

**A QUEST FOR FAIRNESS:
CLASS ACTIONS AND THE GOVERNMENT**

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CLASS ACTIONS AND THE GOVERNMENT

I. INTRODUCTION

*“Strictly speaking, one cannot legislate love,
but what one can do is legislate fairness and justice.”*

*Maya Angelou (b. 1928), African American author and performer.
As quoted in I Dream a World, by Brian Lanker (1989).*

It has been more than six years since the B.C. government brought in the *Class Proceedings Act* (the AAct¹). As such, it is an opportune time to assess what effect this government initiative has had on the government itself.

The Act’s desired effect was to increase access to justice, modify behaviour of defendants, and manage scarce judicial resources. It has achieved all those objectives. Not surprisingly, this public policy success story has been used to advantage both for and against government interests.

In this paper I review the basic structure of class actions, discuss the class actions which have been brought against the government, assess whether the government has been treated fairly under this new regime, and suggest means by which the government may benefit from the use of class proceedings.

II. THE BASIC STRUCTURE

One person may commence a proposed class proceeding. However, court approval must be obtained before the proceeding obtains formal class action status. There are five statutory requirements:

- a. the claim must disclose a cause of action;
- b. there must be a class of two or more persons;
- c. the proposed representative plaintiff must be appropriate, present a reasonable litigation plan and have no conflicts with other class members;
- d. there must be issues of fact or law common to all class members;
- e. the court must find that a class action would be the preferable procedure for resolving the common issues.

1 R.S.B.C. 1996, c.50

Once certified, a case generally has two stages. The first is the resolution of all issues that are common for the class (such as the negligence of the manufacturer in a products liability case). The second stage is the resolution of any individual issues that remain (such as causation and damages in a products liability case).

The statute creates a number of benefits for class members:

- a. class members are more likely to be able to attract competent counsel prepared to take the case on a contingency fee basis, since their fee will be determined based on the aggregate benefit obtained for the class as a whole;
- b. class members need do nothing further to participate in the action—they are deemed to be part of the certified class action unless they opt out⁴;
- c. neither class members nor the representative plaintiff are responsible for costs in relation to the determination of the common issues;
- d. limitation periods are extended for all class members;
- e. the court can make an aggregate award to the entire class;
- f. the court can use statistical evidence to determine the level of the aggregate award;
- g. the court is directed to simplify the proof of any remaining individual issues once the common issues trial is complete.

Under section 3 of the Act, a defendant may also seek class action status if it is facing two or more actions of the same type. This provision has not been invoked to date. However, the government in particular may be able to seek the benefit of this provision should it ever find itself in the unfortunate circumstance of having to fight similar cases on multiple fronts.

III. THE STATISTICS

About 100 class actions have been filed in B.C. since introduction of the *Act* in 1995. Many of these actions have never been pursued. By definition, class actions are large complex cases which require substantial commitment and resources on the part of plaintiffs and their counsel. In several cases, plaintiffs appear to have assumed too much responsibility and the cases have languished.

Of the actions filed, 34 have been against governments, government agencies or Crown corporations, making public bodies the primary target of the new wave of litigation.

As of December 2001, 35 proposed class actions had reached the certification stage. 14 of these cases involved government bodies.

4 Class members from outside B.C. may also be given the right to opt into the B.C. litigation: *Class Proceedings Act*, ss, 6, 16.

Of 18 contested certification hearings, the court agreed to certify 8 cases. The defendants did not contest certification in the remaining 17 cases.

Settlements or partial settlements have been reached in 14 of the 35 certified cases. Nine of these cases were settled at the same time as they were certified by consent, which is a common practice. If a defendant is inclined towards settlement, these “settlement certifications” are to the defendant’s advantage. All litigation against the defendant is foreclosed, save by any persons who opt out (which is rare). Any settlement also obtains the approval of an independent authority in the form of the case management judge.⁶

One certified case was dismissed on consent after the government defendant immunized itself against the litigation through the enactment of retroactive legislation.⁷ No class action has yet proceeded through a full trial.⁸

IV. A SURPRISE?

There has been a some sense amongst government sources that the extent of class action activity directed towards it has come as somewhat of a surprise. Should this have been the case? The answer is clearly no.

