# CLASS ACTIONS - THE GOOD NEWS

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## 1. INTRODUCTION

We now have approximately 20 years of experience with class proceedings in Ontario. The approach of both the Court and the parties has evolved significantly over that time.

The introduction of class proceedings raised alarms for defendants, particularly large well-funded parties who faced potential claims by large groups of people. Until that time, defendants had benefited from a *de facto* immunity from liability for damages in the courts where individual losses were a relatively small in relation to the costs and risks involved in litigation.

Above all else, class actions legislation changed the economics of litigation. It made the pursuit of small claims not only viable for claimants, but highly profitable for class counsel. The relevant factor was now not the amount of any individual claim, or even the difficulty in proving liability, but the total size of the collective claim.

Thus in many cases the single biggest factor is not the size of the individual claim but the size of the class. If the class is large enough even the smallest of individual claims can be economically attractive to pursue.

With class sizes of tens of thousands of persons not being extraordinary, it is easy to see that even claims of $100 per class member generates a collective claim in the millions of dollars.

Before class actions, defendants understandably had little concern about such claims. They knew that it was unlikely that they would face claims given the risks that claimants faced and the fact that the legal expenses to prove their claim would be completely disproportionate to the small amount of such claims. They might face the odd small claim brought as a matter of principle, but these could be managed fairly easily.

Thus the prospect of suddenly facing class actions resulted in a substantial shock for the target defendants or simple denial.

In part the concerns were clearly legitimate. However, the unanticipated nature of these claims and the large amounts potentially involved resulted in a reaction which was disproportionate to the risk.

While anyone can start a class action, it only becomes a viable class-action if the court certifies that the claim is appropriately pursued as a class-action. Consequently in the early years defendants focused heavily on the certification motion. If they wanted to stage that was effectively an end of the exposure. If they lost they then focused on trying to settle the claim even if it meant paying questionable claims. The result was a series of settlements for amounts which were much smaller than the amounts being claimed but still represented substantial payments for claims, and particularly for costs which then went to the class counsel.

While class actions have always been handled by large and experienced law firms, the economics of class actions has created a group of small plaintiffs firms and several of these have proven to be highly profitable.

These developments created an environment where a number of defendants seemed to conclude that unless they could defeat certification, class actions represented a no-win situation for them.

Overreactions always tend to result in corrections. We have seen such corrections in recent years. While class actions remain a serious issue for typical target defendants, they are by no means the crisis portrayed by many.

In this paper we will start with a brief review of class actions, with a particular focus on their economics. we will look at the basic rules that apply to class actions and the economics of class actions. This will explain why such actions may be so attractive to plaintiffs and class counsel, and why they present extraordinary challenges for defendants. But it will also form the basis for the discussion of how defendants can respond most effectively.

We will then look at the good news for defendants illustrated by some recent results in Canada.

The good news is that defendants have several means available to them to manage the risk presented by class actions. These range from early complete dismissals to a range of means to ensure ultimate success or, at a minimum, substantially reduce the exposures to claims and costs.

## 2.0 CLASS ACTIONS

### 2.1 PROCEDURAL DISTINCTIONS

The essence of a class action is that it permits a representative plaintiff to bring a claim on behalf of all members of the class without the direct involvement of such members.[1] Class actions are representative actions. Thus you have the peculiar situation that the person instructing the class counsel may well have an insignificant interest in the litigation. Class representatives are required to meet criteria intended to minimize the problems which may arise due to their limited interest and differences between the interests of areas class members. But the fact is that this situation is fundamentally different than that in other litigation.

Class actions can be very unfair to defendants. They result in very different and difficult challenges for both the parties and the court. The rules of practice and evidence which have evolved over centuries were designed with individual actions in mind. They are sometimes poorly suited or even incapable of dealing with the issues which may arise in class actions.

Class proceedings legislation has therefore set out specific provisions to address some of these concerns and allowed for greater flexibility and discretion on the part of the court. These provisions both remove protections which exist for parties under conventional rules and create alternative means for establishing the procedure to be followed in the action. In some cases the legislation even has the practical effect of changing the available remedy.

Probably the greatest significant difference in class actions is the forced consolidation of all the claims of the class, including the claims of the majority which typically has no great interest in making a claim at all. This not only makes many substantial claims economically viable for the first time, but it fundamentally changes the economics of litigation in ways that affect all aspects of class proceedings.

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[1] Defendants may also seek certification, but for the purposes of this paper, the assumption will be that the action is initiated by a representative plaintiff.

The second most significant difference is the procedural differences which the legislation provides. These differences can work to the benefit of the class or of the defendant. A detailed grasp of these differences is critical if a defendant is to protect itself properly.

This peculiar structure potentially makes a class action a tremendously powerful mechanism for suing defendants. It also creates a whole series of procedural issues which would not otherwise exist, and this requires an innovative and flexible approach by the Courts to the management of these actions.

## Certification Motion

Several key steps have been added. As a result of concerns about the negative consequences of class proceedings, the legislation contains a gatekeeper provision which requires that the court must approve, or certify, the action as a class-action before it can proceed as such. The representative plaintiff must pass the court to certify the action by what is known as the certification motion.

## Plan for Proceeding

If the action is to proceed as a class action, the legislation provides for what is called a plan for proceeding. This sets out in detail how it is proposed the action proceeds, and has become the means by which substantial changes can be made to how the action will be litigated. It has assumed a significance which does not appear to have been intended by the legislation.

## Bifurcation

Bifurcation is another significant feature of class proceedings. While the courts have always been able to split proceedings to allow one issue to be determined first, the law, particularly in Ontario, has generally been against doing so. However, class proceedings typically contemplated these two stages: the common issues and the individual issues. However, each of these stages can be further divided. This can have the effect of narrowing the issues not just in the initial stage, but for the entire proceeding.

