

AN INSIDER'S GUIDE TO CLASS CERTIFICATION

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Introduction

Class certification is the key event in any class action. If the case is certified, the pressure on the defendant to settle increases enormously. Moreover, a successful certification application often attracts a considerable amount of media attention, which for business reasons most defendants wish to avoid. If the case is not certified, the defendant is often "home free" as the plaintiffs can't afford to sue on their own.

As such, both parties put an enormous effort into this battle. It is important for both sides to consider all the tactical implications of every step they take in this effort.

This paper sets out various practical tips and tricks the authors have learned from their experience in approximately 40 class actions.

Getting to the Hearing

Simply reading the various class action statutes could lead one to assume that the certification hearing occurs shortly after filing.² That would be a very grave mistake. In our experience, for example, only one case has ever met the 90-day deadline contemplated by s. 2(3) of the B.C. *Class Proceedings Act* (the "B.C. Act" or "B.C. CPA").

Unfortunately for Plaintiff's counsel, class members and the media often go further and assume that as soon as it is launched the case is already a viable class action. They have trouble understanding the initial delay involved in determining whether the action will actually be a class action at all.

Given the high profile nature of such cases, there is often enormous pressure on class counsel stemming from the class to get the case moving quickly. Furthermore, from their own economic perspective, class counsel do not want to invest too much time in a case until they are assured that they represent an entire class, rather than simply one individual who may lack the ability to pay counsel's bills.

Conversely, defendants have every incentive to delay the certification hearing as long as possible. Unless and until certification occurs, it is just an individual action with "attitude", and does not threaten the financial viability of the defendant company.

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² Quebec *Code of Civil Procedure*, Book IX; *Class Proceedings Act*, 1992, S.O. 1992, c. 6; *Class Proceedings Act*, R.S.B.C. 1996, c.50; *Class Actions Act*, S.S. 2001, c.12.01; *Class Actions Act*, S.N.L. 2001, c. C-18.1; *Class Proceedings Act*, C.C.S.M. c. C130, *Class Proceedings Act* S.A. 2003, c. C-16.5, *Federal Court Rules*, 1998, SOR/98-106, as amended by *Rules Amending the Federal Court Rules*, 1998, SOR/2002-417, s.17.

In practice, certification will not occur until the Plaintiff gets the case before a case management judge, and a schedule is created to move the case towards certification. This process has usually created at least six months delay at a minimum, and has been stretched out to years by more creative defendants.

Once you get before the case management judge, some of the preliminary steps are:

- a. filing of pleadings;
- b. preliminary motions;
- c. delivery of Plaintiff's certification motion and supporting affidavits;
- d. delivery of Defendants' responding affidavits;
- e. cross examination on affidavits; and,
- f. exchange of argument.

Given the potential for appeals and other procedural maneuverings, it is easy to see how the process can bog down without aggressive case management.

Furthermore, unsophisticated plaintiffs themselves sometimes create delays that are not in their interest or those of the class. For example, demands for document production prior to certification can give defendants (in cases where there are many documents) an excuse for slowing down the march to certification. In B.C., the law requires the parties to produce documents relevant to certification prior to that application, rather than producing all documents.³ However, it is often difficult for the parties to know where the line can be drawn, and that uncertainty can lead to additional expense and time-consuming motions.

The Certification Test

The certification test itself appears quite dry and legalistic. The BC *Act*, like the other statutes, requires the following:

- (a) the pleadings disclose a cause of action;
- (b) there is an identifiable class of 2 or more persons;
- (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
- (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;

³ *Endean v. Canadian Red Cross Society* (1997), 68 A.C.W.S. (3d) 817 (B.C.S.C.), *Kimpton v. Canada (Attorney General)* (2002), 97 B.C.L.R. (3d) 119, 2002, BCSC 67. See also W. Branch, *Class Actions in Canada* (Aurora: Canada Law Book Inc., loose-leaf) at section 4.1590 and cases thereunder.

- (e) there is a representative plaintiff who:
 - (i) would fairly and adequately represent the interests of the class;
 - (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding; and
 - (iii) does not have, on the common issues, an interest that is in conflict with the interests of the other class members.

However, buried beneath each component of the statutory test is an array of fascinating practical and tactical issues for both parties. A brief analysis of each of these explains some of the delays and costs described above.