The government’s evaluation of the effect of class actions must have begun with the United States, where class actions are most developed. Class actions have been available at the Federal Court level since 1966.

The array of cases that have been brought against government in the U.S. is astounding, limited only by the ingenuity of a resourceful American bar.

*Newberg on Class Actions*⁹, the U.S. bible on class actions, has nine chapters devoted to each of the key class action areas. Two of these nine areas involve governments: “Government Benefit Class Actions” and “Criminal Justice Class Actions”. Even a brief review of these chapters would have revealed the wealth of U.S. authority that Canadian counsel had to draw upon when

6 Class action settlements are reviewed more fully in chapter 16 of Branch, *Class Actions In Canada* (Aurora: Canada Law Book) and in the web article “Settling a Class Action (Or How to Wrestle an Octopus) located at <http://www.branmac.com/Images/octopus.pdf>.

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

8 These statistics and the accompanying case authorities can be found at Branch, *Class Actions In Canada* (Aurora: Canada Law Book), para. 4.1970, save for two recent certifications in *Withler v. A.G. Canada*, and *Fitzsimonds v. A.G. Canada* which are discussed further below.

9 (West Group, 1992)

deciding where and how to invoke the new Canadian legislation.

When the legislation was introduced in B.C., there was discussion about this issue. The *Hansard* debates do reveal a few warnings.

The first mention of this issue came from then-opposition member Dennis Mitchell who stated:

I note that it's significant that the province can now also be pursued by class proceedings. School boards, for instance, can be pursued; a local government or even Crown corporation can be pursued...

I note that the commencement date for this bill is August 1, 1995. I wonder if the Attorney General might offer some specific reasons why that date has been chosen and whether or not provision has been made in this year's budget -- perhaps in the budget of the Attorney General or anywhere else in government -- to handle the additional costs likely to be incurred by the province as a result of this legislation. Again, it's a cost consideration I would be interested in hearing from the Attorney General on.

Over the years there have been many requests by affected parties to have the ability to sue the province. We know about current interest by citizens who are going after manufacturers of the products I mentioned earlier. It would be interesting to know some of the other concerns the Attorney General referred to in his comments in the House and in the press release that he issued when he referred to legal actions involving consumer goods, civil rights, securities, competition laws and the environment. Perhaps it would be interesting to get into some specific examples, so that we might learn from other jurisdictions about these areas. If it's possible to get specific, that would be of interest.¹⁰

The next comment on this issue came from Gordon Wilson, then in opposition as well:

I echo the comment made by the member for West Vancouver-Garibaldi, who talked about ICBC and school boards all now being potentially subjected to this kind of class-action litigation. There may be a problem, even though there are some provisions in here to make sure that frivolous or vexatious complaints don't proceed. There may be, as a result of this vehicle, a potential for a flood of these kinds of things -- at least in the initial years of the implementation of this act -- that we may want to try and deal with. I suggest that there has to be some measure in this particular section to look at that, to address that and to make sure it doesn't muddy what otherwise should be pretty clear and pure waters on this bill.¹¹

Even one government member showed some awareness of the possibilities. Mr. B. Jones

¹⁰ *Hansard*, June 5, 1995

¹¹ *Ibid*

stated:

Members opposite may want to take advantage of this kind of legislation, as they have of the freedom-of-information legislation, to challenge the activities of any body -- be it government, be it a corporation, be it whatever -- to redress grievances where individuals have suffered, perhaps in a very small way individually, but in a very great way collectively.¹²

When he rose in reply to these points on 2nd reading however, Attorney-General Colin Gabelmann did underplay these issues:

There were questions about costs to government. In each and every one of the Ontario cases, they were private sector issues. They were not suits against government. In terms of administrative costs to the system, are there funds in the AG's budget for this? We think that very little will result from it in the early going -- perhaps in this fiscal year -- but that in the long term there will be savings to the system because of the combination, and then the reduction of the number of cases and reducing them into one manageable system.