## Class Counsel

One of the more significant aspects of a class action is the extraordinary role played by the class counsel. In many class actions, members of the class, including the representative plaintiff, have little stake in the outcome. However, class counsel always have a substantial stake. This will be particularly true in the usual case where the counsel is acting pursuant to a contingent fee retainer agreement. While lawyers usually have considerable influence on their clients, in the case of a class action the class counsel is the primary "client". While it is possible for a class action to be funded by members of the class, for the balance of this paper we will assume that we are dealing with a more typical situation where the class counsel is acting under such a contingent fee agreement.

While there is no reason why a class action cannot be brought on behalf of claimants, each of whom has a substantial claim,[2] there are compelling practical reasons why a typical class action involves claims by a substantial number of claimants with small claims, at least in relation to the costs involved in litigation.

If there is going to be enough money at the end of the day to justify the cost of the proceeding, certain conditions probably must be satisfied:

1. While the amount of any individual claim can be very small, the total amount of the claims by their class must be for a substantial amount. The minimum amount required will vary with the probability of success and the cost of the litigation. However, in general, the minimum amount is in the millions of dollars.

2. There must be a representative plaintiff willing to assume the responsibility and potential exposure to costs.

3. There must be class counsel that believes the prospects of success are sufficient to justify the substantial investments such claims involve.

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[2] In *Larcade* which is discussed below the total claims for the 30,000 members adds up to close to twenty billion dollars.

4. The proposed defendants must have sufficient ability to pay the anticipated substantial judgment.

## Costs

Canadian jurisdictions have sought to protect parties from the costs of litigation by typically ordering the responsible party to pay some portion of the successful party's costs. Class proceedings challenge this approach.

First, one must decide whether it is appropriate to make class members responsible for costs. Second, assuming only the representative plaintiff is to be held responsible, should such representative be responsible only for its share of the defendant's costs reflecting its small claim, or for the entire claim of the class.

There are practical and policy considerations which argue for different approaches. Different jurisdictions have taken different approaches.

In those jurisdictions where the representative plaintiff is exposed, typically a representative plaintiff simply does not have the means to pay a substantial order for costs. If this is the norm, then it appears to be somewhat arbitrary to hold the exceptional representative plaintiff responsible for the costs, particularly if it is to be the entire costs of litigation.

Within Canada we have jurisdictions such as Ontario where the representative plaintiff is potentially responsible for the litigation costs to the defendant, and others such as Saskatchewan where the representative plaintiff is protected. However, given that class proceedings are primarily justified on the basis of public policy considerations, even in Ontario legislation directs the court as follows:

> **Costs**
>
> **31.** (1) In exercising its discretion with respect to costs under subsection 131 (1) of the *Courts of Justice Act*, the court may consider whether the class proceeding was a test case, raised a novel point of law or involved a matter of public interest.
>
> **Liability of class members for costs**
>
> (2) Class members, other than the representative party, are not liable for costs except with respect to the determination of their own individual claims.

**Small claims**

(3) Where an individual claim under section 24 or 25 is within the monetary jurisdiction of the Small Claims Court where the class proceeding was commenced, costs related to the claim shall be assessed as if the claim had been determined by the Small Claims Court.

## 2.2 CRITERIA FOR CERTIFICATION:

Class proceedings provide several benefits. Some of these are for the defendant but most are for the plaintiffs. At their best, they provide an effective disincentive for those who would abuse power to gain large advantage, knowing that it is unlikely that the victims will sue due to the small individual loss or vulnerability of the individual victim. In these circumstances class actions provide an effective disincentive by providing an effective remedy where the defendant breaches its obligations.

At their worst, class actions present an unfair burden on defendants who must face the large defense costs with no effective means of indemnity should the claim have no merit.

The Ontario *Class Proceedings Act, 1992*, is a procedural statute that requires the satisfaction of certain conditions before an action can be certified as a class proceeding. The conditions are as follows:[3]

5.(1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if:

(a) the pleadings or the notice of application disclose a cause of action;

(b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;

(c) the claims or defences of the class members raise common issues;

(d) the class proceeding would be the preferable procedure for the resolution of the common issues, and

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[3] *Class Proceedings Act, 1992,* S.O. 1992, c.6, s.5.

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

There is extensive case law on what each of these five criteria mean.

### (A) DO THE PLEADINGS DISCLOSE A CAUSE OF ACTION?

The test for establishing a cause of action on a certification motion is the same as that which must be met on a motion pursuant to Rule 21 of the ***Rules of Civil Procedure*** for the striking out of all or a portion of a pleading: the pleading will be permitted to stand so long as it is not "plain and obvious" that it discloses no reasonable cause of action.[4]

In Ontario the plaintiffs must demonstrate not only that the representative plaintiff has a cause of action against each named defendant but it is also necessary that every cause of action alleged against a particular defendant be demonstrated:

> "in my view it is also necessary that every cause of action alleged against a particular defendant be demonstrated. This is necessary for a number of reasons. First, a defendant should not be subject to any claim, particularly one asserted on behalf of a whole class of plaintiffs, which does not disclose a proper cause of action. Secondly, all of the claims asserted in the statement of claim impact on the question of whether there are common issues. I do not believe that a plaintiff can purport to set up common issues based on causes of action that are not properly pleaded. Thirdly, the nature of the claims advanced very much determines the proper members of the class. In other

[4] *Cloud et al v. Attorney General Of Canada et al*., 2001 Carswell Ont. 3739, O.J. No. 4163 [2001] at paragraph 10.