The Cause of Action Test

This is a low standard. It is not a preliminary merits test, but rather simply an assessment as to whether it is “plain and obvious” that the claim cannot succeed.⁴

However, from the defendant’s perspective, its presence creates numerous useful tools. In particular, defendants may attack all or part of the pleading on this basis. They may suggest that this threshold matter (whether the proceeding discloses a reasonable cause of action) should be heard before the balance of the certification test because it could end all or part of the proceeding at the outset. Courts have often acceded to such requests.⁵

This preliminary pleadings motions alone often drives 6-12 months of delay into the process, disregarding potential interlocutory appeals. There have been cases that have gone to the Supreme Court and back before the certification hearing is argued.⁶

Given the relevance of the pleadings to the determination as to whether a proper cause of action is made out, defendants may also consider making demands for particulars. Again, this creates further delay.

⁴ *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at p. 980.

⁵ A number of strategic considerations come to bear when deciding to challenge intended class actions at the pre-certification stage. See R.L. Hayley, “Preliminary Challenges to Intended Class Actions” in *Class Actions: The 2nd Annual Litigators’ Conference*, January 27-28, 2003 (Toronto, Ont.: Insight 2003) See also Branch, *supra*, sections 4.540 and 4.1397.

⁶ For example, in one case still before the courts, both the plaintiff and defendant brought motions that reached the Supreme Court of Canada prior to the case being certified as a class proceeding. See *Garland v. Consumers Gas Co.* (1995), 122 D.L.R. (4th) 377, 22 O.R. (3d) 451, 17 B.L.R. (2d) 239 (Gen. Div.), (dismissing plaintiff’s summary judgment motion on criminality of interest rate): (1995), 22 O.R. (3d) 767 (Gen.Div.) (refusing to order costs); *affd* (1996), 155 D.L.R. (4th) 671, 30 O.R. (3d) 414n, 93 O.A.C. 155, 28 B.L.R. (2d) 278 (C.A.); *revd* [1998] 3 S.C.R. 112, 165 D.L.R. (4th) 385, 129 C.C.C. (3d) 972, 40 O.R. (3d) 479n, 114 O.A.C. 1, 20 C.R. (5th) 44, 49 M.P.L.R. (2d) 77, 231 N.R. 1; (2000), 185 D.L.R. (4th) 536 (Ont. S.C.J.) (dismissing plaintiff’s summary judgment motion and granting defendant’s summary judgment motion on collateral attack); (2000), 96 A.C.W.S. (3d) 932, [2000] O.J. No. 1684 (S.C.J.); appeal dismissed (2001), 208 D.L.R. (4th) 494, 57 O.R. (3d) 127, [2001] O.J. No. 4651 (C.A.) leave to appeal allowed [2002] S.C.C.A. No. 53.

From the plaintiff's perspective then, some counter-intuitive incentives are created in the class action environment. Specifically, it is crucial that the pleading be kept to the bare bones. Do not plead one cause of action more than is absolutely necessary. Do not plead anything novel unless you have too. A questionable cause of action will lose you a year's worth of momentum towards the real prize – class certification. Do not join one more defendant than you need for the same reason. The collateral defendant will bring a motion to strike that will effectively stay the whole certification process, while the core defendant waits happily in the wings.

Identifiable Class

There are two aspects to this requirement: numerosity and identifiability. In relation to numerosity, the Canadian statutes state that you just need more than one. Cases have been certified with classes as small as 16.⁷

However, from the perspective of plaintiff's counsel's, there is a practical reason why you don't want a class that is too small. First, there may not be a sufficient award at the end of the day to justify taking the case on a contingency. Second, if you are aware of all the class members, it is simpler to just file a mass writ with all the names and avoid the complexity and delay associated with seeking class certification.

In relation to identifiability, the key is objectivity: i.e., will a lay person know whether they are in or out of the proposed class? For example, in an environmental case, a geographic boundary around the class may meet the requirement.⁸ Contrast this example with a products liability case, having a proposed class definition that is "all persons who took the product and suffered damage"; clearly this would not meet the requirement because it is impossible to know from the outset who suffered damage. The proper definition should be "all persons who used the product". Although such a definition is likely over-inclusive, it would probably be accepted, given that the key issue is that it be objective. Practically speaking, if the class member did not suffer damage, they are not going to come forward at the end of the day in any event.

Appropriate Representative

From the plaintiff's perspective, you want a representative who is solid, will hold up well under pressure, and is likely to provide you with reasonable instructions. He or she should be media friendly, but not a "media hound"; passionate about the case, but not irrational. Ideally you would have a representative whose facts are particularly sympathetic, although not different in any major respect from the putative class members with respect to the common issues.