He was correct that there had not been a great deal of litigation against the government in Ontario to that point. However, the legislation was still quite new there as well, having only been brought in three years earlier. The better source of information would have been the U.S. experience, or even that in Quebec (which brought in class legislation in 1978 and had seen substantial litigation against the government since then).

When the bill was being reviewed in detail in committee, the government's exposure arose again:

L. Fox: ... One of the questions I had on this act... It seems to me that this act is going to draw a question given that there's lots of other legislation that contains clauses that protect the government from any actions against it. In this class-action legislation, the government is exposed to actions contained within this legislation. The question that I would have to ask is: which legislation would take precedence in that kind of situation? Is there a need to address that in this section of the act?

Hon. C. Gabelmann: Unless the government has some legislative provision in another statute that one way or another prevents a suit, the government is -- except for that -- open to suit. It doesn't matter whether it's a suit from an individual or a group of individuals operating in combination. Whatever opportunity is available to an individual in terms of suing the government is available to a group of individuals combining into a class.

¹² *Ibid*

L. Fox: In simple terms, then, the other legislation takes precedence over this legislation.

Hon. C. Gabelmann: Yes, because this act doesn't open up any new avenues, other than establishing a procedure for combining together.¹³

On its face, it appears that Mr. Gabelmann may have failed to fully appreciate that in the class action arena “the medium is the message”. Dropping the economic barriers facing litigants alone was enough to result in new actions and new types of actions coming to life. It is not that these causes of action did not exist in the past, but only that there was no ability to bring them because no one individual had the resources to take up the challenge on their own.

The government, to its credit, was willing to create a new tool to lower the economic barriers to litigation against all parties including itself, and there should not have been any surprise about how that tool would be used.

V. THE CASES

The cases against the government and associated entities can be broken down into several categories.

1. Product Liability

*Campbell v. Flexwatt Corp.*¹⁴: radiant ceiling heating panels

*Endean v. Canadian Red Cross Society*¹⁵, *Mitchell v. Canadian Red Cross Society*, and *Killough v. Canadian Red Cross Society*¹⁶: Hepatitis C tainted blood.

Kimpton v. Attorney General of Canada: Leaky condo homeowners¹⁷

Matick v. Canada: Breast implant approval

13 *Hansard*, June 8, 1995

14 (1996), 25 B.C.L.R. (3d) 328 (S.C.), further proceedings (1996) 3 C.P.C. (4th) 208 (B.C.S.C.), aff=d (1997), 98 B.C.A.C. 22

15 [1997] B.C.J. No. 295 (S.C.) (application for documents), (1997), 148 D.L.R. (4th) 158 (B.C.S.C) (certification decision), appeal on spoliation as cause of action allowed (1998), 157 D.L.R. (4th) 465 (C.A.), leave to amend statement of claim refused [1998] B.C.J. No. 1542, settlement approved [1999] B.C.J. No. 2180 (S.C.)

16 2001 B.C.J. 191 (S.C.) (application for in camera settlement hearing rejected), 2001 BCSC 1060 (certification granted against Canadian Red Cross and settlement by two parties approved)

17 The webpage for this class action is located at <http://www.achesonco.com/lcclass.htm>

Price v. B.C.: Injuries sustained by glass crushing machine operators employed by Liquor Distribution Branch

2. Economic Regulation

*Cooper v. Hobart*¹⁸ and *Patterson v. Hawkes Mortgage Ltd. and Superintendent of Real Estate*¹⁹: Action flowing from the fallout from two investment company collapses

