

## POWER IN NUMBERS: B.C.'S PROPOSED CLASS PROCEEDINGS ACT

By Andrew Borrell and Ward K. Branch\*

Class action legislation is a body of procedural rules enabling a prospective plaintiff to advance an action on behalf of a defined group of similarly situated persons. While representative proceedings have been known to most common law jurisdictions for many years, detailed class proceedings legislation in jurisdictions outside the United States is a relatively new development.

In May 1994, the Attorney General of British Columbia announced his intention to introduce class proceedings legislation in British Columbia in 1995. Following the Attorney General's announcement, his Ministry circulated a discussion paper seeking submissions from the public and the legal profession regarding class proceedings legislation. As a result of this process, on May 10, 1995, the Attorney-General introduced in the Legislature Bill 16, the *Class Proceedings Act* (the "Act"). It is expected that the Act will be enacted in the normal course of the present session and will be operative by August 1, 1995.

This paper is based upon the text of Bill 16 as it stood after second reading which occurred on June 6, 1995. Bill 16 is now in Committee which may result in some amendments to its text.

If enacted, B.C. will become the third province in Canada to have such legislation, after Quebec (1978) and Ontario (1992). The modern U.S. class action was enacted in 1966.

This paper outlines the general scheme of the Act. It then examines the areas where this type of legislation has been invoked. Finally, it assesses some of the tactical issues that may arise when utilizing the Act.

### IMPETUS FOR CLASS ACTION LEGISLATION

Most Canadian jurisdictions have made provision for representative actions in their respective rules of civil procedure (see B.C. Rule 5(11) and Ontario Rule 12.01). However, the manner in which these provisions have been interpreted has severely curtailed their utility.

A typical interpretation of these rules can be found in *Hayes v. B.C. Television Broadcasting System Ltd.*<sup>1</sup> where the Court of Appeal held that the test for the appropriateness of a representative action under B.C. Rule 5(11) is:

- (a) Is the purported class capable of clear and finite definition?
- (b) Are the principal issues of fact and law essentially the same with regard to all members?
- (c) Assuming liability, is there a single measure of damages applicable to all members?

The decision of the Supreme Court of Canada in *Naken v. General Motors*<sup>2</sup> further demonstrates the narrow view taken of these rules. In this case four purchasers of Firenza automobiles sought to use the existing representative proceeding rules to bring their action jointly on behalf of the approximately 4,000 purchasers in Ontario of the 1971 and 1972 Firenza. The Supreme Court of Canada held that the rules were

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insufficient to support such an attempt, and suggested that legislative reform was required to facilitate such an action. In the course of its judgment the Court commented extensively on the procedural deficiencies of the existing Ontario rule.

Although there were both English and Canadian authorities that might have been taken as support for a broader and more liberal interpretation of the rules, they received limited and conservative application. The following commentary is illustrative:

At first glance this Rule seems to permit class actions generally and in most situations. In fact there is no change from the former Rules and the opportunities for such actions are uncommon. The jurisprudence demands an identity of damages for each member of the class and an identity of defences against each.<sup>3</sup>

As the recent *Report on Class Actions* of the Ontario Law Reform Commission exhaustively illustrates, the law respecting class actions and, in particular, the interpretation of Rule 75 [now Rule 12] and its counterparts elsewhere, has been characterized by uncertainty and, more importantly, has been distinguished by a reliance on formalistic and non-functional categorizations to differentiate actions appropriately brought as class actions from those that are not. The result has been a body of case law that can fairly be regarded as conservative, and more seriously described as illogical.<sup>4</sup>

It was against this background that the impetus for class action legislation arose.

#### PURPOSE OF CLASS ACTION LEGISLATION

The major innovation of class action legislation is that it allows litigation to proceed notwithstanding a level of differentiation between the interests of the class members (unlike the rules for representative proceedings). That is, class action legislation permits global resolution of the common issues of the class. The individual issues are then determined separately after the resolution of the common issues.

The report of the Attorney General's Advisory Committee in Ontario states that the objects of class action legislation are as follows:

- (1) more efficient handling of potentially complex cases of mass wrong;
- (2) improved access to justice for those whose actions might not otherwise be asserted; and
- (3) to inhibit misconduct by those who might be tempted to ignore their obligations to the public.

These purposes have been adopted and referred to in many Ontario decisions including the leading Ontario case, *Abdool v. Anaheim Management Ltd.*<sup>5</sup>

#### GENERAL SCHEME OF CLASS ACTION LEGISLATION

Class proceedings legislation typically follows a fairly conventional structure that has developed over many years of experience and refinement in the United States. However, the specific manner in which particular issues are addressed can and do differ significantly between jurisdictions. These differences often reflect conscious policy decisions. The Act, not surprisingly, follows the conventional structure. However, the manner in which certain key issues are addressed reflects policy decisions made by the Attorney-General regarding the function of civil litigation in British Columbia.

The following is a review of the general scheme of the Act viewed in the context of provisions in other jurisdictions. We hope this contrast will assist in understanding the Act and illustrate for the reader some of the policy decisions made by the Attorney-General in drafting this legislation.

##### A. Certification Process

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someone must first obtain court approval for "certification" of the proposed class. Certification is the process by which the Court approves of the class action as an appropriate mechanism for the advancement of issues common to the class.

**1. Criteria for Certification**

While the specific provisions may vary significantly between jurisdictions, there are generally five criteria that must be satisfied for certification of a class action. These criteria have been adopted in British Columbia in section 4 of the Act.

