

# **The Wheat and the Chaff: Class Action Case Selection**

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**Ward K. Branch  
Branch MacMaster  
1210-777 Hornby Street  
Vancouver, BC  
V7G 2N2  
Phone: 604-654-2966  
Fax: 604-684-3429  
Email: [wbranch@branmac.com](mailto:wbranch@branmac.com)**

**Won J. Kim  
Roy Elliott Kim O'Connor LLP  
10 Bay St., Suite 1400  
Toronto, Ontario  
M5J 2R8  
Phone: 416-362-1989  
Fax: 416-362-6204  
E-mail: [wjk@reko.ca](mailto:wjk@reko.ca)**

**Wiser far than human seer,  
Yellow-breeched philosopher!  
Seeing only what is fair,  
Sipping only what is sweet,  
Thou dost mock at fate and care,  
Leave the chaff, and take the wheat,**

**Ralph Waldo Emerson (1803–1882), U.S. poet, essayist. *The Humble-Bee* (l. 52–57)<sup>1</sup>**

## A. INTRODUCTION

Class actions can indeed carry the sting of Emerson’s “Humble Bee”. However, plaintiff’s counsel may be the one stung unless they carefully take the time to separate the wheat from the chaff.

The greatest hazard of a plaintiff’s class action practice is appropriate case selection. Many opportunities will present themselves, but few must be chosen. This paper will outline the factors that are part of this critical process.

It is often tempting to file a case merely because of the sheer size of case as reported by the client who has walked into your office. Do not let this happen.

The larger the case, the greater the resources committed to it by the defence. If the factors below are not carefully assessed, you will not simply be throwing good money after bad, you will be throwing *barrels* of good money after bad.

Take the time to carefully assess each of the following factors. The client will not like this, at least initially. They will want an immediate answer as to whether you are prepared to take on their case. You need to take the time to carefully explain the dynamics of class action litigation, particularly the cold hard economics.

Basically, the prospective client needs to understand that the way class action works is by encouraging plaintiff’s lawyer to invest his or her time and money into the case for free, in the hopes that the effort will someday be rewarded at a level that exceeds usual hourly rates on routine billable work.

The lawyer is being asked to invest a vast amount of his or her time over the next few years. You need to feed your spouse and kids in the meantime. Because you are being asked to make this huge investment, you need to first do your “due diligence”.

Many lawyers regard this type of “dollars and cents” discussion with the client as distasteful. However, you may be surprised how well the clients understand the message. In our experience, the general public seems to be more comfortable with the class action lawyer’s statutorily mandated entrepreneurial position than many lawyers or judges. As

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<sup>1</sup> The New Oxford Book of American Verse. Richard Ellmann, ed. (1976) Oxford University Press.

long as you properly explain the process, most clients will accept that it may take a few days or weeks before you can provide a definitive answer as to whether you will accept the retainer.

So what does this due diligence period involve?

#### B. WHO IS THE CLIENT?

We cannot overemphasize the importance of evaluating your relationship with your client, who may ultimately be your representative plaintiff. Taking on a class action is a serious commitment on your part. You must be in control of the process, including the selection of the representative plaintiff, the litigation strategy, and the use of resources to be invested. It is important to have a signed retainer agreement with your representative plaintiff, which clearly states what the proposed fee arrangement is, setting out the role of the client and the role of the lawyer, and what happens if there is a dispute. It is crucial that the client be advised of the risks of an adverse costs award in those jurisdictions where that is an issue.

Having an open and frank discussion with your client at the outset will make the process easier in the long run. If you get the sense that you will not be able to work with your client in the long term, you would be wise not to commence the action, or to find an alternate plaintiff to give instructions.

Class actions are unique in that, once certified, in addition to the duty you owe to your individual client, your duties as the solicitor for the class will extend to a large group of people, most of whom you will never meet. It is therefore important that the action is conducted in such a way as to benefit the entire class, and not only your individual client or representative plaintiff.

#### C. THE MERITS MATTER

Your consideration must then move to the merits. The client will often put forward a very favourable impression of this issue. You obviously need to make your own assessment.

It is not enough that the merits appear *reasonably good*. A higher threshold is required in this area. Class actions are so fraught with procedural challenges that you need to be convinced that the merits are *very strong* before embarking down the long and difficult path.

Some of the favourable signs you will be looking for in this respect are:

1. Has there already been a favourable individual trial finding against the potential defendant, either in Canada or the U.S.?