⁷ *Griffith v. Winter* (2002), 23 C.P.C. (5th) 336, 2002 B.C.S.C. 1219 (B.C.S.C.), affd 2003 BCCA 367.

⁸ *Hollick v. Toronto (Municipality)* (1998), 18 C.P.C. (4th) 394 and 409 (supp. reasons); reversed 168 D.L.R. (4th) 760 (Ont. Div. Ct.); leave to appeal granted 168 D.L.R. (4th) 760n (Ont. CA).

You often have to be sensitive to personal issues. Are there employment or confidentiality issues that make it difficult for the potential representative plaintiff to act as a spokesperson for the group?

Sometimes the right person does not walk in off the street. However, this fact does not mean you cannot launch the action expeditiously, since the problem can often be remedied subsequently. Once the class action is filed, there will usually be a certain amount of media coverage. This yields a number of inquiries from class members. By properly vetting these inquiries, it is often possible to locate someone better suited to the role. An application can then be made to substitute them as the plaintiff, either at the certification hearing or before.

Also, the authors strongly recommend that a plaintiff only use one representative plaintiff. First, as a management issue, it is far easier to seek and obtain instructions from just one individual. The whole purpose of the legislation was to prevent the administrative chaos created by having dozens or hundreds of clients. Do not enter into solicitor-client relationships with every class member who contacts your office for the same reason. Just maintain a database of these individuals.

Second, as a tactical matter, you do not want to create an opportunity for the defendant to highlight the individuality of each class member's case by cross-examining each of several plaintiffs. This just creates the opportunity to add a "real world" gloss on the arguments that the defendant will be advancing to undermine the benefits of certification.

The plaintiff must also produce a case management plan. Quite justifiably, the court is often very worried about this issue given the overwhelming size of the litigation. At a certain level, however, there is a compelling argument that so long as one common issue will be resolved, there should be no need to offer anything more "fancy" than trials of remaining issues in the usual way. The class action will still have improved the efficiency of the litigation. However, there is often a sense that court is looking for some type of "magic bullet" that makes the class action somehow simpler than traditional litigation.

In response, the authors have created the attached case management plan, which does illustrate that there are a number of tools and filters available that make it very unlikely that there will have to be a great number of full traditional individual trials at the end of the day. In our view, it comes close to a "magic bullet" for the concerns the court may have.

From the defendant's perspective, the low bar created by the courts for the test of "appropriateness" of the representative plaintiff does not yield many tactical opportunities.⁹ However, in particular cases there may be an ability to argue that the representative plaintiff lacks sufficient understanding, or is too close to the defendant.

⁹ *Endean v. Canadian Red Cross* (1997), 148 D.L.R. (4th) 158, reversed on other grounds, 157 D.L.R. (4th) 465 (B.C.C.A.).

If the proposed plaintiff has a cause of action against other parties, but not your client, there may be an ability to challenge the plaintiff on this basis.¹⁰

There may be an ability to challenge the particular plaintiff based on limitation periods in advance of certification. The law on whether limitations should be considered before certification, or at the individual hearings after resolution of the common issues trial, is mixed. Whether the court will allow this challenge on a preliminary basis appears to depend on the strength of the facts in that case.¹¹

Common Issues

The plaintiff must put forward at least one common issue. Usually this is not difficult. There are a number of “routine” issues that have developed.

In a negligence case, the existence of a duty of care and whether that duty has been breached are usually accepted as common issues. Whether punitive damages should be awarded is another. In some cases, a generalized causation question can be advanced: for example, can this product cause cancer?

If available, asking whether the defendant’s conduct breaches a statute is often a good common issue.

Interpretation of standard form contract terms are also often accepted as an appropriate common issue.

One of the tactics invoked by defendants to undercut the proposed common issues is to admit them. However, courts have rejected these efforts noting (properly) that an admission “in the air” does not do the class any good, and that only a binding determination of that issue within a class action will have true binding effect.¹²

Preferable Procedure

This is where the real practical debate occurs. In short, is the class action a good idea or not.

