

The Wheat and the Chaff: Class Action Case Selection

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

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

A. INTRODUCTION

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

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

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

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

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

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

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

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

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

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

So what does this due diligence period involve?

B. THE MERITS MATTER

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

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

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

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

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

C. ARE THERE ENOUGH PEOPLE?

At a certain size, the procedural complexities of class litigation are simply not worth the effort. The writer's personal "rule of thumb" is that certification should not be sought for a class less than 20 persons. At that level, it will likely be simpler to manage the case as a multiple plaintiff mass proceeding. Although class certification would force the members

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

of the class to opt out, in a group that small you are more likely to have sufficient individual interest that anyone who would not seek to retain you to bring an individual action is also likely to opt out of the case in any event.

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

In cases that have been the subject of government action, the government statements may disclose this fact. A Freedom of Information request can also assist in this respect.

D. ARE THE GLOBAL DAMAGES SUFFICIENT?

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

Again, the writer's rule of thumb is that the global damages should be \$1 million or more. This approach is based on the fact that the defence costs incurred in the writer's defence retainers *for the certification hearing alone* have varied between \$70,000 and \$250,000. Assuming that Plaintiff's counsel must go toe-to-toe with defence counsel at all stages, including but not limited to the certification hearing, it is obvious that the damages must be in this range if there is going to be any realistic prospect of obtaining a premium on your time.

E. WILL THE CASE BE CERTIFIED?

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

In assessing whether the case will be certified, a broad review of the case law is required.³ A few touchstones are useful here. The more positive answers to the following questions, the more likely the case will be certified:

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

³ A shameless plug: the writer's text *Class Actions in Canada* (Aurora: Canada Law Book), catalogues all of the certification decisions in each substantive area in chapter 5, as well as in a summary form in Appendix A.

4. Is it based on an environmental spill causing property damage?
5. Is the heart of the case based on
 - (a) one corporate decision ;
 - (b) made at a high level;
 - (c) that was reduced to writing?
6. Can damages be calculated on a mathematical basis without hearing evidence from individual class members? (as opposed to some type of mathematical calculation)?

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

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

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

F. DOES THE TARGET HAVE ASSETS?

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

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

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

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

- (a) are there any policies available?
- (b) if so, are they agreeing to defend the case? This is always a good sign. There is often a clue given in this respect if an appearance is entered by the law firm that serves as the address for service, but then a second firm with an insurance defence practice comes on board shortly thereafter.
- (c) what are the limits of the policy?
- (d) do defence costs deplete the limits?
- (e) does the insured still have sufficient assets available that you can use the "bad faith card" to trigger a settlement within the policy limits?

G. IS THE TARGET LIKELY TO SETTLE?

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

The most commonly used positive indicator of this issue is a settlement in the United States. Where a target or its U.S. parent has already settled a case in the United States, this is an indication that the calculus on the advisability of settlement has already been completed and found to be attractive. However, do not rely exclusively on this factor. The writer has received instructions to vigorously defend three cases in which the U.S.-based target had already settled in the United States. A change in management, or corporate exhaustion after having incurred the cost of the American settlement, can result in a different approach in Canada.

Other indicators regarding the likelihood of settlement include:

- (a) the ability to create public and media pressure on the target; and
- (b) the likelihood that the target is going to undergo corporate restructuring that will require it to clear any pending litigation "off its books".

H. CAN THE TARGET CHANGE THE RULES?

The author learned this rule first hand when, a few days away from a summary judgment hearing on the constitutionality of the B.C. probate regime in *Howard Estate v. B.C.*,⁴, the government passed new legislation to "patch" the problem, and retroactively negated

4 (1999), 66 B.C.L.R. (3d) 199 (S.C.) (certification decision), dismissed on consent (July 14, 2000) (S.C.). For more information on this litigation see <http://www.branmac.com/Pages/probatefee.html>

any ability to sue by imposing a new tax that matched the probate fees previously paid without legislative authority.⁵

I. CAN THE MULTI-JURISDICTIONAL ISSUES BE MANAGED EFFECTIVELY?

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

The management of the multijurisdictional issues in Canada is in a state of considerable flux. This is discussed further in a paper the writer has written entitled "Chaos or Consistency: The National Class Action Dilemma".⁶

J. DO YOU HAVE THE RESOURCES TO MOVE THE CASE FORWARD?

Many class actions filed in B.C. have simply "died on the vine", without ever having been moved forward to certification.⁷ One suspects that part of the reason for this phenomenon is that plaintiff's counsel soon realized that they did not have the ability or resources to carry the matter forward.

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

As noted above, there are many reasons for partnering:

- (a) Class action firms partner with firms with expertise in the underlying substantive area;
- (b) Firms with the initial client contact partner with class action firms;
- (c) Class action firms in one jurisdiction, partner with class action firms in other Canadian jurisdictions;

⁵ The strength of the remaining constitutional class actions against the government that the writer is involved with is that they involve issues that the government does not have the power to correct: *Withler v. A.G. Canada* and *Fitzsimonds v. A.G. Canada* (challenge to death benefit age reduction provisions of public service pension plans) and *Nanaimo Immigrant Settlement Society v. B.C.* (December 8, 1999), Victoria 873/98 (B.C.S.C.) (challenge to constitutionality of charity licence fee structure)

⁶ This article can be found at the writer's webpage at http://www.branmac.com/Images/national_class.pdf

⁷ See article "Class Actions: Four Years Later" at http://www.branmac.com/Pages/4years_later.html

- (d) Class action firms in Canada partner with plaintiff's firms in the United States who have already had experience with the target.

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

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

K. CONCLUSION

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

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