**a. The pleadings must disclose a cause of action**

Section 4(1)(a) of the Act requires that the pleadings disclose a cause of action. The proceeding may be commenced by writ or petition.

The wording of this section is very similar to those provisions in the British Columbia Rules of Court permitting the dismissal of a matter that does not disclose a cause of action. One would expect that a similar test will be applied to this section. The Court will presume the facts alleged in the pleadings are true and consider whether it is plain and obvious that the claim cannot succeed. This will not be a preliminary merits test. However, a defendant remains at liberty to bring forward a summary judgment application under the normal rules at any time.

**b. Identifiable class of persons**

Section 4(1)(b) requires that there be an identifiable class of two or more persons. This requirement is comprised of two distinct matters: numerosity and definition. A class necessarily implies that there be more than one person (numerosity) who share identifiable or ascertainable characteristics (definition).

*Numerosity:* The first question is how many persons are required to constitute a class. Many jurisdictions require that there be "numerous" class members such that it is impractical to bring them individually before the court. However, this requirement generates judicial debate and inconsistency regarding whether four, five, or 20 class members satisfies the test. This debate also occurred under B.C. Rule 5(11) and Ontario Rule 12.

This problem was avoided in B.C. and Ontario by requiring only that the class have two or more persons. This does not mean that a class of few persons will necessarily be certified; however, courts may consider the size of the class in determining whether a class proceeding is the preferable procedure for the fair and efficient resolution of the common issues, a requirement discussed further below.

*Definition:* There are relatively few American cases and almost no Ontario cases considering the requirement of identifiability or ascertainable characteristics and therefore little judicial guidance for those drafting or challenging class definitions.

In the United States it has been held that it is the representative plaintiff's burden to establish the existence and scope of any class with certainty.<sup>6</sup> Typically, American courts have inquired whether the definition of the purported class provides a basis by which members of the class can reasonably be identified in some objective manner. This does not mean that the precise numbers or identities of the class members need be known, but one must be able to assess whether a particular person falls within the definition or not.<sup>7</sup>

**c. The proposed representative is appropriate**

Section 4(1)(e) of the Act requires that a representative plaintiff come forward 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; and
- (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

These provisions, which are almost identical to those in Ontario, attempt to insure adequate representation of non-participating class members whose rights, interests and obligations may be adversely affected by the representative plaintiff's conduct of the class proceeding.

In *Abdool v. Anaheim Management Ltd.* the Court held that a representative plaintiff need not be "typical" in order to be one who would adequately represent the class.<sup>8</sup> In *Peppiatt v. Nicol*<sup>9</sup> the Court considered the fact the representative was selected by other members of the class and that they had retained experienced counsel as reflecting positively on his appropriateness. In *Maxwell v. MLG Ventures Ltd.*,<sup>10</sup> the defendant challenged the appropriateness of the proposed representative on the basis that she had an inadequate understanding of the legal process and the issues involved in the case. The Court stated:

I am not satisfied that a less than complete knowledge of the intricacies of the civil litigation process, or of the legal issues involved in the action . . . disqualifies Maxwell as a representative plaintiff.

The Court held that Maxwell had an adequate understanding of the legal process and issues and was able to instruct counsel. Therefore, it does not appear that a particularly high threshold will be applied when assessing appropriateness.

In the U.S., the courts have considered the competency of the proposed class counsel in determining whether the representative is appropriate. Therefore, defence counsel opposing a certification order may find themselves in the peculiar position of arguing that class counsel will not provide adequate representation in advancing the case against their client. In other words, defence counsel may argue that the plaintiff should not be allowed to bring the action because their counsel will not be sufficiently skilful in their conduct of the action.

There are few cases that have dealt with the requirements of a workable plan for advancing the action of the class of the proceeding. In *Maxwell*,<sup>11</sup> the defendant was unsuccessful in challenging the plan on the grounds that it did not address payment of the defendant's costs and provided no estimated fees or disbursements. However, the defendant was successful in challenging the sufficiency of the notice to class members. This is discussed further below under "Notice to the Class".

There are other criteria a representative plaintiff must meet. The person certified as the class representative must ordinarily be a class member (section 2(4)) and there must be members of the class resident in British Columbia (section 2(1)). In contrast, in Ontario, there is no express requirement that there be members of the class resident in Ontario, and it appears that the representative plaintiff must always be a member of the class.

#### d. Commonality

In the U.S. the common issues must predominate over the individual issues in order for a class to be certified. This test has resulted in certification battles in which each side tries to come up with the longest list on their side of the "common" v. "individual" issues ledger.

To avoid this problem, Ontario's legislation provided that so long as the claims or defences of the class members raise common issues the action may be certified. The common issues need not predominate.

The Ontario Act states expressly that the Court shall not refuse to certify a class based solely on the fact that (1) different remedies or quantum of damages are sought by members of the class, (2) there are separate contracts, (3) the number in the class is unknown, or (4) the identity of each class member is unknown. However, where more than one of these factors exists, the Court may find that the class action procedure is not the preferable procedure as set out below.<sup>12</sup>

B.C.'s provisions are similar to those in Ontario with one important caveat. Like the Ontario provisions, sections 4(1)(c) and (d) require that there be common issues and

expressly provide that the common issues need not predominate over issues affecting only individual members. However, the "predomination" debate may still be relevant in B.C. by reason of section 4(2)(a), which is discussed in the next section.