¹⁰ *Ragoonanan v. Imperial Tobacco* (2000), 51 O.R. (3d) 603 (S.C.J.). But in B.C., see *Campbell v. Flexwatt Corp.* (1997), 44 B.C.L.R. (3d) 343, 98 B.C.A.C. 22, (C.A.); *Harrington v. Dow Corning*, [1996] 8 W.W.R. 485, 22 B.C.L.R. (3d) 97, 31 C.C.L.T. (2d) 48, 48 C.P.C. (3d) 28 (S.C.), affirmed [2000] 1 W.W.R. 201, 82 B.C.L.R. (3d) 1, 47 C.P.C. (4th) 191, 2000 B.C.C.A. 605, and *MacKinnon v. Money Mart Co.*, [2004] B.C.J. No. 176, 2004 B.C.S.C. 140. A more restrictive BC view is espoused in *MacKinnon v. Van City*, [2004] B.C.J. No. 155, 2004 B.C.S.C. 125.

¹¹ See Branch, at section 4.540 and cases thereunder.

¹² *Endean v. Canadian Red Cross Society* (1997), 148 D.L.R. (4th) 158, [1997] 10 W.W.R. 752, 36 B.C.L.R. (3d) 350 (B.C.S.C.) (certification decision), revd 157 D.L.R. (4th) 465, 172 W.A.C. 73, [1998] 9 W.W.R. 136, 48 B.C.L.R. (3d) 90, 42 C.C.L.T. (2d) 222, leave to appeal to S.C.C. granted 165 D.L.R. (4th) vii, 196 W.A.C. 158n, 235 N.R. 400n. *Dalhuisen Guardian ad Litem of v. Maxim’s Bakery Ltd.* (2002), 112 A.C.W.S. (3d) 1020, 2002 BCSC 528, *Bywater v. TTC*, (1998), 27 C.P.C. (4th) 172 (Ont. Ct. (Gen. Div.)), supplementary reasons 30 C.P.C. (4th) 131 (Ont. Ct. (Gen. Div.)).

The B.C. *Act* is helpful in this respect as it actually sets out a non-exhaustive list of factors for the court to consider in assessing this question.¹³ Essentially, the Ontario courts have created similar factors by way of judicial interpretation.

The factors are as follows:

In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:

- (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
- (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
- (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
- (d) whether other means of resolving the claims are less practical or less efficient; and
- (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

The practical issues relating to each factor will be considered below.

Predominance

The real question here is how far will the common issues trial take you down the track to recovery. The challenge for defendants is to come up with as long a list as possible of issues that are individualistic in nature and therefore will remain to be determined at the second stage of the trial. The longer it is, the less “bang for your buck” you get out of a class action. Issues that are individualistic in nature include the following:

- a. causation;
- b. reliance;
- c. damages;
- d. limitation periods;
- e. fault assessment of other parties; and
- f. interprovincial legal variation if class extends beyond borders.

¹³ S. 4(2) of the *B.C. Act*. This provision was recommended by the CBA’s B.C. Branch Committee on Class Actions (Rodney L. Hayley, Chair, and David Donohoe) in “Submissions to the Attorney General of British Columbia on proposed Class Action Legislation” (1994), drawing on a previous recommendation of the Ontario Law Reform Commission which had not been accepted by the drafters of the *Ontario Act*.

Where possible, it is helpful for defendants to illustrate the complexity of these points by using the representative plaintiff as a “case study”. This moves the objection from the theoretical to the practical, which, in our experience, is a useful exercise.

As a plaintiff, the way to undermine this long list is to ask why resolving these very same issues in individual litigation is “preferable.” At least within a class action, you have cleared away the common issues. Further, another way for the Plaintiff to explain this factor is to ask “where is the heart of this case”. In other words, if it were an individual trial, what issue would attract most of the focus and attention? Even if the defendant’s list is long, if the common issues are the heart of the case, it should be certified.

Class members’ interest in controlling their own actions

In practice, this factor is simply asking how big the case is. If the damages alleged are sufficiently large, then presumably class members have an interest in controlling their own actions. In one case, the court suggested that a \$300,000 claim per plaintiff was a factor weighing against certification.¹⁴

From the plaintiff’s perspective, the answer to this objection is to say that we should put that theory to the test. The case should nonetheless be certified and the number of opt outs can be monitored. If there are too many opt outs, the case can be decertified. Practically speaking, the court will likely recognize that even for large claims, the parties would probably prefer to work together through a counsel prepared to operate on a global contingency fee.¹⁵

Presence of Other Proceedings

This factor is not particularly useful, because any factual scenario cuts both ways.

