, but there is a real issue as to whether you will get that action *certified*.

## 7. CONCLUSION

Will Plaintiffs counsel now do their “forum shopping” in B.C. courts in order to take advantage of the ability to file industry class actions? Perhaps, but the *MacKinnon* decisions serve as a cautionary tale for such efforts.

Unless (1) the factual underpinnings of the industry claim area almost identical across companies, and (2) it is just too hard to locate class members for each

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<sup>45</sup> See the discussion of this issue at pp. 12-13 above.

<sup>46</sup> [2005] B.C.J. 1904 (S.C.).

major company, it may not be a wise decision. Counsel may be buying too much additional certification risk for the marginal benefit of common management.