**e. The class action is the preferable procedure for the resolution of the common issues**

This final requirement contains the greatest measure of judicial discretion. While section 4 of the Act states that the class action *must* be certified if the five requirements are met, this last requirement allows for the exercise of enough discretion to ensure that the battle over certification will be more than the simple application of set rules.

Ontario's legislation did not provide much in the way of guidance in terms of assessing the preferability of class actions. The approach of the Ontario courts to date has been to consider the original purposes of class litigation to assess how well the proposed class action would meet each of these purposes.

For example, if each proposed class member's claim is sufficiently large that it could be brought economically individually, then the Court is less likely to find that a class action is the preferable procedure. Further, the Court will consider the degree to which the class action on the common issues will resolve the dispute between the parties.<sup>13</sup>

These factors will presumably be relevant in B.C. as well. However, B.C. has provided more direct guidance to the Court. Section 4(2) states that the Court must consider all relevant matters including:

- (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 proceedings 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 proceedings would create greater difficulties than those likely to be experienced if relief were sought by other means.

Section 4(2)(a) may allow B.C. counsel to import the vast American case law with respect to the "predomination" of common and individual issues.

**2. Procedural Aspects of Certification**

**a. Time for certification application**

The proposed representative plaintiff may commence an action or file a petition without court approval. However, the representative must file an application for certification within 90 days after the last statement of defence or appearance to a petition has or should have been filed: section 2(3).

**b. Who may apply for certification**

While certification usually takes the form of a plaintiff certifying a class of plaintiffs, in Ontario and the United States plaintiffs may certify a class of defendants. Further, defendants may seek certification of plaintiff or defendant classes. U.S. practice indicates that defendants have tried to make use of their ability to certify plaintiff classes to define and limit their liability.

While the Act permits either a plaintiff or defendant to seek certification of a class of plaintiffs (section 3), there is no provision for the certification of defendant classes by anyone. This is not too surprising in light of the problems associated with

defendant classes the Attorney General outlined in the discussion paper. The most important of these was that defendants in the class would almost always seek to opt out of the class action rather than be bound by an adverse judgment.

**c. Subclassing**

In each of B.C., Ontario, Quebec and the U.S. provision is made for subclasses whose members have somewhat different interests in relation to the common issues. For example, in *Comartin v. Bordet*,<sup>14</sup> a suit by unhappy travellers, the Court divided the class into three according to the length of the member's holiday stay.

In addition to the ordinary subclassing requirements, B.C. has added a novel requirement that a class comprised of resident and non-resident members must be divided into subclasses along those lines: section 6(2).

The Act requires that the subclass have their own representative plaintiff, who must also produce a workable plan for the conduct of the litigation.

**d. Evidence on the certification application**

In the United States, prior to the certification hearing there is usually a lengthy process of discovery, both oral and written, directed to establishing the presence or absence of the prerequisites for class certification. This process can often take more than a year where there are disputes as to the responsiveness to written discovery and the scope of discovery permitted.

The only specific provisions in the Ontario and B.C. Acts require both parties to file affidavits related to class characteristics and provides that "the court may adjourn the motion for certification . . . to permit further evidence." The reported Ontario cases refer only to affidavit evidence when considering certification applications. It is not clear whether there have been attempts to obtain pre-certification discovery.

**e. Redefinition and decertification**

The B.C. Act follows the Ontario and U.S. legislation in allowing the Court to amend the certification order or decertify a class where the conditions for certification are no longer met: section 10.

**f. Appeal of certification disposition**

The Act allows both parties to appeal the disposition of a certification order as of right: section 36(1)(a). If a representative plaintiff does not appeal the disposition of a certification application or the appeal is abandoned, any member of the class may apply within 30 days after the expiry of the appeal period for leave to act as representative plaintiff for the purposes of the appeal: section 36(2) & (3).

In contrast, in Ontario a plaintiff may appeal a certification decision as of right, but a defendant must seek leave. The Ontario provision is said to have been motivated by the experience in Quebec where it was found that defendants appealed virtually every certification order made, creating delay and increased cost for representative plaintiffs. It will be interesting to see if B.C.'s experience is similar to that of Quebec.

**3. Results of Certification Attempts**

There has been some statistical analysis of the results of certification attempts in Quebec. For example in Quebec, as of January 22, 1991, 62 motions had been granted and 71 had been dismissed. Of the 16 actions that had proceeded to trial, 12 had succeeded and four were dismissed.<sup>15</sup>

We are aware of nine applications for certification in Ontario, five of which have been successful.

**B. Retainer and Payment of Counsel**

Both the Ontario and B.C. Acts require that the retainer agreement for class actions: (a) be in writing, (b) state the terms regarding payment of fees and disbursements,

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(c) estimate the expected fee, (d) state the method of payment, and (e) be approved by the Court.

Ontario does permit fee recovery contingent on success in class action proceedings, but does not permit a pure contingency fee agreement of the type recognized in B.C. Ontario has adopted what has become known as the "Lindy Lodestar" approach to the determination of counsel fees. Under this approach, the lawyer's hourly rate may be multiplied by a Court-approved factor at the close of the litigation.

B.C. did not adopt the "Lindy Lodestar" approach, and the Act does not interfere with the standard contingency contract familiar in British Columbia.

The Act does require court approval of any agreement whether or not it is a contingency fee arrangement. Any agreement respecting fees and disbursements that is not approved by the Court is unenforceable. There is no specific time during which the application for approval must be brought. Presumably, the application will normally take place at the close of the litigation, as is currently the practice with respect to approval of contingency contracts in cases brought by infants. The Act provides that notice need not be served on the defendants, unless ordered by the Court: section 38(3). This may be meant to encourage earlier application for approval of the fee arrangement by ensuring that the terms of the retainer remain private.

