

CLASS ACTIONS THE GOOD NEWS

Roderick S.W. Winsor
416.593.3971
rwinsor@blaney.com



Introduction

- Short history – pendulum
 - pre *Class Proceedings Act*
 - Thalidomide
 - Air India
 - Ontario 1992 *CPA*
 - early resistance
 - successes by Class
 - current trend

Introduction

- **“The Good News”**
- **To answer this need to look at**
 - **class actions – how are they different**
 - **the bad news – why are they bad for defendants**

DESCRIPTION

- **“One or more members of a class of persons may commence a proceeding in the court on behalf of the members of the class.”**
 - **Representative Action**
 - **Most of the claimants have no involvement in the action**
 - **Even representative plaintiff has limited involvement and interest**
- **Fundamentally a matter of procedure**
- **Though procedural differences can have profound consequences**

PROCEDURAL DIFFERENCES

- Consolidation of class' claims
- Instructions come from representative plaintiff only
- Court involved in matters usually left to parties or prescribed by law
 - choice of representative plaintiff
 - choice of counsel
 - determining issues
 - discretion to change procedure
 - settlement
- Class counsel

Additional stages in class actions

- certification motion
- plan for proceeding
- bifurcation
- administration of judgment

Certification Motion

- **criteria**
 - **cause of action**
 - **identifiable class**
 - **common issues**
 - **preferable procedure**
 - **representative plaintiff**
 - **workable plan**

Plan for Proceeding

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- Not really from Class Proceedings Act
- But has become a powerful tool
- Can deal with just about anything
- Changes how game is played
 - which may change result

Bifurcation

- Common issues v Individual issues
- But each can then also be split
 - eg Phase 1 – common issues

WHAT WAS THE BAD NEWS?

- Made some substantial claims viable for first time
- Removed the immunity large defendants had
 - for claims that were expensive to prove in relation to amount of individual claim
- Multiplier
 - $50,000 \times \$500 = \$25,000,000$
- Expensive to defend
- Often no realistic prospect of recovering costs
- Conclusion? No win situation

Defendants' Response?

- focus on defeating certification motion
- if certified then tried hard to settle
 - even questionable claims

THE GOOD NEWS

- Always recognized that class actions could be very unfair to defendants
- Class Proceedings Act and Rules always gave the defendants tools
- Courts have always had limited sympathy for most class actions
- Put the two together and effective defenses are possible

THE TOOLS - Some Examples

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

Invigorated summary judgment motions

- Timing
- Change in Rule and culture
- Novel legal claims
 - Duty of care

Certification motions give you several shots at summary disposition of claim

- No certification may be obvious goal
- But offers a tremendous opportunity to defendants
 - To narrow or restate the claim
 - At each stage of certification inquiry

Certification Motion Criteria

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- Cause of Action – *A.L v. Ontario*
- Identifiable Class
 - *Turner* York U strike claim
 - *Sunquest* holiday
- Common Issues
- Preferable Procedure
 - other procedures – *Bell Canada* (regulator)
 - Judicial Review – *Autism*
 - individual or test case – *Gary Jackson* condo - conditions
- Representative Plaintiff

Bifurcation

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- common and individual issues
- but can also bifurcate these
- many advantages
 - limit evidence
 - have strongest defense addressed first
 - control costs

Plan for proceeding

- no rules, but can deal with
 - notice
 - opting out
 - production
 - examinations
 - evidence
 - sequence of steps
 - bifurcation

Plan for proceeding – cont'd

- plaintiffs' precedents
- seek plan that allows defense to present case
 - most effectively
 - and efficiently

COSTS – Defense

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- Defendants face
 - own defense costs
 - costs payable to class

Costs - Class Counsel

- **What has fuelled class actions above all else is costs**
- **Class Counsel can make or lose fortunes**
- **Without Class Counsel no class action**
- **So managing costs critical component of defense**

Costs - Representative Plaintiff

- **exposure**
- **public interest**
 - “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.” But.....
 - *Lewis v Cantertrot* \$ 18,000
 - *Ruffolo v Sun Life* \$215,000
 - *Singer* certification motion \$200,000
 - *CIBC* overtime \$525,000
 - *Attis v. Canada* \$165,000

Costs - What can be done?

- **Defense costs**
 - **summary judgment**
 - **defeat certification**
 - **narrow issues, class**
 - **bifurcation**

Representative plaintiff

- try to get representative plaintiff with means
- offers to settle
- good defense

Costs - Class Counsel

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- they tend to get paid in relation to time spent
- no one can stop them running up time
- but you can reduce their opportunities
 - narrow issues
 - efficient procedure
- final word - offers to settle !