*McKay v. CDI Education Corporation and the Private Post-Secondary Education Commission*²⁰: Challenge to the quality of education at a private college

Zlamal v. Private Post-Secondary Education Commission: Repayment of tuition from private college

3. Government Services

*Rumley v. B.C.*²² alleged sexual assaults at the Jericho School

4. Environmental Claims

*Sutherland v. Vancouver Airport Authority and A.G. Canada*²³: Alleged nuisance caused by new third runway

*Pausche v. British Columbia Hydro & Power Authority, District of Maple Ridge*²⁴: Flood damage

18 [1999] B.C.J. No. 690 (S.C.), further reasons [1999] B.C.J. No. 1360 (S.C.), appeal allowed 2000 BCCA 151

19 2000 BCSC 862 and 2000 BCSC 997

20 (1999), 30 C.P.C. (4th) 101 (B.C.S.C.). The claim was discontinued against PPSEC prior to the certification hearing however.

21 *McKay v. CDI Career Development Institutes Ltd.*, (1999), 30 C.P.C. (4th) 101 (B.C.S.C.). The claim was discontinued against PPSEC prior to the certification hearing.

22 [1999] B.C.J. No. 2634 (C.A.), appeal dismissed 2001 SCC 69

23 (1997) 15 C.P.C. (4th) 329 (B.C.S.C.)

24 2000 BCSC 1556

Anderson v. Her Majesty the Queen in Right of BC: Class action by residents near the Swartz Bay ferry terminal alleging nuisance

5. Statutory Interpretation/Administrative Law

Tiemstra v. ICBC: challenge to ICBC's "no-bash/no-cash" policy

Dunstan v. ICBC: interpretation of disability policy integration provisions

Ansell v. ICBC: challenge to right of Motor Vehicle Branch to refuse drivers license renewals based on non-payment of insurance premiums

*Auton v. B.C.*²⁵: funding for autistic treatment

*Halvorson v. Medical Services Commission of BC*²⁶: Class action by physicians requesting payment for medical services provided to persons whose identification or insurance information was not complete. Parallel proceedings brought under the Judicial Review.

*Azvedo v. Legal Services Society*²⁷: Action on behalf of all lawyers who received a legal aid referral from the Defendant on or after July 1, 1994, and who subsequently billed the Defendant for legal services rendered pursuant to the referral, and who were not paid in full by the Defendant by reason of a "holdback".

Konkin v. Her Majesty the Queen in Right of BC: Class action alleging illegal forfeiture by the defendant government under the Taxation (*Rural Area*) Act

*Friesen v. Hamel*²⁸: electoral fraud allegation

Missar v. New Forest Opportunities Ltd.: Miscalculation of tax deductions owing on wage replacement benefits

25 (March 31, 1999) Vancouver C984120 (S.C.)

26 2001 BCSC 632

27 (March 12, 1988) <http://www.courts.gov.bc.ca/jdb%2Dtxt/ca/98/01/c98%2D0128.txt> (B.C.C.A), supplementary reasons (March 30, 1998) <http://www.courts.gov.bc.ca/jdb-txt/ca/98/01/c98a0128.txt>

28 (1997), 28 B.C.L.R. (3d) 354 (S.C.) (summary judgment application); (1997), 47 B.C.L.R. (3d) 308 (certification decision), aff'd (1999) 57 B.C.L.R. (3d) 276 (C.A.), leave to appeal to S.C.C. refused 252 N.R. 397n

F.G.M. Holdings Ltd. v. Workers Compensation Board of BC: Claim for damages caused by initial failed process to implement no-smoking regulations²⁹

Logan v. B.C.: Challenge to expropriation of mineral tenure rights by the *Park Amendment Act*

B.C. Coalition of People with Disabilities v. B.C.: Interpretation of eligibility criteria for disabled persons under the *Home Owner Grant Act*