If there are no other claims, the plaintiff says that this shows that there is a serious access to justice problem. Conversely, the defendant argues that it shows there is no real interest in the problem or demand that it be redressed.

If there are a number of other claims, the plaintiff says that a class action is necessary in order to avoid inconsistent verdicts. Conversely, the defendants argue that the number of claims shows that the existing system is working fine.

So the factor is generally a “wash” and has never served as the lynch pin in any certification decision. In *Hollick*, however, McLachlin C.J. seemed to find support for denying certification in her analysis of the significance of the absence of claims to the available Small Claims Trust Fund:

¹⁴ *Abdool v. Anaheim Management Ltd.* (1995, 121 D.L.R. (4th) 496, 21 O.R. (3d) 453, 78 O.A.C. 377, 31 C.P.C. (3d) 197 (Div. Ct.).

¹⁵ See for example *CIBC v. Deloitte & Touche*, [2002] O.J. 2858 (S.C.J.); [2003], 172 O.A.C. 59, 33 C.P.C. (5th) 127, [2003] O.J.N. No. 2069 (Div. Ct.).

"The fact that no claims have been made against the Small Claims Trust Fund may suggest that the class members claims are either so small as to be non-existent or so large as to provide sufficient incentive for individual action. In either case access to justice is not a serious concern."¹⁶

Are there other means of resolving the issue?/Does the class action create management problems that would not be experienced by other means?

This is the heart of the preferability test. Practically speaking, what is the best way to manage the litigation?

Defendants have a number of options that they can put forward as alternative procedures preferable to class litigation.

1. Alternative Dispute Resolution ("ADR")

The lesson from the case law here is that the defendant's ADR program must be a good one, and the defendant should be firmly committed to the program before the court will accept that it is the preferable procedure.

If the program was approved by a U.S. court as reasonable, that helps its acceptance.¹⁷

Conversely, the following factors make it less likely that it will be accepted as a suitable alternative:

- a. If it is only available to part of the class;¹⁸
- b. If the defendant makes its implementation conditional on the case not being certified;¹⁹
- c. If there is no right to counsel;²⁰ and
- d. If the decision-maker is not independent of the defendant.²¹

2. Statutory Remedies

If the legislature has created an alternative simplified remedy, that may be accepted as the preferable procedure.²² However, if the statutory remedy does not allow for payment of money, that hurts it.²³

¹⁶ *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158, at p. 180.

¹⁷ *Bittner v. Louisiana Pacific Corp.* (1997), 43 B.C.L.R. (3d) 324 (S.C.).

¹⁸ *Chace v. Crane Canada Inc.* (1996), 26 B.C.L.R. (3d) 339, 32 C.C.L.T. (2d) 316, 5 C.P.C. (4th) 292 (S.C.) (certification granted), affd 44 B.C.L.R. (3d) 264, 14 C.P.C. (4th) 197, 164 W.A.C. 32 (C.A.).

¹⁹ *Brimmer v. VIA Rail Canada Inc.* (2000), 47 O.R. (3d) 793 (S.C.J. (Div. Ct.)) (preferable procedure and leave to appeal); (2000), 50 O.R. (3d) 114, 1 C.P.C. (5th) 185 (S.C.J.) (granting certification), affd (2001), 151 O.A.C. 133 (S.C.J. (Div. Ct.)).

²⁰ *Rumley v. British Columbia* (2001), 205 D.L.R. (4th) 39, [2001] 11 W.W.R. 207, 256 W.A.C. 1, 95 B.C.L.R. (3d) 1, 9 C.P.C. (5th) 1, [2001] S.C.J. 39, 2001 SCC 69.

²¹ *Olsen v. Behr Process Corp.* (2003), 120 A.C.W.S. (3d) 957, [2003] B.C.J. No. 627 (S.C.).

²² *McKay v. CDI Career Development Institute Ltd.* (1999), 64 B.C.L.R. (3d) 386, 30 C.P.C. (4th) 101 (S.C.); *Hollick v. Toronto (City)* (2001), 205 D.L.R. (4th) 19, 56 O.R. (3d) 214n, 153 O.A.C. 279, 42 C.E.L.R. (N.S.) 26, 13 C.P.C.