> words, if certain claims are eliminated because they are based on non-existent causes of action, various individuals who might otherwise be members of the proposed class are also removed as prospective class members."[5]

### (B) IS THERE AN IDENTIFIABLE CLASS?

A clear definition of the class is critical because individuals entitled to notice, entitled to relief, and bound by the Judgment must be identified at the outset of litigation.[6]

The class must be defined in objective terms which are clear and specific. Definitions should avoid criteria that are subjective (e.g. a plaintiff's state of mind) or that depend upon the merits (e.g. persons who are discriminated against). Such definitions frustrate efforts to identify class members, contravene the policy against considering the merits of a claim in deciding whether to certify a class, and create potential problems of manageability.[7]

The *Act* requires that there be a minimum of two members in the class. However, the issues of class definition and class size have pertinence to other issues on certification, including whether a class proceeding will be the preferable procedure. Accordingly, a defendant is within his or her rights to insist upon an appropriate class definition that is supported by an evidentiary basis.[8]

In addition, the objective criteria by which members of the class can be identified should bear a rational relationship to the common issues asserted by all class members. The criteria should not depend on the outcome of the litigation.[9]

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[5] *Pearson v. Inco. Ltd. et al* [2002] O.J. No. 2764 (Ont. S.C.J.) at paragraph 84.

[6] *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 at paragraph 38; *Bywater v. Toronto Transit Commission*(1998), 27 C.P.C. (4th) 172 (Ont. Gen. Div.) at paragraph 10; *Pearson v. Inco Ltd. et al, supra*, at paragraph 98

[7] *Bywater v. Toronto Transit Commission*, supra; *Cloud et al v. Attorney General Of Canada et al*., supra, at paragraph 59

[8] *Lau v. Bayview Landmark Inc.* (1999), 40 C.P.C. (4th) 301, at paragraph 26; *Hollick v. Toronto (City)*, [2001] S.C.J. No. 67 at paragraph 25

*9 Western Canadian Shopping Centres Inc. v. Dutton, supra, at paragraph 38,*

The definition of the class should not be overly inclusive. That is, the class should not include persons who do not have a claim. It falls to the putative representative to show the class is defined sufficiently narrowly.[10]

### (C) DO THE CLAIMS OF THE CLASS MEMBERS RAISE COMMON ISSUES

The *Class Proceedings Act* defines "common issues" as:

> common, but not necessarily identical issues of fact, or
>
> common, but not necessarily identical issues of law that arise from common, but not necessarily identical facts.[11]

The plaintiff must satisfy the Court that there is a common issue or there are common issues of law or fact, the adjudication of which would move the litigation forward in a meaningful way. Without a common issue or common issues, there can be no certification.[12]

The Supreme Court of Canada has addressed the proper approach to commonality:[13]

> "...The underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact finding or legal analysis. Thus an issue will be "common" only where its resolution is necessary to the resolution of each class member's claim. It is not essential that the class members be identically situated vis a vis the opposing party. Nor is it necessary that common issues predominate over non common issues or that the resolution of the common issues would be determinative of each class member's claim, however, the class members' claims must share a **substantial common ingredient** to justify a class action. Determining whether the common issues justify a class action may require the court to examine the significance in relation to the individual issues". [*emphasis added*]

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[10] *Hollick v. Toronto (City)*, *supra* at paragraphs 20 and 21; P*earson v. Inco Ltd. et al*, *supra* at paragraph 99,

[11] *Class Proceedings Act, 1992*, S.O. 1992, c.6, s.1

[12] *Rosedale Motors Inc. v. Petro Canada Inc.* (1998), 42 O.R. (3d) 776 (Gen. Div.)) at page 785, *Sutherland v. Canadian Red Cross Society* (1994), 21 C.P.C. (3d) 137 (Gen. Div.) at paragraph 22

[13] *Western Canadian Shopping Centres Inc. v. Dutton*, *supra*, at paragraph 39

It would not serve the ends of either fairness or efficiency to certify an action on the basis of issues that are common only when stated in the most general terms. Inevitably such an action would ultimately break down into individual proceedings. That the suit had initially been certified as a class action could only make the proceedings less fair and less efficient.[14]

It is also necessary that there exist a rational connection between the class as defined and the asserted common issues.[15]

In order to be considered a "common issue" for the purposes of the *Act*, the issue must settle an important element or dispose of a significant feature of the litigation.[16] A common factual core does not necessarily amount to a common issue. Courts may dismiss motions for certification in these circumstances.[17]

The question on a motion for certification is not simply whether there are common issues raised by the claims advanced. There will always be common issues raised by any common event. The issue is whether the resolution of the proposed common issues sufficiently advances the overall determination of liability so as to justify the certification of the action as a class proceeding. An important consideration is whether any individual issues that will remain for determination after the common issues are resolved are limited or whether what remains to be determined is sufficiently extensive that the determination of the common issues essentially marks the commencement as opposed to the completion of the inquiry.[18]

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[14] *Rumley v. British Columbia,* [2001] 9 C.P.C. (5th) 1, at paragraph 29

[15] *Hollick v. Toronto (City), supra* at *paragraphs* 20 and 21, *Western Canadian Shopping Centres Inc .v. Dutton, supra*, at paragraph 28,

[16] *Rosedale Motors Inc. v. Petro Canada Inc., supra,* at page 785

[17] *Controltech Engineering Inc. v. Ontario Power Generation Inc. et al, [2000] 130 O.A.C. 367,* at paragraph 16

[18] *Abdool et al v. Anaheim Management Ltd. et al* (1995), 21 O.R. (3d) 453 (Div. Ct.), at page 475

### (D) IS THE CLASS PROCEEDING THE PREFERABLE PROCEDURE

In many cases this is the critical criterion. As a practical matter this allows for the fullest argument and gives defendants the best opportunity to make a compelling argument that a claim should not be certified. The nature of the test not only allows for more flexibility on the part of the Court, but allows the defendant to bring together all the other arguments and to refer to an evidentiary record.

It may be the most difficult argument to make and requires great care to ensure that the right evidence is before the court and that it is presented in the best way.

The Court must be satisfied that a class proceeding is the preferable procedure for the resolution of the common issues. The term "preferable" was meant to capture two ideas: first, that the class proceeding would be a fair, efficient and manageable method of advancing the claim, and second, that a class proceeding would be preferable in the sense of being preferable to other procedures.[19] Thus the defendant must not simply criticize the plaintiff's argument but present positive reasons why another procedure is preferable.