2. Has there been government action, for example by way of a criminal conviction for *Competition Act* violations or recall orders required by Health Canada?
3. If (1) or (2) are not met in relation to the particular potential defendant, are they at least met with respect to other companies in the same industry or in cases involving similar legal issues?
4. Is the science already established, or are you going to need to build from scratch? Class actions are often triggered by new reports in the scientific literature, even before governmental action has been taken. On the other hand, if the science is in a state of flux, or if there is no science at all, does Plaintiff counsel really wish to be the sponsor of the necessary raw research?<sup>2</sup>

You cannot take any chances in this respect. You may wish to bring in expert counsel in the particular substantive legal area involved to provide an opinion (and potentially to assist in the case thereafter if a decision is made to file).

#### D. ARE THERE ENOUGH PEOPLE?

Below a certain size, the procedural complexities of class litigation are simply not worth the effort. Although a class of 15 has been certified, double digit classes may be simpler to manage as a multiple plaintiff proceeding. Although class certification would force the members of the class to opt out, in a group that small you are more likely to have sufficient individual interest that anyone who would not seek to retain you to bring an individual action is also likely to opt out of the case in any event.

Assuming your threshold is met, you need to try your best to determine what the likely membership is in the class. Although this will usually be disclosed as part of the class certification process, you need to make your own determination of this issue before the case is even filed.

You may also discover potential sub-classes of people whose claims are similar, but not identical, to your primary class. More and more, judges are interested in knowing how large the overall class is. The more information you have at the pleadings stage, the better your ability to evaluate your chances on certification.

In cases that have been the subject of government action, the government statements may disclose this fact. A Freedom of Information request can also assist, although these requests take a great deal of time and effort to prepare.

#### E. ARE THE GLOBAL DAMAGES SUFFICIENT?

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<sup>2</sup> Although not technically a class action, *A Civil Action* by Jonathan Harr documents a case where this factor was arguably given short shrift by the Plaintiff counsel protagonist.

Class actions require tremendous resources. In order to ensure that your efforts can be rewarded at a level sufficient to merit taking on the case, the global damages must be sufficient.

The global damages should be at least \$1 million or more. This approach is based on the fact that usually defendants vigorously defend certification and often incur hundreds of thousands of dollars of costs in the process. Assuming that Plaintiff's counsel must go toe-to-toe with defence counsel at all stages, including but not limited to the certification hearing, it is obvious that the global damages must be in the seven figure range if there is going to be any realistic prospect of obtaining a premium on your time at the end of the day.

Interim costs are recoverable in certain jurisdictions, including the costs of the certification hearing. You should be sure to understand the costs regime in your jurisdiction prior to commencing a class proceeding. Recovering your costs may also require additional time and resources, which need to be budgeted.

#### F. WILL THE CASE BE CERTIFIED?

Except in the most extraordinary case, the individual representative's case alone will not justify the effort to bring the proceeding. It is only through certification that the reward will be sufficient.

The courts in every jurisdiction handle certification differently. Certification may be easier to achieve in some provinces compared to others. This will depend partly on whether the jurisdiction is an "opt-in" or an "opt-out" regime. In Ontario, for example, an "opt-out" regime, the Courts tend to be reluctant to certify except in very clear cases, where all of the tests for certification set out in the legislation are met. Counsel in other "opt-in" jurisdictions may face fewer hurdles at the certification stage.

The first step in assessing whether the case will be certified is to have a solid understanding of the requirements of your province's class proceedings legislation and rules. One way to achieve this is to carefully review the existing case law. As this is still a relatively new area in Canadian law, the Courts will seek considerable guidance from recent precedents in assessing whether a case should be certified.<sup>3</sup>

A few touchstones are useful here. The more positive answers to the following questions, the more likely the case will be certified:

1. Is the case dependant on the interpretation of a uniform contractual document?
2. Is the case based on products liability?

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<sup>3</sup> A shameless plug: the writer's text *Class Actions in Canada* (Aurora: Canada Law Book), catalogues all of the certification decisions in each substantive area in chapter 5, as well as in a summary form in Appendix A. A review should help guide this assessment.

3. Is the case based on a right of action provided by statute, such as a misrepresentation in a prospectus?
4. Is it based on an environmental spill or flood causing property damage?
5. Is the heart of the case based on
  - (a) one corporate decision ;
  - (b) made at a high level;
  - (c) that was reduced to writing?
6. Can damages be calculated on a mathematical basis without hearing evidence from individual class members?

On the flip side, positive answers to one or more of the following questions means that certification will be more difficult:

1. Is the case on liability based on individual meetings between the class members and multiple representatives of the potential defendant?
2. Is reliance an element of the cause of action?
3. Is it a nuisance case involving contamination over a long period of time causing smells or noise?
4. Is it necessary to hear from each class member in order to determine their damages?
5. Has the potential defendant implemented a voluntary ADR program?
6. Could the class get the same relief through an administrative law remedy?