3. Administrative Law Remedies

If the same outcome could be achieved through an application for judicial review, the court may conclude that a class action is unnecessary.²⁴

However, if the core remedy sought is damages, the fact that an application for judicial review could achieve part of the desired result does not undermine the need for a class action.²⁵

4. Test cases

Defendants often suggest that a test case would be just as efficient. Judges are sometimes blinded to the apparent simplicity of test case resolution, and can fail to focus on the fact that a true test case requires the agreement of the parties; a court lacks jurisdiction to order that a party's rights will be decided in a case in which he or she is not a party. Moreover, a plaintiff can easily undermine the defendant's argument for a test case, as follows:

1. Require the defendant to admit on the record whether they are actually accepting the actual implications of the true test case: i.e., are they agreeing that the result in the individual case will bind everyone else for all time? In one case, an appellate court finally pressed this issue, and flushed out the fact that the defendant was not actually going that far.²⁶
2. Explain that a class action is in effect a test case, with a number of collateral procedural benefits to ensure that it functions efficiently. Not the least of these is the requirement for notice and court approved settlements, which ensure that no "sweetheart deals" can be done, without knowledge of the class as a whole, that could undercut the issue of ever reaching trial for the benefit of the larger group.
3. Note that the plaintiff in a test case still faces the costs problem which is, in most jurisdictions, mitigated by the class action legislation.

5. Individual Trials

If all else fails, the only thing left for a defendant to suggest is that individual trials are preferable. Often, when reduced to this alternative, the defendant simply says nothing

(5th) 1, 24 M.P.L.R. (3d) 9, 277 N.R. 51, *sub nom Hollick v. Metropolitan Toronto (Municipality)*, 2001 S.C.C. 68 at paras. 31-3.

²³ *Reid v. Ford Motor Co.*, [2003] B.C.J. No. 2489 (BCSC 1632).

²⁴ *Auton (Guardian ad Litem of) v. British Columbia (Minister of Health)*(1999), 32 C.P.C. (4th) 305, 12 Admin. L.R. (3d) 261 (B.C.S.C.); [2000] 8 W.W.R. 227, 78 B.C.L.R. (3d) 55, 77 C.R.R. (2d) 293, 2000 BCSC 1142, supplementary reasons 102 A.C.W.S. (3d) 816, 2001 BCSC 220.

²⁵ *Nanaimo Immigrant Settlement Society v. British Columbia, sub nom. Nanaimo Community Bingo Assn. v. British Columbia* (1999), 28 C.P.C. (4th) 295 (B.C.S.C.); (1999), 89 A.C.W.S. (3d) 896 (B.C.S.C.).

²⁶ *CIBC v. Deloitte & Touche*, [2003] O.J. No. 2069 (Div. Ct.).

– they just toss up all the problems with class litigation, without ever explaining why individual litigation is better. It is important for a plaintiff to flush the defendant out.

It is often very useful to illustrate why almost every section of each of the Acts is designed to make a class action operate more effectively than individual litigation. These practical advantages of class proceedings include:

- (a) management by a single judge (*BC Act*, s. 14);
- (b) the ability of the class to attract sophisticated lawyers through aggregation of potential damages and the availability of contingency fee agreements with the added protection of the class members of court review of solicitor's fees (*BC Act*, s. 38);
- (c) class members may apply to participate in the class action (*BC Act*, s. 15);
- (d) formal notice program on certification and subsequent notice programs in the discretion of the court alert all interested persons to the status of the litigation (*BC Act*, ss. 19-23);
- (e) the court has a number of powers designed to protect the interests of absent class members;
- (f) simplified structures and procedures for individual issues can be designed by the courts;
- (g) protection for all parties from adverse costs awards during the common issues stages of the case (*BC Act*, s. 37);
- (h) tolling of the limitation period for the entire class (*BC Act*, s. 39); and
- (i) orders and settlements accrue to the benefit of the entire class (*BC Act*, s. 26).²⁷

Of particular note is s. 27(3) of the *B.C. Act* and its equivalent in other jurisdictions. It states that in relation to any individual issues remaining:

... the court must choose the least expensive and most expeditious method of determining the individual issues that is consistent with justice to members of the class or subclass and the parties and, in doing so, the court may

²⁷ *Scott v. TD Waterhouse* (2001), 94 B.C.L.R. (3d) 320, 2001 B.C.S.C 1299, at paras 115-117; *Wilson v. Servier Canada Inc* (2001), 104 A.C.W.S. (3d) 1007, [2001] O.J. No. 1615, at para. 116; *Anderson v. Wilson*, (1997) 32 O.R. (3d) 400, (1999) 44 O.R. (3d) 673 (C.A.), leave to appeal to S.C.C. denied [1999] S.C.C.A. No. 476, at 420; *Chace v. Crane Canada* (1996), 26 B.C.L.R. (3d) 339, 32 C.C.L.T. (2d) 316, 5 C.P.C. (4th) 292, at pp.18-19 (BCSC). *Howard Estate v. BC* (1999), 66 B.C.L.R. (3d) 1999, 32 C.P.C. (4th) 41, 26 E.T.R. (2d) 210 (S.C.); *Nanaimo Immigrant Settlement Society v. B.C.* (2001), 244 W.A.C. 26, 84 B.C.L.R. (3d) 208, 201 BCCA 75, para. 20.