Particularly in the case of government defendants, a wide variety of alternative procedures may exist. Trial of an issue or judicial review in an individual case may well be preferable.

While Section 5(1)(d) of the *Act* makes it clear that preferability is to be determined only with respect to the resolution of the common issues and not the claim as a whole, it is nonetheless true that the issue of preferability must be considered in the context of the case as a whole. Looking at the common issues in their context involves a consideration of the degree to which the

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[19] *Hollick v. Toronto (City), supra*, at paragraph 28,

resolution of those common issues will advance the overall action compared to the individual issues that remain to be determined thereafter.[20]

In considering whether the determination of a common issue will sufficiently move the case forward, it is necessary to consider the nature and extent of the litigation that will remain to be dealt with at the "individual issues" stage of the proceeding. If the resolution of the common issue does not significantly advance the litigation, a class proceeding will not be the preferable procedure.[21] A Court should be cautious when certifying actions which will inevitably break down into a series of individual trials.[22] Where the common issues are subsumed by the individual differences, certification is not appropriate.[23]

The preferability inquiry is conducted by looking at the three principal advantages of class actions: judicial economy, access to justice and behaviour modification.[24] These considerations are very important and have to be addressed with care. In the case of government it should be possible to argue in most cases that to the extent there are any common issues there is no basis to conclude that the Crown will not honour the finding of the Court for the benefit of all, whether or not they are part of the proposed classes and whether the action proceeds as a class proceeding or not.

It may be possible to argue that certification of the action as a class proceeding is not the preferable procedure for reasons such as:

(a) Any common issues which survive consideration of whether the claim discloses a cause of action, will be subsumed by the multiplicity of individual issues both

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[20] *Hollick v. Toronto (City)*, supra, at paragraphs 28-30, *Pearson v. Inco et al*, supra, at paragraphs 115 and 116, *Controltech Engineering Inc. v. Ontario Hydro*, supra, at paragraph 26, *Rosedale Motors Inc. v. Petro Canada Inc*, supra, at page 789; *Bywater v. Toronto Transit Commission*, *supra*, at paragraphs 181 - 182,

[21] *Tiemstra v. Insurance Corp. of British Columbia* (1997), 12 C.P.C. (4th) 197 (B.C.C.A.) at paragraphs 15-17. *Carom v. Bre-X Minerals Ltd.* [1999] 30 C.P.C. (4th), at paragraphs 259, 272 and 275 (S.C.J.)

[22] *Abdool v. Anaheim Management Ltd., supra* , at pages 474 - 475,

[23] *Moutheros v. DeVry Canada Inc.* (1998), 22 C.P.C. (4th) 198 at paragraph 31

[24] *Hollick v. Toronto (City)*, supra, *Abdool v. Anaheim Management Ltd*., supra, at page 472

with respect to liability and damages, which will require a determination on a claim by claim basis;

(b) Determination of issues raised by the other criteria raise individual issues which overwhelm the common issue. For example, whether a person is a member of the class may require extensive individual assessment;

(c) The consequences of the common government activity may have very different individual consequences, not just different damages;

(d) The relationship between each member of the class and government may be quite different;

(e) As government often acts through unrelated agencies, the plaintiffs may have dealt with different agencies and on a different basis.

(f) Limitation periods may be different for different class members.

(g) Where there are vague and wide ranging allegations, a class proceeding puts the government defendant in an unfair position in trying to defend the action as a class proceeding and makes management of a class proceeding very difficult for the Court and the parties. In contrast, defending a claim with specific allegations relating to specific people will enable the defendant to respond in a specific way and at reasonable cost both in terms of legal expenses but more importantly in terms of the limited resources of the government. This is in the best interests of society in general. This will also assist the Court in determining any issues in a focused, fair and expeditious manner.

(h) Defending a class action of the type proposed by the plaintiffs will force the government to dedicate a large portion of its resources to defend claims which arise out of a very large number of differing circumstances. It may well turn out that many of these differing circumstances are hypothetical.

(i) If such a class action proceeds the scope of production by the Crown and examination for discovery of the Crown will be oppressive, yet

(j) The ability of the Crown to obtain examination for discovery of the plaintiffs will be limited and ineffective to demonstrate that many of the included claimants have no claim even if the bare pleading has merit.

## (E) SUITABILITY OF THE REPRESENTATIVE PLAINTIFF

There are three separate considerations in Section 5(1)(e) of the *Act* under this final requirement for certification. It must be demonstrated that the representative plaintiff:[25]

1. would fairly and adequately represent the interests of the class

2. has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding

3. does not have, on the common issues for the class, an interest in conflict with the Interests of the other class members.

### Fairly and Adequately Represent the Interests of the Class

It is unlikely that one can show this and little advantage in doing so assuming the class can find a new representative plaintiff. However, in a given case it may be worth pursuing, particularly if there is some conflict as is discussed below.

### Produced a Plan for the Proceeding that Sets Out a Workable Method of Advancing the Proceeding and Notifying Class Members

A detailed plan is of critical importance in complex litigation. A litigation plan which is long on generalities and short on specifics is inadequate. A workable plan must address issues such as the experts that will be used, what investigations have been or are to be undertaken, interviews to be conducted, how documents are to be managed, and, most importantly, how the myriad of

[25] Section 5(1)(e) of the *Class Proceedings Act*

individual issues that will remain, after the common issues are resolved, are going to be addressed.[26]

The litigation plan should make provision for the following:

(a) the method by which individuals would submit claims;

(b) the manner in which such claims would be processed;

(c) how documents are to be managed;

(d) the use of experts;

(e) describe the individual issues and provide a workable and manageable plan for addressing the numerous individual issues;

(f) how to deal with limitation period issues which may arise;

(g) the just or appropriate treatment of any unclaimed amounts in relation to that process.