The Act does not provide any guidance as to the exercise of the Court's discretion in terms of approving the fee agreement. Presumably, the standard *Yule v. Saskatoon (City) (No. 4)* factors will apply, with special consideration paid to the risk assumed by plaintiff's counsel in accepting a class action retainer on a contingency basis.

After certification, the representative plaintiff has authority to instruct the class lawyer, direct the litigation, participate in discoveries, and authorize settlement (subject to Court approval). Other class members may apply to the Court for the right to participate in the decision-making process: section.<sup>15</sup>

C. Notice to the Class

Given the potential impact of class proceedings upon the rights of potential class members, notice of a proceeding that may affect their legal rights and entitle them to relief is obviously significant. However, notice requirements can be a substantial burden on the parties to a class action and an impediment to its progress. These competing values have resulted in substantial variety between jurisdictions regarding notice ranging from mandatory notice requirements to a discretion to order that no notice be provided at all.

The Act leaves the nature of the notice to the discretion of the Court in light of certain enumerated factors: section 19.

One need not arrive at the application for certification with a complete list of the members of the class. Part of the plan required under section 4(1)(e)(ii) is a plan for notifying members after certification. Notice may be by personal mail, advertising, notice to a sample group within the class, or by any other means that the Court considers appropriate. The Court retains the discretion to decline to order notice where it would not be useful.

It is important that any notice be understandable to the lay person. This will ensure broader awareness and interest in the action and less likelihood that there will be funds left unclaimed at the end of the day. Experience in the United States suggests that the notices are often misunderstood. The Act sets out the information that must be contained in the notice in great detail, including a requirement that an address be provided to which inquiries about the litigation may be addressed: section 19(6). The Court may require that further notices be sent out during the course of the litigation, such as when a settlement offer is made: section 21.

In *Maxwell*,<sup>16</sup> the Court held that the proposed notice was insufficient on the basis that it did not set out the nature of the non-disclosures alleged nor did it advise that an affidavit would be required from each prospective class member as to his prior

knowledge of the matters said not to have been disclosed by the defendant. The Court also directed that the notice should set out that, in the event the Court ordered separate discovery of a class member, such member would have to pay his or her own legal costs associated with such a discovery.

#### D. Opting In and Opting Out

All class action legislation provides a mechanism by which potential class members become bound by the class proceeding. The options are to: 1) require that potential class members "opt in" to the class; or 2) require that potential class members specifically "opt out" of the class.

In virtually all jurisdictions including Ontario, the choice has been made to require that class members opt out. The certification order will include provisions for opting out by a specified date. If the member does not opt out, then the judgment or settlement in the class action is binding upon him or her. The opt-in model was rejected on the basis that it fails to maximize the participation of individual class members. Experience has shown that very few class members elect to opt out.

However, the requirement to opt out may raise constitutional issues regarding the effect of a judgment in one jurisdiction on a resident of another jurisdiction who did not opt out.

Ontario's legislation does not specifically address the difficult issues that arise with respect to non-resident class members. To what extent are they bound? What if there is competing class action legislation in their home province?

In the United States, the constitutional "due process" and "full-faith and credit" clauses have resulted in case law that provides that where the foreign court has accorded the extra-jurisdictional class member due process the member will be bound by the class action judgment. The basic requirements to satisfy the due process obligation are notice, rights protected by adequate representation and an opportunity to be heard.

The recent Supreme Court of Canada decisions in *Morguard Investments Ltd. v. De Savoye*<sup>17</sup> and *Hunt v. T&N plc*<sup>18</sup> adopted and constitutionalized the "due process" and "full-faith and credit" principles. It is unclear how these principles will be applied in the class action context.

The Act deals with the opt-out/opt-in debate in a very different manner than Ontario.

The Act provides for an opt-out procedure for all potential class members resident in B.C. and an opt-in procedure for non-resident class members: section 16. In order to be bound by or benefit from the class action in B.C., class members resident outside of B.C. must specifically opt into the class proceeding. The certification order will set out the procedure to opt in: section 8(1)(g). The Court may create a special subclass for extra-provincial class members with their own representative: section 16(5). Thus, there will be no effect of a judgment in B.C. on non-resident class members unless they specifically opt in to the class proceeding.

There remain jurisdictional issues, in particular the effect of the disposition of an Ontario class action on class members resident in B.C. who do not opt out of the proceeding in Ontario but who also do not opt out of an overlapping B.C. proceeding.

In *Bendall v. McGhan Medical Corporation*,<sup>19</sup> a class comprised of breast implant recipients was certified. The class was certified as "all persons who have had silicone gel breast implants placed in their bodies, whose implants were manufactured, developed, designed, fabricated, sold, distributed or otherwise placed into the stream of commerce by the named Defendants". The definition is in no way limited to Ontario residents. Could a similar class action be commenced in British Columbia? Could a defendant succeed on a motion that the British Columbia Court decline jurisdiction or obtain a stay of one of the actions? Note that in assessing whether a

class action is appropriate, the Court is entitled to consider whether the class action involves claims that are the subject of other proceedings.

If both proceed, what is the effect of a settlement or determination in one of them? What if the class definitions do not overlap completely or are worded differently? These difficult issues remain to be resolved.