Kraeker v. Glen Clark: Challenge to authority of Provincial government to cancel U.S. military lease of the Nanoose Bay installation by employees of the base

6. Constitutional Challenges

*Howard v. B.C.*³⁰: challenge to constitutionality of probate fee structure)

Withler v. A.G. Canada and *Fitzsimonds v. A.G. Canada*³¹: Challenge to death benefit age reduction provisions of public service pension plans

*Nanaimo Immigrant Settlement Society v. B.C.*³²: challenge to constitutionality of charity licence fee structure

*Alford v. A.G. Canada*³³: Challenge to federal authority to create a native fishery

Jones v. Chretien: Challenge to governmental policing activities during APEC Summit

VI. THE GOVERNMENT'S APPROACH TO CERTIFICATION

Given that the provincial government enacted the legislation, one would expect that the government might be less inclined to oppose certification so that the objects of the Act could be furthered. However, for the most part, this has not occurred. Government entities do not appear

29 2000 BCSC 1188

30 (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>

31 The webpage for these class actions is located at <http://www.branmac.com/Pages/deathbenefits.html>

32 (December 8, 1999), Victoria 873/98 (B.C.S.C.)

33 (1997), 31 B.C.L.R. (3d) 228 (B.C.S.C.), aff'd 85 A.C.W.S. (3d) 297 (B.C.C.A.) (application for particulars)

any more willing to agree to certification than the average private company defendant.

The provincial government did not oppose class certification in the Hepatitis C litigation, and it has since used the structure to settle the three actions brought against it. The federal government also recently consented to certification of two parallel constitutional cases *Withler v. Canada* and *Fitzsimonds v. Canada*.

Beyond these cases however, governments have generally contested certification, and argued that each proposed class member should be required to sue it individually. Indeed in certain cases in which the author has been involved, counsel for the government has gone so far as to suggest that the fact that no class action has reached trial is an indication that the vehicle does not work.³⁴

It is somewhat difficult to derive a consistent theory as to which cases will be opposed and which cases will be certified by consent. One possible theory is that the political weight of the Hepatitis-C lobby groups grew too heavy to allow opposition to certification in the blood cases, whereas the legal weight of the previously approved constitutional class actions discussed below made the result in *Withler* and *Fitzsimonds* such a foregone conclusion that there was little point in opposing certification. In the absence of such overwhelming political or legal weight however, the government appears to be motivated to minimize its possible financial exposure by opposing certification.

When certification has been contested, government has had a reasonable degree of success. Government-related defendants have resisted class certification in five of their nine contested cases. The successful defences to certification advanced by the government have included the following.

The inherent individuality of the claim

In *Tiemstra v. Insurance Corp. of B.C.* certification was successfully opposed on the basis that even within a class action the court would have to consider each individual accident in any event in order to determine whether or not no-fault benefits were payable. As such, there was insufficient justification for imposition of the class action procedure.

Similarly in *Sutherland v. Vancouver Airport Authority and AG Canada* and the court agreed that the delicate balancing of private and public interests inherent in the nuisance cause of action required a consideration of each class member's evidence.

34 The fact that no case has reached trial may simply be a matter of the sample size. Only 21 certified cases have not yet settled. Many of these cases are of relatively recent origin. Many have been subjected to numerous appeals of the initial certification decision. The fact that none of these cases has yet reached a full trial is not surprising, and is certainly not statistically significant at this stage of the development of class action process.

The availability of an alternate administrative remedy

*Auton v. B.C.*³⁵ the court concluded that a class action was unnecessary as the required declaration could be achieved through the operation of judicial review application. Some of the reasoning in *Auton* is inconsistent with the B.C. Court of Appeal's later judgment in *Nanaimo*, discussed below, although the case can still be rationalized on the basis of the manner in which the case was pleaded. The fact that the class did not appear to be forcefully advancing a damages remedy for each class member may have had an effect on the decision. If the only real remedy sought was for a change in future government conduct, the reasoning is more supportable.