The practice is both flexible and forgiving and plans can be modified as the action progresses. This can be very frustrating for defendants who are forced to respond to a moving target. However there is authority that it is not an answer to concerns raised in respect of a deficient litigation plan and/or the potential for conflict within the class that such matters can be dealt with after certification. The plaintiff bears the obligation of satisfying the court that the requirements for certification are met. It is not satisfactory for the plaintiff to assert that any failings that may be identified in the case for certification can be dealt with at some later point.[27]

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[26] *Pearson v. Inco et al.*, *supra*, at paragraph 144

[27] *Pearson v. Inco et al*, *supra*, at paragraph 148,

**Do the Plaintiffs have, on the Common Issues for the Class, an Interest in Conflict with the Interests of Any Other Class Members?**

Conflicts can arise in a variety of circumstances. It may be that a representative plaintiff is in a sufficiently different position from some other members of the class that allocating funds to one will take money from the other.

**Section 6 of the *Class Proceedings Act* :**

Section 6 of the *Class Proceedings Act*[28]specifically limits the Court from refusing to certify solely on any of the following grounds:

1. The relief claimed includes a claim for damages that would require individual assessment after determination of the common issues.
2. The relief claimed relates to separate contracts involving different class members.
3. Different remedies are sought for different class members.
4. The number of class members or the identity of each class member is not known.
5. The class includes a subclass whose members have claims or defences that raise common issues not shared by all class members.

While the Court shall not refuse certification solely if any one of the five delineated grounds in Section 6, this does not mean that they are not valid considerations. Thus it may be important to consider these grounds particularly if several of them exist in a given case.[29]

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[28] *Class Proceedings Act, 1992,* s.6,

[29] *Abdool v. Anaheim Management, supra,* at page 473

## 2.3 PLAN FOR PROCEEDING

At the certification stage the plaintiff must demonstrate that it has a plan for proceeding which is viable. It appears that the intent was to ensure that claims which were unmanageable would not be certified.

However, the parties have sought to take advantage of this provision to enforce procedural changes on the other party to the benefit of the first. They have sought "approval" of the plan which effectively becomes an order of the court establishing a procedure to be followed in the action. While procedure should serve to ensure the orderly and efficient resolution of the dispute, it should not change the result on the merits. However, in reality procedure often affects substance. Thus this tool can be of immense importance to the parties.

## 2.4 COSTS

As noted above, the single most significant consequence of class actions is that they make claims of viable which would otherwise not proceed. How costs are dealt with is a critical element in class proceedings.

First, how the court deals with costs as between parties will significantly affect whether a claim will be brought at all, and if it is brought, how it will proceed. The more favorable the costs provisions for a plaintiff, and particularly class counsel, the more likely a claim is to be litigated and the more likely it is to be litigated aggressively.

Rules which vary in the costs orders on the basis of offers to settle are very important. It is surprising to see how little use has been made of offers to settle in class proceedings. It is true that it is sometimes more difficult to frame an offer to settle, particularly one which comes within the four corners of the rule, but such rules typically provide for judicial discretion in those situations where the conventional offer is not possible.

Some class counsel have been extremely aggressive in how they pursue class actions and how they pursue costs. The single most effective means of moderating such conduct in many cases is to serve an offer to settle very early in the litigation. If the defendant can put the class' costs and risk early in the litigation, this creates tremendous pressure on the class counsel. It should

facilitate an early settlement as is the intention of the Rule, and should inhibit class counsel resulting in more orderly litigation and more reasonable costs.

Other means of managing costs for defendants include looking carefully at the type of provisions found in plans for proceeding. It is quite possible to seek court orders with the consent of other parties to provisions which makes sense in a particular case.

Throughout the class proceedings, issues arise which require the court to make orders with respect to costs. For example, how notice is given to the class may result in very different costs. In those cases where the defendant continues to have dealings with the class notice can be included with a regular communication resulting in virtually no additional costs. In other cases, publication on the Internet can be done very inexpensively in some circumstances. Such approaches can be contrasted with the expensive publication of notice required in many cases.

By demonstrating reasonability before the court, it is more likely that in the event of a dispute the court will side with the party which demonstrates a genuine desire to provide meaningful notice at the most reasonable cost.

## 2.5 CLASS COUNSEL

Counsel in class proceedings fulfill a very different role than not typical of other litigation. They typically have a much greater degree of control and make most and sometimes all of the material decisions on behalf of the class, notwithstanding the class proceedings presume that it is a representative plaintiff that will instruct counsel.

However, typically representative plaintiff has much less interest in the litigation than most litigants and in many class actions representative plaintiffs have limited ability to meaningfully instruct counsel.

Class counsel do face significant challenges which are unique to class proceedings. For example, there are unresolved issues with respect to what class counsel is to do in those circumstances where the representative plaintiff provides instructions which do not appear to be in the best interests of the class.

However, from the defendant's perspective the most significant facts about class counsel are those relating to how class counsel get paid.

First, class counsel are typically paid on the basis of a contingent fee agreement. Second, while this is not unique to class proceedings, the amounts involved may be very much greater than those typically found in contingency cases in Canada. Third, it is more likely that there will be a dispute as to who acts for the claimants in a class proceeding as different claims may be advanced for the same class. Thus it is common to see arrangements between different lawyers which allow them to act on behalf of the class. The details of these arrangements may affect both litigation and resolution.

While regrettable, the realities of how class counsel are paid may affect all aspects of the proceeding. For example, we have seen settlements where the substantial majority of the compensation paid effectively goes to paying class counsels' costs. The reasons for this may be more complicated than appears on an initial review. However, the underlying reasons should be addressed by defendants and careful consideration given to how to manage the risk.

## 3.0 THE GOOD NEWS

Class actions have always provided some protection for defendants. However, recent cases have given strength to some of these

What is the good news for defendants in class actions? In point form:

- Invigorated summary judgement motions;
- Certification motions give you several shots at summary disposition of claim;
- Common issues
- Bifurcation
- Plan for proceeding
- Costs

### 3.1 SUMMARY JUDGMENT MOTIONS AND NO CAUSE OF ACTION

Summary judgment motions are intended to dispose of actions before substantial costs or delays are incurred. However, as they are summary procedures, there has always been a concern that there was a substantial danger of injustice when the courts proceeded too expeditiously. Consequently the courts have always tried to strike a balance between these two competing considerations. At times the pendulum has swung in favor of summary judgment and at times against.