You may be faced with a motion to strike portions of a pleading or summary judgment motion prior to certification. This is especially true in litigation where your cause of action is novel, or in litigation against a government defendant. Summary judgment motions are attractive to defendants who wish to dispose of the issues raised in the action before the certification hearing, with its attendant costs and publicity. The recent jurisprudence indicates that such motions should generally not proceed prior to certification, although it remains mixed.<sup>4</sup> Often a summary judgment motion or motion to dismiss will be heard together with the certification motion.

Not only does the potential for the defendant to bring a pleadings or summary judgment motion require that your pleading very clearly set out a proper cause of action and an

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<sup>4</sup> See *Attis v. Canada (Minister of Health)*, [2005] O.J. No. 1337 (S.C.J.), *Moyes v. Fortune Financial Corp.* (2001), 13 C.P.C. (5th) 147 (S.C.J) and *Baxter v. Canada (Attorney General)* [2005] O.J. No. 2165 (S.C.J.).

appropriate class definition, but it also requires that you budget the additional time and resources required to fight such a motion. Even if you are successful on the motion, the potential for multiple appeals can add months, if not years, to the litigation.

You also need to assess whether there is anything you can do to improve the odds in your favour. It is not an area in which there is much room for dabbling – there is too much at stake. As such, it is very common for the firm who initially had the client walk in their door to partner with a firm that specializes in class actions. Any increase in odds offered by the specialist firm’s time expertise and assistance reduces the financial risk to the initial firm.

#### G. DOES THE POTENTIAL DEFENDANT HAVE ASSETS?

This is a frequent hazard in the class action area. When a company has wronged a group of people in a public way, they are often in serious financial trouble even before class litigation commences, for example where:

- (a) the potential defendant has already been forbidden to sell their main product, or
- (b) the misrepresentation alleged is that their company has value when, in fact, it does not.

By scouring the financial press and any public filings, you can hopefully obtain some insight into this issue. However, in the case of smaller, privately-held entities it may be more difficult.

Insurance issues will often loom large here. Although this can be difficult to determine prior to filing, you need to try to find out the following points regarding the insurance situation as soon as possible:

- (a) Is there any insurance available?
- (b) If so, is the insurer agreeing to defend the case?
- (c) Is the insurer raising coverage issues?
- (d) What are the limits of the policy?
- (e) Do defence costs deplete the limits?
- (f) Does the insured still have sufficient assets available to satisfy any excess liability?

#### H. IS THE POTENTIAL DEFENDANT LIKELY TO SETTLE?

The economics of the litigation are obviously dramatically improved if a settlement can be achieved before an excessive investment of time and expense occurs.

The most commonly used positive indicator of this issue is a settlement in the United States. Where a target or its U.S. parent has already settled a case in the United States, this is an indication that the calculus on the advisability of settlement has already been

completed and found to be attractive. However, do not rely exclusively on this factor as parallel Canadian actions are not always treated equally. A change in management, corporate exhaustion after having incurred the cost of the American settlement, or a different legal and factual matrix can result in a different approach in Canada.

Other indicators regarding the likelihood of settlement include:

- (a) the potential public and media pressure on the target; and
- (b) the likelihood that potential corporate restructuring will require the defendant to clear any pending litigation “off its books”.

It has been the authors’ experience that certain defendants, including government defendants, are more reluctant to settle at the early stages, even following certification, for political and other reasons. This is especially true when the cause of action alleged is new or unique, or where the law in the particular area is unsettled. Again, if a defendant is willing to take a class action to trial, it is likely that they will also be willing to take the matter through numerous appeals.

Remember also that any settlement will require court approval. Where there remain individual issues with respect to damages, an arbitration or other process may be implemented. These additional steps may take up time and resources that you will need to plan for.

## I. CAN THE RULES CHANGE?

One of the authors learned this rule first hand when, a few days away from a summary judgment hearing on the constitutionality of the B.C. probate regime in *Howard Estate v. B.C.*,<sup>5</sup>; the government passed new legislation to “patch” the problem, and retroactively negated any ability to sue by imposing a new tax that matched the probate fees previously paid without legislative authority.<sup>6</sup>

The fact that there are never any certainties was recently underscored in Ontario, when the Court of Appeal overturned its own three-year-old decision in a class action involving automobile insurance deductibles. Although the plaintiff was successful in an individual action against the insurer, the Court of Appeal reversed itself when applying the same law to a class action, dismissing the claims on a motion to dismiss for failure to disclose a cause of action.<sup>7</sup>

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5 (1999), 66 B.C.L.R. (3d) 199 (S.C.) (certification decision), dismissed on consent (July 14, 2000) (S.C.). For more information on this litigation see <http://www.branmac.com/Pages/probatefee.html>

6 The strength of the remaining constitutional class actions against the government that the writer is involved with is that they involve issues that the government does not have the power to correct: *Withler v. A.G. Canada* and *Fitzsimonds v. A.G. Canada* (challenge to death benefit age reduction provisions of public service pension plans) and *Nanaimo Immigrant Settlement Society v. B.C.* (December 8, 1999), Victoria 873/98 (B.C.S.C.) (challenge to constitutionality of charity licence fee structure)

<sup>7</sup> see *Segnitz v. Royal & SunAlliance Insurance Company of Canada*, [2005] O.J. No. 2436 (C.A.)

