

**CLASS ACTIONS FIVE YEARS LATER:
A GUIDE FOR LEGAL ASSISTANTS**

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I. INTRODUCTION

It has been five years since B.C.'s *Class Proceedings Act* (the "Act") came into effect. As such, it is an opportune time to assess whether the legislation has had the desired effect of increasing access to justice, modifying behaviour of defendants, and managing scarce judicial resources.

In this paper the author reviews the structure of class actions, where class actions have been brought, and some issues that arise for legal support staff in the area.

II. THE BASIC STRUCTURE

One person may commence a proposed class proceeding.¹ However, court approval must be obtained before the proceeding obtains formal class action status. There are five statutory requirements:

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

Once certified, the statute creates a number of benefits for class members:

1. class members need do nothing further to participate in the action—they are deemed to be part of the lawsuit unless they opt out;
2. neither class members nor the representative plaintiff are responsible for costs in relation to the determination of the common issues;
3. limitation periods are extended for all class members;
4. the court can make an aggregate award to the entire class;
5. the court can use statistical evidence to determine the level of the aggregate award;
6. the court is directed to simplify the proof of any remaining individual issues once the common issues trial is complete.

III. THE STATISTICS

¹ 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. However, this provision has never been invoked.

The author is aware of more than one hundred class actions that have been filed in B.C. since introduction of the Act. Many of these actions have never been pursued. By definition, most 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.

As of September 2001, the author's research indicates that 35 cases reached the certification stage. Of 20 contested certification hearings, 10 were certified.² The defendants did not contest certification in remaining 15 cases. Settlements or partial settlements have been reached in 14 of the certified cases. No class action has reached trial in the five years since the Act was passed.

IV. THE TARGETS

A. Government

Perhaps to its own surprise and dismay, government has been the primary target of its own legislation. At least twenty-two actions have included governments, government agencies or Crown corporations as defendants.

Government and associated entities have had mixed success avoiding proposed class actions. Government-related defendants have avoided class certification in five of the nine cases they have contested. The successful defences to certification advanced by the government have included:

1. the inherent individuality of the claim: *Sutherland v. The Attorney General of Canada*³ (airport noise nuisance) and *Tiemstra v. Insurance Corp. of B.C.*⁴ ("no bash/no cash" challenge)
2. the availability of an alternate administrative remedy: *Auton v. B.C.*⁵ (funding for autistic treatment);
3. technical statutory requirements relating to the proposed cause of action: *Friesen v. Hamel*⁶ (electoral fraud); and

² Branch, *Class Actions In Canada* (Aurora: Canada Law Book) at 4.1970

³ (1997) 15 C.P.C. (4th) 329 (B.C.S.C.)

⁴ (1996), 22 B.C.L.R. (3d) 49 (S.C.), aff'd (1997), 38 B.C.L.R. (3d) 377 (C.A.)

⁵ (March 31, 1999) Vancouver C984120 (S.C.)

⁶ (February 27, 1997), Vancouver A962818 (S.C.)

4. the lack of a cause of action: *Cooper v. Hobart*⁷ (attack on the Registrar of Mortgage Brokers flowing from the Eron Mortgage collapse).

The government was unable to avoid certification in the following cases: *Campbell v. Flexwatt Corp.*⁸ (product liability litigation concerning radiant ceiling heat panels), *Howard v. B.C.*⁹ (a challenge to constitutionality of probate fee structure), *Nanaimo Immigrant Settlement Society v. B.C.*¹⁰ (a challenge to constitutionality of charity licence fee structure), and *Rumley v. B.C.*,¹¹ (claims brought in connection with sexual assaults at the Jericho School).

The last of these decisions should be a particular concern for governments, as the Court of Appeal adopted a very liberal approach in certifying the action. The claim alleged the occurrence of sexual assaults claims over a 42-year period at a government- run school for the deaf. The Court of Appeal held that the issue of the government's alleged systemic negligence could be conveniently tried within one proceeding.

The provincial government did not oppose class certification in *Endean v. Canadian Red Cross Society*¹² and *Killough v. Canadian Red Cross Society*¹³, and it has since used the structure afforded by a class proceeding to settle the claims against them. Pending class actions include one on behalf of leaky condo homeowners. This case has not yet reached the certification stage.

B. Product Manufacturers

Product manufacturers have been the next most popular prey. To the uninitiated, this would not

⁷ [1999] B.C.J. No. 690 (S.C.), further reasons [1999] B.C.J. No. 1360 (S.C.), appeal allowed 2000 BCCA 151

⁸ (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

⁹ (March 15, 1999), Vancouver A982836 (S.C.)

¹⁰ (December 8, 1999), Victoria 873/98 (B.C.S.C.)