**E. Limitation Periods**

The Act provides that the running of a limitation period against class members is suspended upon commencement of a class action. It will begin running again on the happening of certain events, such as (1) a decision by the particular class member to opt out of the proceeding, or (2) discontinuation of the action: section 39.

**F. Case Management**

The Court is granted a more active role and wider discretion in the management of class actions to ensure there is sufficient procedural flexibility for the matter to proceed forward in an efficient way.

The Ontario Act provides for compulsory case management in each class action. The same judge hears every motion. However, this judge will not be the trial judge. The Court retains a discretion to make any order necessary to ensure the appropriate conduct of the proceeding upon the application of any party.

B.C. adopts this interventionist approach to class actions. Many sections contain the proviso "unless the Court otherwise orders". The Court has the general power to make any order necessary to ensure effective function of the class action: section 12. B.C. has taken the approach somewhat further than Ontario, however. B.C. requires that the judge who hears the original certification motion hear all subsequent motions (unless the judge is unavailable): section 14. Further, that judge may also serve as the trial judge.

**G. Discovery**

The Act states that the parties retain the same rights to discovery as in a standard action. However, leave of the Court must be obtained in order to discover non-representative class members: section 17.

**H. Settlement**

While the representative plaintiff may authorize a settlement in the first instance, all class action legislation requires Court approval to bind the class members. This requirement is found in section 35 of the Act. While section 35 specifies no requirements for approval, courts in other jurisdictions typically look to ensure that the representative plaintiff is not settling for inadequate reasons, such as fatigue or lucrative side deals. They also examine whether the proposed settlement is fair, reasonable and in the best interests of those affected. Presumably any settlement would require some plan or mechanism for the distribution of funds and the assessment of the entitlement of each class member to the settlement funds.

In the U.S., usually notice must be provided to the class members of a settlement or other compromise (but not necessarily individual notice). The Ontario and B.C. provisions provide only that the Court *may* order that notice of the proposed settlement be given. While no specific provision is made for class members to appear and oppose the settlement, the Court would likely permit such participation under section 15 of the Act.

In the U.S. there have been several instances of courts refusing to approve settlements. For example, in a class action brought by purchasers of the rock group Milli Vanilli's album, the Court refused to approve a settlement granting each class member a \$3 credit towards a further purchase. The Court felt that the class members should not be required to buy further goods from the record company alleged to have deceived them.<sup>20</sup>

### I. Trial

Class action legislation provides for the adjudication of the common issues, with subsequent proceedings for the assessment of the individual issues, which are usually damages.

The Act provides that the initial trial will resolve the issues common to the class: section 25. After that determination is made, the Court is granted broad discretion in terms of managing the resolution of the individual issues. The Court may determine the individual issues itself, refer them to other judges, or commission reports by independent experts: section 27.

If the action is concluded by a consent judgment, or by resolution on the merits, the findings with respect to common issues will be binding on all members of the class: section 26.

A person who opted out of the class action is not bound by the findings in the class action.

### J. Damages and Other Remedies

Class action legislation does not normally limit the type of remedy that may be sought (although if the nature of the remedy sought differs greatly amongst class members, certification may be refused). As such, theoretically any type of remedy can be sought, including injunctive and other equitable relief, statutory remedies and administrative writs. Normally, the remedy sought will be damages.

The Act provides substantial flexibility regarding the manner in which a damage award is calculated and distributed. In Ontario and B.C., the Court is entitled to make individual awards of damages or award an aggregate amount for the entire class. Further, the Court may distribute the awards individually based upon each class member's loss or on a proportionate or average basis, where it would be impractical to determine each party's individual loss: section 31. The Court may direct the distribution of aggregate awards with or without some form of claims process by class members: section 32.

In determining the appropriate award, the parties may make use of statistics or samples. Provision is made for notice and cross-examination in relation to any such evidence. Finally, the Court may order that the award be distributed directly from the defendant by any means including abatement and credit, through some third party or paid into court or some other depository.

The Court will set a time limit in which the members of the class must make their claim against the award. After that time period, the member must apply to court in order to obtain the right to access the fund.

Given the size of potential awards, the Court may permit the defendant time over which to pay the award.

Experience in the United States has shown that a class action awards often leave an undistributed residue that can be substantial. This raises the question of how such excess should be disposed of. There are various options that have been utilized in the United States that reflect very different philosophical positions.

On the one hand, one could argue that the surplus should not be returned to the defendant but rather distributed in a manner that will benefit the class or other similarly situated persons. In some cases courts have ordered that a defendant reduce the cost of its goods or services until the surplus is exhausted or distribute the fund to institutions or organizations that would benefit the class and those similarly situated. This concept has become known as "fluid class recovery" or "cy-pres distribution". The theory underlying this position is that the defendant should be deprived entirely of its ill-gotten gains.

On the other hand, one can argue that this approach changes the substantive law of damages in that it permits non-parties to benefit and could permit double recov-

ery by class members who participate in the original distribution and then avail themselves of the price reductions.

The drafters of the Act have not chosen one particular philosophy over the other. The Act provides that the Court may: (1) apply any amounts remaining in a way that would creatively benefit the members of that class, (2) forfeit the sums to the Crown, or (3) return the amount to the defendant: section 34(5). Consistent with the balance of the Act, the Court is left with broad discretion regarding the distribution of the excess.