Technical statutory requirements relating to the proposed cause of action

In *Friesen v. Hamel*³⁶, the court found that a resident of one riding lacked the statutory ability to represent the residents of another riding when advancing a challenge under s.256 of the *Election Act*.

Lack of a cause of action

Several cases against government defendants were dismissed prior to a full certification hearing on the basis that the claim disclosed no cause of action. In other cases the cause of action requirement was considered along with the balance of the certification test. In particular, in *Cooper v. Hobart*,³⁷ the Registrar of Mortgage Brokers was able to establish that it did not owe a duty of care to individual investors. This was obviously a key finding, particularly given that the trial court had rejected the author's argument on behalf of the government that the claims were too individual to support certification.

The Failed Fights

In the first B.C. class action to reach the Supreme Court of Canada, the government failed in its bid to resist certification of a sexual abuse class action. In *Rumley v. B.C.*, the class sued the government based on its "systemic negligence" in allowing sexual abuse to occur over a 40 year period at the Jericho School for the Deaf. The court found that it would be possible to assess the conduct of the government over this period in one trial, and that negligence could be considered without necessarily requiring evidence from each class member. The court stated:

As Mackenzie J.A. noted, the respondents' argument is based on an allegation of "systemic" negligence -- "the failure to have in place management and operations

35 (March 31, 1999) Vancouver C984120 (S.C.)

36 *Supra*

37 [1999] B.C.J. No. 690 (S.C.), further reasons [1999] B.C.J. No. 1360 (S.C.), appeal allowed 2000 BCCA 151, appeal refused 2001 SCC 79

procedures that would reasonably have prevented the abuse". The respondents assert, for example, that JHS did not have policies in place to deal with abuse, and that JHS acted negligently by placing all residential students in one dormitory in 1978. These are actions (or omissions) whose reasonability can be determined without reference to the circumstances of any individual class member. It is true that the respondents' election to limit their allegations to systemic negligence may make the individual component of the proceedings more difficult; clearly it would be easier for any given complainant to show causation if the established breach were that JHS had failed to address her own complaint of abuse (an individualized breach) than it would be if, for example, the established breach were that JHS had as a general matter failed to respond adequately to some complaints (a "systemic" breach). As Mackenzie J.A. wrote, however, the respondents "are entitled to restrict the grounds of negligence they wish to advance to make the case more amenable to class proceedings if they choose to do so"...

While the issues of injury and causation will have to be litigated in individual proceedings following resolution of the common issue (assuming the common issue is decided in favour of the class, or at least in favour of some segment of the class), in my view the individual issues will be a relatively minor aspect of this case. There is no dispute that abuse occurred at the school. The essential question is whether the school should have prevented the abuse or responded to it differently. I would conclude that the common issues predominate over those affecting only individual class members

This case may represent the high-water mark for class certification in Canada. It is difficult to understand how any global findings in relation to government practices over this extended period will be effectively translated down to each instance of sexual abuse suffered by each potential class member.

The ability to advance sexual abuse class actions based on allegations of "systemic negligence" certainly opens the government up to a broad range of potential claims, and should be a matter of some concern.

The government was unable to avoid certification in the products case *Campbell v. Flexwatt Corp.*³⁸ in which the province was joined as a defendant due to its role in approving, and subsequently requiring disconnection of, certain types of radiant ceiling heating panels. It is clear that the B.C. courts have concluded that products liability cases will be given every chance to work within the new structure, and the government defendants are simply being swept up along with this trend. All products liability class actions to come before the B.C. Supreme Court have been certified save one.³⁹ The government decided to settle the *Campbell* case shortly before the trial was set to commence.