¹¹ [1999] B.C.J. No. 2634 (C.A.)

¹² [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.)

¹³ 2001 BCJ 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)

seem surprising. Most would assume this to be an essential and proper area for class actions given the practical difficulties facing the single individual who wishes to challenge a large multinational manufacturer.

However, a review of the American experience illustrates a decidedly hostile approach to products liability class actions, particularly in recent years. (The Erin Brokovich case was actually a multi-plaintiff lawsuit, not a class action). U.S. courts have become very concerned that such actions have the potential to bog down in the many individual issues that can arise, including causation, learned intermediary defences, choice of law, limitation periods, and damages.

B.C. courts have disregarded these concerns, noting that the test for certification is more liberal in B.C. than in the United States. All products liability class actions to come before the court have been certified¹⁴ save one. The products involved include breast implants, toilet tanks, blood, radiant ceiling heating panels, jaw implants, and radiant ceiling heating panels.

A pending action involves allegations that MacDonalds did not properly disclose that they used beef fat in the cooking of their French Fries. This case is scheduled to go to class certification in the spring.

C. Insurance Companies

The first company targeted with a class action in British Columbia was the Insurance Corporation of British Columbia. The corporation's policy of closely scrutinizing claims in which there was minimal impact between the two vehicles was challenged immediately after the Act came into effect.¹⁵ 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.

The Court of Appeal's analysis suggests that class actions against insurance companies are more likely to be approved where the action seeks the interpretation of a standard form insurance provision, rather than where there is a challenge to a claims adjustment process. The former is susceptible of common uniform resolution, while the latter is more sensitive to the vagaries of the individual claimant, and its handling.

¹⁴ Branch, *Class Actions In Canada* (Aurora: Canada Law Book) at 5.40-5.350; *Hoy v. Medtronic Inc.*, 2001 BCSC 1343.

¹⁵ *Tiemstra v. I.C.B.C.*, *supra*.

A number of class actions have been filed against Canadian life insurers who sold so-called “vanishing premium” policies. The allegation in these actions is that the insurers did not adequately disclose that a decrease in interest and dividend rates could result in a change in the year in which the policy would begin “paying for itself”, allowing the individual to stop paying insurance premiums out of their own pocket. None of these actions has been the subject of a contested certification hearing. However, five insurers negotiated settlements which have been approved by the courts.¹⁶

D. Investment Actions

Actions flowing from failed investments or unexpected drops in share value are amongst the most common class actions in the United States. A similar wave of litigation is just beginning in Canada. Class actions have been commenced by Bre-X, Delgratia Mining, Boliden and BCRIC shareholders. As at the date of writing, no contested certification decisions had been issued in these cases.

The Ontario experience suggests that investment cases will be certified if they are based on a prospectus, takeover circular, or other standard form document, or where conspiracy or fraud is alleged. However, if the cause of action is based on negligent misrepresentations that may vary amongst investors, such actions are unlikely to be certified.¹⁷

The most recent class action certified in this area was against TD Waterhouse in relation to their practice of setting exchange rates.¹⁸

E. Other Actions

¹⁶ Branch, *Class Actions In Canada* (Aurora: Canada Law Book) at 5.1360-5.1400

¹⁷ Branch, *Class Actions In Canada* (Aurora: Canada Law Book) at para.5.490-5.850; *Carom v. Bre-X Minerals Ltd.*, 44 O.R. (3d) 173 (S.C.)

¹⁸ *Scott v. TD Waterhouse*, 2001 BCSC 1299

The first four categories comprise the vast majority of class actions that have been commenced since the Act was proclaimed in force. However, there is an assortment of other cases, including actions challenging the quality of education at private colleges¹⁹, interest rate calculation disputes²⁰, the right to bump passengers from flights²¹, and utility rate overcharges.²²

V. PROCEDURAL CONDUCT OF THE MATTER

The Act states that, unless ordered otherwise, the judge who hears the certification hearing will case manage the class action through to trial.

The practice that has developed is for a case management judge to be appointed at the outset of the litigation, even prior to the certification hearing. In the normal course, plaintiff's counsel will write to the court requesting appointment of the case management judge. It can take 1-3 months for the court to respond.

A pre-certification hearing will then be held at which the court will discuss scheduling and other certification issues including:

1. dispositive motions, such as challenges to jurisdiction and summary dismissal applications²³;
2. delivery of the notice of motion and affidavit in support of certification;
3. delivery of responding affidavits;
4. cross-examination on the affidavits;
5. exchange of the certification argument; and

¹⁹ *McKay v. CDI Career Development Institutes Ltd.*, (1999), 30 C.P.C. (4th) 101 (B.C.S.C.)