In recent years attempts have being made to make it easier for parties to obtain summary judgment. Our experience so far remains mixed. However, summary judgment motions can be brought right at the outset of the class proceeding. If the defendant is successful the substantial costs and risks involved in litigation can be eliminated at a relatively modest cost.

Whenever there is a strong factual defense, and particularly where there is a strong legal defense, summary judgment motions should be considered at the outset. One should also consider the alternatives such as waiting until the certification motion to argue that the claim does not disclose the cause of action if the defense is a purely legal one.

The Rule which permits a defendant to move to defend a claim on the basis it does not disclose a cause of action is mirrored in Section 5 of the *Ontario Class Proceedings Act*. Consequently this issue can be argued either in advance or at the certification motion. In any event, if the defendant can persuade a court at the outset that the claim has no merit, and this can result in a termination of the class proceeding without the need for further litigation. While such motions can be expensive where the issues are difficult or the facts complex, the costs are typically far lower than they will be if the issues are litigated further.

We now have many examples of class proceedings failing at the outset on the basis that there is obviously no merit in the claim. For example, in a series of cases the courts have concluded that the plaintiff is not entitled to a remedy at law even if the plaintiff's allegations are true. In other words, the plaintiff has no cause of action. Thus in Ontario the courts have dismissed the claims against the Ontario government brought by the families of special needs children and the victims

of SARS[30] and West Nile virus. The defense argument in these cases was not that the government had acted properly, but that whether or not the plaintiff's allegations were true the government could not be sued for damages as a matter of law. An example of this is the decision in *A.L. v. Ontario*,[31] also known as the Special Needs class action.

Ontario provides a variety of programs for the benefit of special needs children and their families. These programs provide a variety of relief including funding under different programs. The Act also provides that the Minister may enter into a "special needs agreement".

The plaintiffs alleged that as a result of a decision made by the government not to enter into any further special needs agreements, families with special needs children were denied access to the one program which provided needed care if other funding was insufficient. The plaintiffs allege that the net effect of this is twofold: First the families did not have sufficient funding to care for their children. Second, because the government provided priority to children in need of protection who were cared for by Children's Aid Societies, this created a situation where parents were forced to give up custody of their children to the CAS if they wanted the necessary funding would be made available for the child's care.

In the original certification motion, the Crown argued that these allegations did not disclose a cause of action and that the proceeding should therefore not be certified. In any event certification was not the preferable procedure as the foundation issue could easily be determined by the trial of this issue in a single case.

The decision of the Court of Appeal stated that:

> I wish to be clear that my decision does not rest on the assumption that the courts are entirely powerless to review or control the Minister's exercise of the discretion conferred by s. 30. I agree with the motions judge that it is not plain and obvious on the pleading that the respondents would necessarily fail on their claim that the Minister was in breach of certain statutory duties, namely, failing to provide clear and consistent criteria for special needs agreements

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[30] *Williams v. Canada* (2005), 76 O.R. (3d) 763

[31] *A.L. v. Ontario (Minister of Community and Social Services)* [2006] O.J. No. 4673

> and deciding to terminate their availability. However, since any duties or obligations contemplated by the statute are public in nature, they are not capable of giving rise to a private tort law duty of care or an action in negligence for damages.

## 3.2 CERTIFICATION MOTION

The Ontario rule requires the court to certify an action where the five conditions are met. Serious consideration should be given to attacking each of these conditions.

While the goal is usually to persuade the court that the action should not be certified, each condition also provides the defendant an opportunity to try and narrow the claim. It is quite possible to eliminate large portions of the claim by limiting the class, the common issues, or relief being sought.

It is useful to consider whether the representative plaintiff has a cause of action. There are several circumstances in which the class may have a claim but the representative plaintiff does not. For example, in products cases the representative plaintiff may have used a different product that manufactured by the defendant or may be unable to determine that they did use the defendant's product. A representative plaintiff may already have settled with the defendant and thus have no claim. The representative plaintiff may be a person to whom the defendant is not only duty of care.

In many cases disqualifying the representative plaintiff may simply lead to a new representative plaintiff being proposed. However, in other cases this may not be possible and this can be a relatively simple and inexpensive way of resisting the claim.

### Disclose Cause of Action

The failure to plead the cause of action with some care can be fatal. While the Rules require amendments whenever there is no irreparable prejudice, certification has been refused where the representative plaintiff has failed to plead the particulars of the contractual cause of action sufficiently. For example, in an action seeking compensation as a result of classes being

cancelled due to a strike at your university, certification was refused in the absence of a clear pleading of breach of a specific term of the contract.[32]

## Identifiable Class

Class counsel frequently try to define the class as broadly as possible so as to increase the global damages. However, if the defendant resists such definitions substantial groups of potential class members can be excluded.

Courts have turned broad classes against plaintiffs by finding that such classes undermine the required common interests of class members. Thus including members who had purchased a holiday but not stayed at the resorts and more significantly the broad class created a predominance of individual issues, resulting in a dismissal of certification motion.[33]

For example, in the event of a building fire class counsel may seek to include not just residents, but those who may have been in the vicinity or who own any property within the building at the time of loss. The *Class Proceedings Act* provides for several bases for attacking such broad and ill-defined classes. While the Act does provide for the creation of subclasses with different interests, broader classes may make the litigation unmanageable and therefore not the preferable procedure for the resolution of the common issues. Similarly, the overly broad class may not be "identifiable" as required by the Act.

## Common Issues

Determination of the common issues offers defendants a valuable opportunity to limit the claim and the defense costs. The common issues will determine, for example, the scope of production and discovery. Knowledge of cases can involve and forcing the course and the plaintiff to address the common issues in a clear and concise manner at the outset can eliminate the need to get into areas which will increase both the costs and the risk.