#### K. Costs

In Ontario, the normal costs rules will generally apply. The representative plaintiff will be responsible for any adverse cost award. Some special rules have been created, however. The Court may consider the special nature of the class action in determining the appropriate award of costs. The Court may consider whether the action was a test case, raised a novel point of law, or involved a matter of public interest.

In Quebec, the normal tariff has been altered to reduce the impact on representative plaintiffs.

Both Ontario and Quebec have created a fund that may provide assistance to representative plaintiffs. The primary reason for the fund is to reduce the deterrent effect that the liability for costs may have upon the willingness of persons to bring class actions and to act as representatives.

The Act adopts a different course with a "no costs" rule: section 37. No costs will be awarded to either party. The basis for such a rule is the concern that individuals may be deterred from bringing a class action if they face liability for costs if unsuccessful. However, the Court does retain the discretion to make costs awards where there has been (a) vexatious, frivolous or abusive conduct, (b) if any improper or unnecessary steps were taken for an improper purpose, or (c) if there are other exceptional circumstances: section 37(2).

The "no costs" rule avoids the necessity of creating a special fund to support class actions. Proposed classes will still be responsible for their own disbursements (unless funded by their counsel). However, they have been freed from the fear of an adverse costs award.

A concern that has been expressed with respect to this rule is that plaintiffs may now commence class proceedings for the sole purpose of taking advantage of this provision. One example that has been put forward is as follows: "... a married couple and their three children are all injured while occupants in the same vehicle as a result of the negligence of the driver of another vehicle. Why wouldn't these five plaintiffs seek to certify their five related claims as a class action in order to insulate themselves from possible liability to pay party and party costs?"<sup>21</sup> However, the concern is likely not as great as it may first appear.

First, these plaintiffs would likely not be willing to forfeit the possibility of recovering their own costs from the defendant. In many smaller cases the costs of pursuing the claim including disbursements are quite large relative to the value of the claim.

Second, the class proceeding must otherwise satisfy the tests set out in the legislation for certification. A court will surely recognize bare attempts to take improper advantage of the costs rule and refuse to certify them on the basis that a class proceeding is not the preferable mechanism.

#### L. Appeal of Judgment on Common or Individual Issues

Any party may appeal as of right the disposition of a judgment on common issues or an order with respect to aggregate awards other than a order that determines indi-

vidual claims: section 36(1). As with appeals from certification or decertification proceedings, where a representative plaintiff does not appeal such a judgment or order, then another member of the class may apply for the right to appeal on behalf of the class: section 36(2).

The Act requires that leave be obtained to appeal from the determination of any individual issue: section 36(4). In contrast, in Ontario, there is an appeal as of right for any award greater than \$3,000. For amounts less than \$3,000, leave must be sought.

#### WHEN ARE CLASS ACTIONS USED?

The experience in other jurisdictions with such legislation demonstrates that class action legislation is of wide application to many areas of the law and to most types of relief. Here are some of the areas where it has been invoked in other jurisdictions:

*Products Liability:* Breast implant cases have been certified in Ontario and the U.S. In Quebec a suit on behalf of all Quebec women who had suffered damages as the result of their use of the Dalkon Shield was certified.<sup>22</sup> In the United States, class actions have been utilized to pursue claims relating to all types of products including alarm systems, pharmaceuticals, construction products and tobacco products.

*Labour Law:* In Ontario, a dispute over control of a local union was certified: *Stamos v. Belanger*.<sup>23</sup> In *Curateur public v. Syndicat national des employes de l'Hôpital Saint-Ferdinand*, a public curator sued a union on behalf of a group of 703 patients for damages resulting from lack of care during an illegal strike.

*Employment Discrimination:* The number of cases in this area in the U.S. has fallen over the past decade.<sup>24</sup> However, some observers believe there has been a recent resurgence.<sup>25</sup>

*Corporate and Partnership Law:* Workers have sought to recover unpaid wages from directors of bankrupt corporations: *Plourde v. Helie*.<sup>26</sup>

*Contracts:* In the U.S. case of *Sampson v. Eastman Kodak Co.*, purchasers of Kodak Instamatic cameras sued Kodak when their cameras became useless as a result of a finding that Kodak had infringed Polaroid patents and were restrained from selling supplies for the camera. Travellers frustrated by delays or false advertising have also brought suits.<sup>27</sup>

*Public Utilities Regulation:* In *Hunter v. Southern Bell Tel. & Tel. Co.*,<sup>28</sup> telephone customers alleged that the company had imposed unauthorized charges for the repair and maintenance of inside telephone wires. Suits have also been brought for interruption of cable or telephone service.

*Environmental Cases:* In *Comité d'environnement de La Baie Inc. v. Société d'électrolyse et de chimie Alcan Ltée*,<sup>29</sup> 2,400 residents of a town were authorized to bring a class action to recover damages resulting from the pollution of the air by bauxite, alumina and other substances handled and stored at Alcan's installations.

*Antitrust:* An antitrust suit against the U.S. airlines was certified notwithstanding that there were between 12.5 and 50 million potential class members.<sup>30</sup>

*Securities Law:* Securities class actions are common in the United States. There has been growing concern over the use of class actions in the securities area by "professional plaintiffs" who own a few shares of many companies, who bring misrepresentation or fraud actions when share prices fall. This practice has been referred to as the "class-action shakedown racket" by the *Wall Street Journal*. However, other commentators have noted that securities class actions account for only a fraction of actions in federal courts in the United States.<sup>31</sup>

It has been noted that there is potential for increased litigation for prospectus misrepresentation in Ontario as a result of the implementation of class action legisla-

tion.<sup>32</sup> Recently, an action based on alleged misrepresentations in an offering circular has been certified in Ontario.<sup>33</sup> However, Canada's common law jurisdictions lack the comparable implied rights of action arising from securities legislation that are the foundation of many securities cases in the United States and, therefore, securities class actions in B.C. may be more limited than in the United States.