²⁰ *Johnston v. Royal Bank of Canada*, (June 26, 1998) Vancouver Registry C972962 (S.C.) (certification order); (February 3, 1999) (settlement approval)

²¹ *Koo v. Canadian Airlines*, 2000 BCSC 281

²² *Windbiel v. BC Tel*, Vancouver Registry C985218; *Stall v. Rogers Cable*, Vancouver Registry C993615; *The Owners, Strata Plan LMS 1816 v. British Columbia Hydro and Power Authority*, Vancouver Registry A992029

²³ Several actions have been dismissed prior to certification, including *Edmonds v. Acton Super-Save Gas Stations* (June 20, 1996), Vancouver Registry C954921 (B.C.S.C.); *Azevedo v. The Legal Services Society* (March 12, 1998), Vancouver Registry CA023217 (B.C.C.A.)

6. length and timing of the certification argument itself.

This time frame from initial case management conference through to certification has usually been in the range of four to six months, although there is substantial variation. The class certification hearing will normally take two to five days.

There is some controversy about the scope of discovery prior to the class certification hearing. All parties to the litigation have an obligation to produce an affidavit that includes all facts material to certification. Generally the courts have prevented traditional discovery prior to certification.

If the case is certified, a notice will be delivered to class members and/or published in the newspaper. Class members from outside the province will have to opt into the action. Class members from within the province have to opt out if they do not want to participate.

After this point, the action proceeds as a normal action through to the trial of the certified common issues. If the class claim is successful, another notice is distributed to class members advising them what remains to be done in order to secure an award. The court is directed to make any remaining processes as streamlined as possible.

VI. ISSUES FOR LEGAL ASSISTANTS

A. Deciding Whether to Declare War - Plaintiff's Firms

Class actions can be a powerful tool for class members. There will be no initial outlay required for counsel fees since the cases are normally taken on by plaintiffs' counsel on a contingency fee basis and the disbursements financed by counsel. Class members are immune from an adverse costs award in relation to the common issues. The class confronts defendants with the full scope of their liability in a single proceeding, thereby magnifying the prospects for settlement. If successful, the remuneration for plaintiffs' counsel can be quite substantial. As such, plaintiff firms with sufficient knowledge in the area are constantly on the lookout for problems deserving of attention.

Notwithstanding these benefits, plaintiffs' firms must carefully assess the merits of any potential class action given the substantial resources that will have to be devoted to the prosecution of such a claim. Some of the questions that must be considered are:

1. What are the merits of the underlying case? This should be self-evident. However, it is important to recognize that despite the power and leverage generated by a class action, defendants may not always be prepared to settle if they have sufficient confidence in their position.
2. How many class members are there? This can often be very difficult to determine in advance of disclosure from the defendant. However, some effort to estimate class size is essential. Even with a very solid case on the merits, the class action

may not be warranted if the class is small, particularly given the resources required.

3. Have the defendants already settled in the United States? Many claims suitable for a class proceeding in jurisdiction have already been brought by similarly situated American plaintiffs in U.S. courts. If the defendants have already settled, this certainly reduces the risk associated with the litigation. It is important to confirm, however, that the U.S. settlement has not already been made available to Canadians on a voluntary basis.²⁴
4. Is your representative plaintiff appropriate? If the particular plaintiff has “warts”, it may be necessary to determine if there is someone else who can represent the class.
5. Are the resources available to carry the case forward? Class actions are complex and difficult cases requiring an immense commitment of time and effort in order to maintain sufficient pressure on large and powerful adversaries. It is common for firms with various specialties and resources to combine in order to ensure that the class actions receives the attention and expertise they require.

B. Contesting Certification - The Battle Royale

Tremendous resources and time must be invested to maximizing your clients ability to win the certification battle, because this battle determines the war in most cases. Legal assistants will be heavily involved in the coordination of the affidavits, and the tracking down and organizing of a tremendous number of exhibits.

C. Controlling The Horde - Communications With Class Members

Plaintiff's firms will often be inundated with inquiries from class members who are struggling to understand an admittedly complex procedure. The lawyers will not have the ability to deal with each of these calls, and the legal assistants will be on the front line. They will need to develop databases and binders to manage the class member lists. They will need to develop scripts, questionnaires and mailouts in order to minimize the time that has to be spent on the phone with each individual class member.

VII. 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.²⁵

Has the Act lived up to these expectations? Although results have been mixed, that is to be expected as lawyers test the boundaries of the legislation and courts confirm and define its basic parameters. Even though class proceedings in B.C. have encountered unavoidable pains, the question must in the author's view be answered in the affirmative. Many 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, I hope, modify their conduct accordingly.

As such, it can be said that to date this new procedural framework has indeed achieved the desired substantive results.