38 (1996), 25 B.C.L.R. (3d) 328 (S.C.); further proceedings (1996) 3 C.P.C. (4th) 208 (B.C.S.C.), aff'd (1997), 98 B.C.A.C. 22

39 Branch, *Class Actions In Canada* (Aurora: Canada Law Book) at 5.40-5.350

In *Howard v. B.C.*⁴⁰, and *Nanaimo Immigrant Settlement Society v. B.C.*⁴¹ the government sought to argue that constitutional class actions are unnecessary, since one individual could challenge the impugned provisions and cause them to be struck down. However, the courts have adopted a more practical approach to the preferability of proceeding by way of class proceeding. In *Nanaimo Immigrant Settlement Society v. B.C.*, the Court of Appeal stated:

The Province submits that a class action is unnecessary for the resolution of the constitutional questions and others which can be resolved by a declaratory judgment. Such a judgment would "bind the world", unlike a judgment on the common issues in a class proceeding, which under s. 26 of the Act binds only those members of the class who do not opt out. Once the declaratory judgment has been pronounced, the Province argues, all that will be left will (or may) be the plaintiffs' individual restitutionary claims, which are not "common" and can be brought at a later time if necessary.

But as Mr. Branch responded, the question is not whether the class action is necessary - i.e., whether there are other alternatives - but whether it is the "preferable procedure" for resolving the plaintiffs' claims. Section 4(2) of the Act states that that question involves a consideration of "all relevant matters" - a phrase that includes the practical realities of this method of resolving the claims in comparison to other methods. In the plaintiffs' submission, what makes a class action preferable in this case are the practical advantages provided by the Act for the actual litigation process. Some of these advantages accrue only to the plaintiffs: as Mr. Branch noted, if the claims are aggregated, contingency fee arrangements are likely to be available for the plaintiffs. The claims can be pursued by one counsel or a few counsel rather than by many. A formal notification procedure is available. Generally, it is more likely that those charities that have paid provincial licence fees in connection with bingo and casino games can pursue the matter to completion - something very few individual charities could do on their own. Other advantages arising under the Act are beneficial to both parties - the assignment to the action of one case-management judge, and the attendant elimination of lengthy Chambers proceedings before different judges. From the Province's point of view, none of these considerations prejudices its ability to defend the action fully, except to the extent that financial constraints on the plaintiffs are eased. Those constraints are not an "advantage" the Province should wish to preserve.

In my view, these factors militate strongly in favour of certification, and are obviously consistent with the stated objectives of the Act. The fact that the threshold questions include matters of constitutional law that could be resolved in a shorter declaratory action should not, in my view, overshadow these realities. As Mr. Branch said, the obtaining of a declaration is not the plaintiffs' primary objective; the repayment of their fees is. Nor should the fact that restitution is being sought by individual plaintiffs outweigh the fact

40 (March 15, 1999), Vancouver A982836 (S.C.)

41 (December 8, 1999), Victoria 873/98 (B.C.S.C.)

that a class action will move the proceedings forward to a considerable extent. (at paras. 19-21)

The practical cost/benefit approach adopted by the B.C. Court of Appeal to the issue of certification is most appropriate.

The class proceeding is a procedural tool, and the court must carefully assess whether a defendant's opposition to certification is truly motivated by concerns about the manageability of the proposed process, rather than an interest in seeing litigation against it minimized by maximizing expense for each class member. It behooves the government to not oppose certification on this latter basis alone.

VII. SOME LESSONS LEARNED

Don't sue a defendant who can change the rules

The author 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.*, the government passed new legislation to "patch" the problem identified in *Eurig v. Ontario*, and retroactively negated any ability to sue by imposing a new tax that matched the probate fees previously paid without legislative authority. The strength of the remaining constitutional class actions is that they involve issues that the government does not have the power to correct.

There has not been a "silly season"

The government would be hard pressed to suggest that any of the actions that reached the certification stage to date were brought improperly. All raised serious legal and factual issues in relation to the government's role in product regulation, or the statutory or constitutional legality of its activities. Two of these cases have already resulted in substantial settlements for B.C. citizens. These settlements would most certainly never have been achieved without the class actions' ability to create the necessary pressure to get the government's attention.