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[32] *Turner v York University* 2010 OJ No. 5937.

[33] *Alves v. Sunquest* 2010 SKQB 104.

## Preferable Procedure

The most wide-ranging issue certification motion is whether a class proceeding would be the preferable procedure for the claim advanced. While there is some guidelines as to the applicable considerations, this issue allows the parties to step back and take a broad view of the advantages and disadvantages of a class action.

Defendants have often focused on how expensive a class action would be for the defendant. However, such arguments would generally support a request for proceeding in a way that reduces costs, at least until there is a finding of liability against the defendant. That's the issue really requires the defendant to demonstrate that there is a better alternative to a class-action win all matters are considered. For example, the availability of an alternative remedy or procedure may be persuasive. Such alternatives may include judicial review or pursuit of the claim in a different forum.

For example, a recent decision of the Ontario Superior Court,[34] certification was denied in an action seeking damages as a result of the failure of the defendant to install telephone services at the time promised. There were several reasons for this but in part the court noted that the Canadian Radio Telecommunications Commission [CRTC] had broad jurisdiction over the terms of service of a regulated carrier and offered a forum designed to deal with complaints such as those made in the action.

Similarly, the same court denied certification in a proceeding in which damages were claimed as a result of false advertising about the effectiveness of sun protection products. The court noted that the plaintiff did not plead misrepresentation, which was the obvious claim, because this would have undermined the argument on the common issue. Whenever the class seeks to certify a claim based on misrepresentation, it becomes vulnerable to the argument that as reliance is individual, the claim is not suited to a class-action.

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[34] *Penney v Bell Canada* 2010 ONSC 2801

However, the court also noted that the existence of an existing regulatory regime dealing with the products. In the circumstances the court concluded that was a preferable alternative to the class-action.

Where the claims are in a more substantial amounts, particularly in relation to the litigation costs, joinder of claims may be preferable. Thus while a class action has been certified in Canada arising out of[35] an aviation accident, typically claims arising out of aviation disasters typically proceed as a series of individual claims which are tried together. This is not a perfect solution. In such circumstances a few of the lawyers typically end up doing the vast majority of the work and yet all plaintiffs benefit equally with respect to liability. Thus in the proceedings arising out of the bombing of Air India 182, which proceeded before class proceedings legislation existed, the court appointed four lawyers to conduct the liability proceedings and ordered a cost sharing regime .

In a recent British Columbia case[36] the court denied certification on behalf of contributors to a development fund. While the British Columbia legislation is different than that of Ontario, in essence the court concluded that individual actions was the preferable procedure. The court did take steps to protect the claims of the other investors with respect to a limitation period defense, which is a benefit of class proceedings.

A vigorous response with respect to the preferable procedure may have benefits even if the claim is certified. This can have the effect of forcing the plaintiff to narrow the claim so that it can persuade the court that a class proceeding would be manageable and otherwise preferable.

Similarly, when one resists the choice of representative plaintiff, this may lead the plaintiff to modify the claims so as to eliminate any concerns which may be raised.

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[35] *Singer v Schering-Plough* 2010 ONSC 42

[36] *Gary Jackson Holdings Ltd v Eden* 2010 BCSC 273.

## Bifurcation

In many cases separate issues may affect each other. The most obvious examples are cases where there are severe injuries and the determination of the damages issues creates a very sympathetic case for the determination of liability. As the issues of damages and liability are typically separated, or bifurcated, in class proceedings, defendants may feel this is not an issue of concern.

However, there may be several issues both with respect to liability and damages in a class proceeding. It may be to the defendant's benefit to choose the order issues will be determined in and to get party to those issues the defendant wishes to have determined first and separate from the other issues. While one may ask why a plaintiff would agree to this or a court order this, and there are often arguments which can be advanced which can result in the further separation of issues.

## Plan for Proceeding

The plan for proceeding is not prescribed and there is considerable flexibility in the negotiation and argument with respect to its contents. The plan gives defendants an opportunity to narrow the evidence, issues and procedural steps. This can result in reducing the claim, be able to present a more compelling defense, and a substantial reduction in costs both for the defense and with respect to the potential exposure to the plaintiff.

These days judges are very open to suggestions which appear to expedite the resolution or determination of a claim, avoid delay and reduce costs. Thus every term of the plan for proceeding should be considered with considerable care. Often one can negotiate modifications which achieve the desired result. In other cases it may be possible to persuade the court that the defendant suggestions are meritorious.

## Costs

Much of what goes on in a class-action is the result of costs. At the end of the day a successful defendant in a typical class-action wishes to have the action dismissed at the earliest possible opportunity and at the minimum cost. In those cases where the representative plaintiff cannot

make a meaningful contribution to the defendant's costs, it is particularly important that the action be litigated in a cost effective and timely manner.

In those cases where the defendant is not successful on liability, then the focus is to limit the amount of exposure, the defense costs and the costs of the class.

In some cases these considerations conflict. For example, a vigorous defense may be worthwhile but will increase both the defendants costs and those payable to a successful class. Careful consideration and litigation of issues such as the available motions, defining a class and common issues, and determination of the plan for proceeding may also prove expensive, but worth while.

Whether or not a defendant decides it is worthwhile pursuing a particular approach, it is important that the defendant properly consider the alternatives at every stage. While the rejection of a certification motion can turn a class proceeding into a sprint, typically class proceedings can be compared more usefully to a marathon. At each stage the conduct of the defense may have substantial long-term consequences which may not be anticipated at the time.

**Costs payable by Representative Plaintiff**

For some time there appears to have been a feeling within the legal profession that unsuccessful representative plaintiffs would be protected from the full brunt of the Ontario costs regime. They looked to express provisions in other Canadian jurisdictions to this effect and the existence in the Ontario act of the section requiring a court to consider the public interest factors listed. However, it is now clear that Ontario courts are likely to award substantial costs against representative plaintiffs in the absence of a compelling public interest consideration.