## J. CAN THE MULTI-JURISDICTIONAL ISSUES BE MANAGED EFFECTIVELY?

Plaintiff's counsel needs to assess whether they can or should seek to certify the case on a provincial, national, or worldwide basis. You must ensure that the calculus performed in deciding whether to take the case assumes a jurisdictional scope that you are going to be able to maintain if challenged. This often calls for the development of interjurisdictional alliances with other plaintiff's counsel in order to minimize the risk that part of your proposed class will be removed from your control. However, the need to establish alliances reduces the potential fee.

As is discussed above, it is important to consider which jurisdiction is most appropriate to commence and prosecute the action. Often counsel in different provinces will work as a consortium to start similar actions, and then agree to be bound by the determination in a single jurisdiction. Issues such as the ease with which a case will be certified, the legislative context of the particular province, political, media and administrative considerations and the costs regime are factors to consider in selecting the appropriate jurisdiction.

The management of the multijurisdictional issues in Canada is in a state of considerable flux.<sup>8</sup> Recently, Courts have considered whether it is appropriate to move a class action from one jurisdiction to another, particularly for case management purposes, or where similar actions have been commenced in multiple jurisdictions within a province. Such motions may be heard together with or following motions for certification.<sup>9</sup>

All this uncertainty must be factored into the analysis.

## K. DO YOU HAVE THE RESOURCES TO MOVE THE CASE FORWARD?

Many class actions filed in Canada have simply "died on the vine", without ever having been moved forward to certification.<sup>10</sup> One suspects that part of the reason for this phenomenon is that plaintiff's counsel soon realized that they did not have the ability or resources to carry the matter forward.

Every firm needs ongoing cash flow to stay afloat. Class actions alone are not likely to provide this. There are few, if any, examples of firms relying solely on this area to pay all their bills. However, when a class action is in an active state, it can require the resources of many lawyers, legal assistants and office staff at once. Few firms can individually devote that many resources to one file over any extended period of time. That is why the

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<sup>8</sup> This is discussed further in a paper the writer has written entitled "Chaos or Consistency: The National Class Action Dilemma". This article can be found at the writer's webpage at [http://www.branmac.com/Images/national\\_class.pdf](http://www.branmac.com/Images/national_class.pdf)

<sup>9</sup> See *Lieberman v. Business Development Bank of Canada*, [2005] B.C.S.C. 389 and *Baxter v. Canada*, [2005] O.J. No. 2165.

<sup>10</sup> See article "Class Actions: Four Years Later" at [http://www.branmac.com/Pages/4years\\_later.html](http://www.branmac.com/Pages/4years_later.html)

concept of “partnering” between law firms is more prevalent in the class action area than any other.

As noted above, there are many reasons for partnering:

- (a) Class action firms partner with firms with expertise in the underlying substantive area;
- (b) Firms with the initial client contact partner with class action firms;
- (c) Class action firms in one jurisdiction partner with class action firms in other Canadian jurisdictions; and,
- (d) Class action firms in Canada partner with plaintiff’s firms in the United States who have already had experience with the target.

All of these partnering arrangements make sense for specific substantive reasons. However, they also make sense for basic financial reasons:

- (a) they provide access to lawyers in other firms who can perform part of the work, so that part of the firm can continue to conduct the regular cash flow business;
- (b) the disbursements will be funded out of multiple firms’ lines of credit; and,
- (c) the risk of an unsuccessful outcome is spread across multiple firms.

As noted above however, one of the factors tending away from partnering is the need to dilute the potential fee, which can turn an economic case into an uneconomic case.

Similarly, there is also a risk that you will be faced with a carriage motion from another firm, and this will force you to prove your ability to carry the action through to its conclusion. If you have never taken on a class proceeding before, and you believe there may be a carriage motion, it would be prudent to team up with more experienced counsel to increase your chances of success. The Courts will inevitably look to more experienced class action counsel to represent the class.

## L. CONCLUSION

Emerson’s Humble Bee “mocked at fate and care”. Class counsel do not have that luxury, given the risk they are asked to take by each prospective client. Separating the wheat from the chaff may, over time, become instinctual. However, even the writer would not claim to have reached that natural state after many years’ practice on each side of the class action bar.

Until that state is reached, carefully evaluate each of the factors above. Consult those with experience and expertise. At most, take the best two or three cases that are presented to you each year. Your banker, physician, and spouse will each thank you for your caution.