Recall that the class proceeding is only a procedural vehicle, although it is a vehicle with tremendous practical effects. But its availability did not change the underlying law in relation to the pursuit of claims against the government. It only gave light to claims that had merit, but could not be brought due to the overwhelming weight of legal fees.

The government was well able to dispose of several of the more "novel" claims on a summary basis using the usual rules at its disposal. Other claims of dubious merit were not advanced at all. Claims that would have become "monsters of complexity and cost"⁴² if managed as class actions were rejected by the courts at the initial certification stage.

42 *Tiemstra v. I.C.B.C.*, *supra*

The author submits that the B.C. plaintiffs' bar has generally acted responsibly with this new tool, and that the experience to date offers no basis upon which the government could properly argue that the rules should be changed to protect it above other defendants.

Using the tool to its advantage

Although the government has felt the sting of class litigation, it has also used the tool to its advantage. It was able to manage the very difficult legal and political problem created by the Hepatitis C situation through use of the class action tool. There has been little public outcry about the fairness of the program, most likely because it was approved by the court after providing class members with "due process".

The government could take more steps to use the class action vehicle. In particular, by firming up its own legal subrogation rights for hospital costs, M.S.P. benefits, or other types of expenditures, it could serve as an important member of the class in many cases.⁴³ For example, *Nantais v. Teletronics Proprietary (Canada) Ltd.*⁴⁴ the government did recover certain amounts within a national settlement. In a recent heartvalve filing *Burnett v. St. Jude Medical Inc.*⁴⁵ a subrogated claim on behalf of the province is being advanced within a class action. It would obviously be preferable to be a plaintiff rather than a defendant.

VIII. CONCLUSION

When introducing the *Class Proceedings Act* in 1995, then Attorney-General Colin Gabelmann stated:

Our legislation will allow individuals to apply to the court to bring a civil action as a group and to seek redress for injury or damages caused by the same or similar circumstances. This is an important breakthrough for British Columbia....

The people of British Columbia have asked for class legislation, and this bill opens up a new justice option for them. It creates more fairness in the system, and it balances the rights of defendants with the rights of injured British Columbians to seek their remedy through a more accessible justice system.⁴⁶

Has the Act lived up to these lofty expectations? Even though class proceedings in B.C. have encountered certain growing pains, the question must be answered in the affirmative. Although

43 *Wipfli v. Britten* (1984), 56 B.C.L.R. 273 (C.A.), *Seminoff v. Kokan* (1991), 84 D.L.R. (4th) 486 (B.C.C.A.)

44 (unreported, October 3, 1997, 95-GD-31789 Ont. Ct. Div.)

45 Vancouver Registry S014221

46 *Hansard*, June 6, 1995

results have been mixed, that is to be expected as lawyers test the boundaries of the legislation and courts confirm and define the basic parameters. Groups have been able to advance claims that would not otherwise have been brought. Several of these groups have reached settlements with defendants who failed to respond to individual complaints in the absence of a class action. Defendants are now well aware of the threat posed by the legislation, and will hopefully modify their future conduct accordingly.

Has the government been fairly treated? Again, the answer is an unqualified *yes*. Their exposure has increased, but not unduly. Governments have been able to summarily resist claims with no merit and class actions with insufficient commonality, leaving only those claims that should properly be brought in the interests of substantive and procedural justice. Indeed, the government has used the tool to its advantage, and there could be more opportunities for it to do so in the future. The government has done the right thing, and it should not pull back from its commitment to fairness.

*“These men ask for just the same thing—fairness, and fairness only.
This, so far as in my power, they, and all others, shall have.”*

Abraham Lincoln (1809–1865), U.S. president. Letter to Leonard Swett, May 30, 1860. Collected Works of Abraham Lincoln, vol. 4, p. 57, Rutgers University Press (1953, 1990).