**WHEN HAVE CLASS ACTIONS BEEN REJECTED AS INAPPROPRIATE?**

*Tainted Blood:* Certification of a class action on behalf of HIV-infected blood transfusion recipients was denied in Ontario.<sup>34</sup> The Court noted that the negligence of the blood bank was very dependent on the exact month and year that the blood was donated, given that the knowledge with respect to AIDS was evolving very quickly. Further, the character of the Red Cross's negligence depended on the identity of the donor who provided the infected blood in each case.

*Negligent Misrepresentation:* A class action may not be the "preferable procedure" for the determination of such actions given the importance of determining (1) what was said to each plaintiff, and (2) whether each plaintiff relied on the statement. However, Mr. Justice O'Brien indicated in *Abdool v. Anaheim Management* that there may be circumstances where a negligent misrepresentation action may be brought as a class action, and that the matters of individual reliance do not necessarily mean a class proceeding is not the preferable procedure.

*Declaration of Invalidity of Municipal By-laws:* In Quebec, it has been held in certain cases that it is inappropriate to seek declarations of invalidity through a class action given that it is impossible for any resident to opt out of the final verdict.<sup>35</sup> However, it is difficult to understand how this is any different from a declaration of invalidity obtained by one individual.

*Libel Suits:* In *Elliott v. C.B.C.*<sup>36</sup> the Court dismissed a libel action brought by airmen in the Allied Command against the producers of the documentary *The Valour and the Horror*. The Court held that a group could not be defamed, and the documentary did not single out any of the proposed plaintiffs.

**ADVANTAGES AND DISADVANTAGES OF CLASS ACTIONS**

From a review of American literature regarding certification one derives the general view that potential plaintiffs view the class action as desirable and that potential defendants view class actions as undesirable. However, in many circumstances class certification may operate to the detriment of a plaintiff and may operate to the benefit of a defendant. More recent literature has advocated a pragmatic approach to assessing the desirability of a class proceeding. There may be circumstances in which plaintiffs should reject a class action and defendants should accede to class certification.

**A. From the Plaintiff's Perspective**

**1. Advantages**

**a. Economies of time, effort and expense**

Class actions create economies of scale that make possible the pursuit of claims that might not otherwise proceed. Class action legislation enables a group of plaintiffs with claims that would not otherwise be feasible independently to pursue and share the costs of a single representative action. The cost sharing can occur by: a) a number of class members coming forward to contribute to the costs of the litigation; or b) attracting counsel on a contingency basis where the potential quantum of a single or several claims might not otherwise be sufficient to attract a contingency arrangement.

**b. Wielding a bigger stick/safety in numbers**

A group of plaintiffs fosters strength in two ways.

First, where the defendant is subject to greater damages or other relief, settlement will likely be taken much more seriously. Literature in the United States suggests that most often the battle in class actions is fought at the certification stage. A successful certification often results in settlement within a short time given the potential scope of liability.

Second, there is likely some psychological benefit in pursuing an action as part of a group of similarly situated persons from whom one may derive support rather than standing alone.

**c. Only means of judicial relief**

Many meritorious claims have no realistic prospect of success because they are too small to warrant independent action. Further, where a potential plaintiff is mentally incompetent, ignorant of legal rights or unable to afford legal representation alone, a class action may be the only vehicle to advance his claim.

**d. Enhanced effectiveness of final judgment**

Where an individual plaintiff pursues and obtains independently a favourable result, a separate action may be required to enforce the relief obtained. A class action entitles all class members to enforce the relief granted. Further, in a case where the assets of the defendant are limited, each class member obtains equal access to the funds available, rather than all the rewards going to the plaintiffs who obtain judgment early.

**e. Statute of limitations postponed for benefit of class**

British Columbia's class action legislation tolls the limitation period for the entire class.

**f. Law reform or public interest litigation**

Class actions present the opportunity for public interest advocacy groups to deter offensive conduct by creating significant exposure to liability and publicity where a regular action may have had little prospect of getting off the ground.

**g. Retroactivity of judgment in respect of challenged legislation**

Where legislation is successfully challenged and overturned a major issue is often the retroactivity of the judgment and the reversal of acts performed pursuant to that legislation. If such a proceeding is cast as a class action a court would likely be required to address the effect of the declaratory judgment on all past, present and future class members.

**h. Avoidance of mootness**

Particularly where the relief sought is injunctive or declaratory, a class action may help avoid a loss of standing due to mootness during the litigation because there is likely some other class member available to assume the role of class representative.

**i. Jurisdiction and service**

Once the representative plaintiff has satisfied the jurisdictional requirements in the chosen venue and served the defendant in accordance with the rules of service, these efforts accrue to the benefit of the other class members.

**2. Disadvantages to Plaintiffs****a. Delay of individual relief**

Because a plaintiff is no longer suing individually but rather in a collective capacity, a plaintiff may have to wait until the relief of all class members has been determined and distributed prior to receiving his entitlement.<sup>37</sup> However, this drawback is only significant where the litigation could otherwise proceed in the absence of class action legislation. Where the economics dictate that the action proceed as a class action or not at all, this is not a negative consideration.