- (a) dispense with any procedural step that it considers unnecessary, and
- (b) authorize any special procedural steps, including steps relating to discovery, and any special rules, including rules relating to admission of evidence and means of proof, that it considers appropriate.

This is a very powerful section that compares favorably to the individual litigation alternative. Even in relation to all the individual issues that may remain, the class action has more tools to simplify that determination than individual litigation has.

Certification Appeals

From a plaintiff's perspective, a plaintiff will have to carefully assess whether it is worth appealing an adverse ruling. The courts have set a high bar for such appeals.

However, from the perspective of a defendant, with of course much greater financial resources, the magnified negative exposure created by certification, and the continuing possibility of settling before the appeal is heard, means that an appeal is justified in virtually every case. This common economic incentive is also reflected in the fact that many class action statutes create higher bars for defendants to appeal than plaintiffs.²⁸

What Happens After the Case is Certified?

As we have emphasized in this paper, certification is a crucial battle in class action warfare. Many cases settle soon after a certification order has been made, and the appeal process has ended. However, since certification is merely a procedural issue – leaving to be resolved the substantive issues of law and fact – one cannot take for granted that a defendant will *necessarily* settle immediately after certification. It should further be noted that if the defendant is unwilling to settle, class counsel must still soldier on, prosecuting the common issues trial and subsequently dealing with the individual issues according to the approved management plan. How difficult that might be is exemplified by *Rumley, supra*. In that case the court certified the case on the basis that the common issues trial would determine systemic negligence in the management of a school for the deaf, where there was evidence of numerous abuses. Assuming that that issue were to be decided in the favour of the class, it would conceivably still be necessary to have individual trials on the issue of whether each class member had actually been sexually or physically assaulted. This would in itself be a very large undertaking for a small plaintiffs' firm.

Moreover, in *Rumley*, many months after the Supreme Court of Canada had held that the case should be certified, the defendant sought to decertify the proceeding. While the defence counsel were quite properly protecting and advancing their client's interest, the unsuccessful application had the inevitable result of increasing the costs of the

²⁸ See Branch, *supra*, at sections 4.1810 to 4.1860, inclusive.

litigation and delaying its resolution.²⁹ One can readily apprehend the potential significance of such tactics by considering the fact that class counsel was running the case from a very small office, with little in the way of support systems. This highlights the importance of properly selecting your case at the outset, choosing those cases where the plaintiff is in the best position to bring pressure for a settlement.³⁰

If the class can continue to be “ground down” by the defence after certification, why then do most cases settle after they have been certified? There are several possible answers. In the first place, the cost of defeat for a defendant could, depending on the particular case, run into the millions or even billions of dollars. A conservative approach, confining the damages to a manageable sum certain is usually seen as preferable to running the risk of even greater compensatory damages being awarded after trial, with significant punitive damages a possibility as well in some cases. Secondly, media pressures intensify after the certification order is made, and many defendants with ongoing dealings with the public are afraid that they will be increasingly seen as grinding down their own constituency. Finally the grinding process is expensive for defendants, who are of course paying on a fee for service basis. Thus, in our experience, the risk of defendants continuing to “play hardball” after certification is relatively small, and class counsel should devote a great deal of energy and resources to surmounting the certification hurdle, with the reasonable expectation that further contested procedures may never arise.

²⁹ *L.R. v. British Columbia*, [2003] B.C.J. No. 313 (S.C.). The motion judge restated the common issues to ensure that there was no confusion over what would be the subject of the common issues trial and what would be reserved for the trials on the individual issues. Appeal allowed on other grounds (CA), appeal dismissed (SCC).

³⁰ See W. Branch, “The Wheat and the Chaff”: Class Action Case Selection” (2002) **Online: Branch MacMaster** <http://www.branmac.com/Images/wheat.pdf>.