An early significant example is the decision of the Supreme Court of Canada in *Kerr v. Danier Leather Inc.*[37] The claim was by investors for damages arising out of prospectus misrepresentation. The claim was described as a dispute between sophisticated commercial parties which involved the determination of the rights on the basis of established legal principles.

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[37] *Kerr v. Danier Leather Inc.*, 2007 CarswellOnt 6446, 2007 SCC 44, [2007] 3 S.C.R. 331 (S.C.C.).

Thus it was not a test case and did not have the requisite public interest consideration. The court stated:

> 69 Nor do general concerns about access to justice warrant a departure from the usual cost consequences in this case. While I agree with counsel for the appellants that "[a]n award of costs that exceeds or outweighs the potential benefits of litigation raises access to justice issues" (Supp. A.F., at para. 39), it should not be assumed that class proceedings invariably engage access to justice concerns to an extent sufficient to justify withholding costs from the successful party. I agree with the observation of Nordheimer J. in ***Gariepy*** that caution must be exercised not to stereotype class proceedings. "[T]he David against Goliath scenario" he writes, "does not necessarily represent an accurate portrayal of the real conflict" (para. 6). Class actions have become a staple of shareholder litigation. The Court of Appeal took the view that this case is a piece of Bay Street litigation that was well run and well financed on both sides. Success would have reaped substantial rewards for the representative plaintiff and his counsel. He put the representative respondents to enormous expense and I see no error in principle that would justify our intervention in the discretionary costs order made against him by the Court of Appeal.

Since then other courts have ordered that the representative plaintiff pays the potential costs in cases where the public interest argument would appear to have been more compelling.

The Court of Appeal[38] upheld an award of $215,000 in costs in favor of the defendant insurer. While noting the public interest considerations the trial judge indicated that the plaintiffs' argument that they were vulnerable was somewhat overstated. The proposed class included employees who were relatively well-paid executives and had not been vulnerable when the contracts were negotiated by their employers.

Similarly the Ontario Superior Court ordered[39] the representative plaintiff to pay the defendant's $18,000 where a claim was dismissed against some of the individual defendants part way through the litigation. The claim arose out of the marketing of a condominium project and had alleged dishonesty on the part of individual defendants without specific knowledge that such allegations were true.

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[38] *Ruffolo v Sun Life Ass. Co.* 2009 68 CPC (6th) 322 (Ont CA).

[39] *Lewis v. Cantertrot Investments Ltd.* 2010 ONSC 5679.

The representative plaintiff was ordered to pay $200,000 in costs to the defendant following an unsuccessful motion for certification.[40]

In an action against CIBC[41] seeking damages for failure to pay employees overtime, costs of $525,000 were ordered payable to the defendant following an unsuccessful certification motion. The court rejected the argument that this was a test case in the public interest noting the claim was highly fact specific. While the public was very much interested in the claim, the court concluded that this was insufficient to justify withholding costs from the bank.

It can be argued that the effect of these decisions is to gut the public interest protection in the *Class Proceedings Act*. While this is an overstatement, there appears to be some truth that the kind of representative plaintiff who will be entitled to rely on the public interest protection is unlikely to be a person who can pay the costs in any event.

The question then arises whether a defendant has any recourse in such situations. In a recent case the representative plaintiff sued for damages arising out of defective breast implants which had been approved by the federal government. They were unsuccessful and ordered to pay $125,000 in costs in addition to $40,000 for the costs for the appeal to the Ontario Court of Appeal. An Ontario court[42] then ordered that the lawyer for the representative plaintiffs pay these costs.

In short, cost provisions remain a highly effective means for defendants to protect their interests in class proceedings. First, these orders are likely to discourage many who would be representative plaintiffs. This will indirectly serve to discourage some potential class counsel. If the courts start making orders against class counsel directly, then this is likely to have a seriously negative effect on class actions. While in general meaningful costs orders in cases involving questionable claims by those seeking financial gain are likely to have a positive effect, the courts may well give effect to the balancing argument that many of the most important public interest cases are precisely those that challenge convention and may result in adverse findings. At a

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[40] *Singer v Schering-Plough* 2010 ONSC 42

[41] *Fresco v CIBC* 2010 ONSC 1036.

[42] *Attis v. Canada (Minister of Health***),** 2008 CarswellOnt 5661, 2008 ONCA 660, 59 C.P.C. (6th) 195, 93 O.R. (3d) 35, 300 D.L.R. (4th) 415, 254 O.A.C. 91

minimum, these orders will discourage proceedings in Ontario where claims can be brought in other jurisdictions without comparable cost provisions.

## 4.0 CONCLUSIONS

Class Proceedings legislation has always been seen as inherently favourable to claimants. However this ignores that its provisions provide many opportunities to defendants to reduce or eliminate their exposure and expenses.

At every stage of the proceeding defendants can take steps to try and achieve one or more of the following:

1. Have the action dismissed.
2. Resist certification.
3. Eliminate portions of the claim or the class.
4. Restate the issues in a manner which benefits the defendant.
5. Establish procedures which may:
    (a) narrow the evidence;
    (b) reduce the claim;
    (c) lead to the determination of threshold issues which will benefit the defendant;
    (d) reduce the defendant's costs and those which may be payable to the class.
6. Protect the defendant from having to pay substantial costs to the Class either by utilizing the above approaches or careful use of Offers to Settle.

Initially there was substantial resistance to class actions by the Courts. This changed with time. However, we appear to be moving back to an approach where certification is becoming more difficult, at least at the first level.

Costs have become a major tool for defendants and a serious disincentive for both personal representatives and class counsel. Both trial and appellate courts have shown a willingness to make substantial orders for costs and to take a narrow view of the public interest consideration in the Class Proceedings Act.

Last, always remember that the primary plaintiff is class counsel and consider their interests in the approach to the defense.