### b. Individual settlements more difficult

The filing of a class action requires court approval before any voluntary dismissal or settlement of the action. Further notice requirements may also be imposed. This can be an onerous and time-consuming undertaking and may deter a settlement that an individual might otherwise be able to conclude. Therefore, prior to commencing or participating in a class action one may wish to consider whether such action will impede a probable quick settlement.

### c. Responsibility of the representative plaintiff

It is the mandate of the class representative to act in the best interests of the class. This responsibility to the class may at times conflict with the class representative's preferences for the resolution of the matter. In the United States some courts have characterized the duty of the class representative as fiduciary in nature.

### d. Counsel competition or conflict

Subclasses or absent class members may be presented with the opportunity of appearing through counsel of their own choice and participating directly in the action. Multiple counsel may find themselves competing for control of the action. A class member may find the action in the hands of counsel not of their choosing and with a different theory, strategy or approach to the case.

### e. Greater procedural difficulties and defence tactics

A class action presents a significant weapon and there are many procedural requirements for the certification of a class and the maintenance of a class action. The wording is often broad and liberally worded, and there is a large measure of discretion residing with the Court. These factors may attract a vigorous and complex defence.

### f. Expense

The additional expenses associated with a class action, particularly of notice, may render an unsuccessful class representative liable for greater amounts than might otherwise be the case. However, where each party bears their own taxable costs, this factor is mitigated.

## 3. Should a Plaintiff Seek Class Certification?

One of the most significant considerations that may influence a plaintiff in this regard is the effect of a class action upon the prospects for settlement. There is some dispute in American literature regarding the effect of class certification upon settlement. Some authors have suggested that the chances are that an action will settle shortly after a successful certification.<sup>38</sup> However, other authors have suggested that class actions are not effective at coercing settlement and render settlement extremely difficult.<sup>39</sup> There is likely no hard and fast rule. However, a prospective plaintiff should carefully consider whether a class proceeding will preclude an early settlement.

In addition, a prospective class action plaintiff must consider:

1. the significant time, effort and money required;
2. the extent to which a class action will delay his relief;
3. the additional responsibilities associated with representing the interests of the entire class; and
4. the administrative burdens, such as notice, imposed by class action legislation.

## B. From the Defendant's Perspective

### 1. Advantages

#### a. Economies of single adjudication

The class action grants to the defendant the ability to consolidate all potential claims in one proceeding. The defendant may avoid a multiplicity of proceedings and

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obtain a single trial for the entire class which will determine the rights of the class members *vis-à-vis* the defendant. A class action may prevent the company from being bankrupted by many individual actions.

**b. Avoid incompatible standards**

A class action will present a defendant with the opportunity to obtain a single adjudication regarding its conduct.

**c. *Res judicata* for entire class**

A final judgment will be binding on the entire class.

**d. Settlement with representative binds entire class**

To settle a case, you need only agree with the representative plaintiff and obtain Court approval. You need not seek express approval from each member of the class.

**e. Minimize legal costs**

Although the administrative costs of class action may be significant, in many instances defending one large case will cost less than defending many smaller cases in which the same issues are raised.

**f. Damage control**

The degree of adverse publicity may be easier to manage in the context of one piece of litigation.

**2. Disadvantages**

The advantages of a class action from the plaintiff's perspective generally operate to the disadvantage of the defendant, such as the enhanced exposure to liability and damages.

**3. Should a Defendant Accept Class Certification?**

In most circumstances a defendant will not desire class certification with its expanded defence costs and large potential damage awards. This is particularly true where the class members have many small claims that would not be viable if pursued independently. However, where the individual claims warrant individual actions in any event, it may be in the defendant's best interest to ask for certification where the advantages outlined above are particularly significant. For instance, where a defendant:

- a. is confident of a successful positive defence it may wish to bind the entire class by a single adjudication; or
- b. is facing a significant number of claims it wishes to resolve conclusively so that it may move on free of the burden of litigation and the risk of further claims.

Further, a defendant may be able to strategically redefine the size and shape of the class that the plaintiff has proposed, either by consent or before the judge hearing the certification application, thereby securing tactical advantages. One example would be securing a class definition that includes only those plaintiffs with claims sufficient to warrant individual actions in any event and excludes those smaller claims that would not likely be pursued in the absence of class certification.

A defendant's strategy in opposition to certification may be contrary to the typical approach taken by defendants in the early stages of litigation.

In a typical individual action it is often to the plaintiff's advantage to focus the issues that go to the merits of the case whereas a defendant usually has no interest in focusing the issues for the opposition. It is often to the defendant's tactical advantage to permit the real issues to remain obscure.

In contrast, a plaintiff seeking class certification will likely cast the case very generally in order to obscure any individual characteristics that might lead a court to conclude that the class proceeding is inappropriate. The defendant, on the other hand, when opposing class certification will usually be required to focus the Court's attention on the factual and legal questions that go to the merits of the plaintiff's

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case and then demonstrate why a class action is not suitable for the resolution of those questions. The defendant will highlight the differences requiring independent determination to establish that a class action is inappropriate.

### CONCLUSION

Class action legislation will pose unique challenges to defence and plaintiff's counsel. The complexities may restrict its usage to mammoth group tort litigation. However, as we have already seen in the United States, Quebec and Ontario, inventive counsel have discovered new and unexpected uses for the procedure.

Given the aggressive nature of the B.C. Bar, we are confident that the new opportunities afforded by this litigation will be discovered and invoked in novel ways.

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