THE MAGIC BULLET CASE MANAGEMENT PLAN

The Plaintiffs propose the following Case Management Plan if certification is granted:

NOTICE

1. A hearing will be held within 30 days of the issuance of the certification order to settle the terms and manner of notice. A draft form of notice is attached as Appendix “A” to this Case Management Plan.
2. The notices required by the certification order will be published or delivered within 60 days of the entry of the certification order.

DISCOVERY

3. The Plaintiffs and Defendants will deliver Lists of Documents to each other within 120 days of the entry of the certification order.
4. The Plaintiffs and Defendants will conduct any examinations for discovery within 90 days from the delivery of the Lists of Documents.

CASE MANAGEMENT AND INTERLOCUTORY APPLICATIONS

5. There will be case management conferences before the appointed judge every two months, unless the parties and the court agree that such hearings are not required.
6. Unless a particular application is a matter of urgency, all interlocutory applications will be heard at these regular case management hearings.
7. Any party bringing an interlocutory application will file supporting material at least 14 days prior to the case management conference. The respondents will file any responding affidavit material 7 days prior to the conference. The applicant will file its factum 5 days prior to the hearing. The respondent will file a responding factum 3 days prior to the hearing. The court will determine whether any additional oral argument is required, and advise the parties accordingly.

COMMON ISSUES RESOLUTION

8. The Plaintiffs propose to resolve as many of the common issues as possible through Rule 18 and 18A applications. Following such applications, for the common issues that remain to be resolved by trial, the Plaintiffs propose the following:

Expert Reports

- a. The Plaintiffs will deliver their expert reports in relation to the certified common issues within 60 days following completion of the examinations for discovery.

- b. The Defendants will deliver their expert reports in relation to the certified common issues within 60 days following receipt of the Plaintiffs' expert reports.
- c. The Plaintiffs will deliver any reply reports within 30 days after receipt of the Defendants' expert reports.

Timing of trial

- d. The common issues trial will begin within 60 days after delivery of the Defendants' Expert Reports.

INDIVIDUAL ISSUES DETERMINATION

- 9. If the Defendants are wholly successful on the common issues, the case will be at an end and no individual issues determination will be required.
- 10. If the Plaintiffs are successful on the common issues, in whole or in part, an orderly process for the resolution of any remaining issues may be required.
- 11. Within 30 days of the issuance of a judgment for the Plaintiffs on any of the common issues, the parties will convene for argument under s. 27 of the Act to determine the appropriate course for any outstanding issues.
- 12. At this time, the Plaintiffs propose the following process:
 - a. Claims forms will be developed and approved by the court that address the relevant issues, and provide for a default level of compensation based on a point system;
 - b. Class members who wish to seek compensation must complete and deliver the forms to the Defendants by a specified time;
 - c. The Defendants will be under an obligation to respond in writing to those class members whose claims are disputed, or compensation will flow pursuant to the established point system;
 - d. If the dispute cannot be resolved consensually by the parties following exchange of the written forms, the Plaintiffs will issue mandatory notices to mediate for any remaining disputes pursuant to the *Notice To Mediate (Residential Construction) Regulation*, B.C. Reg. 152/99 or the *Notice to Mediate (General) Regulation*, B.C. Reg. 4/2001, whichever is applicable;
 - e. Any claims remaining unresolved after mandatory mediation can be referred to a master for a report pursuant to s. 27(1)(b) of the Act. The court will either confirm the report, or decide whether something more is required to resolve the issues, having regard to:
 - i. the direction in s. 27(3) of the Act that the court must choose the

least expensive and most expeditious method of determining the issues;

- ii. the ability of the court to dispense with any procedural step that it considers unnecessary, pursuant to s. 27(3)(a) of the Act;
 - iii. the ability to authorize any special procedural steps, including rules related to the admission of evidence and means of proof, pursuant to s. 27(3)(b) of the Act.
- f. In relation to those remaining class members whose claims the Defendants continue to dispute after the exchange of written positions, voluntary discussions, and mandatory mediation, the Plaintiffs will encourage formal offers to settle given the potential cost penalties that can be imposed on the Defendants. This should control the number of disputes to reach this final stage, particularly after the first few matters establish precedents for later determinations.
- g. As an alternative to this process, the parties may agree to resolve the remaining issues under the *Commercial Arbitration Act* should the Defendant consent, as contemplated by s. 27(1)(c) of the Act.